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

I N T E R L O C U T O R

in Complaint

by

THE COUNCIL OF THE LAW SOCIETY OF SCOTLAND, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the Complainers")

against

DAVID HADDOW CAMPBELL, Anderson Strathern LLP, 1 Rutland Court, Edinburgh (hereinafter referred to as "the Respondent")

By Video Conference, 29 June 2023. The Tribunal, having heard submissions in relation to the Complaint at the instance of the Council of the Law Society of Scotland against David Haddow Campbell, Anderson Strathern LLP, 1 Rutland Court, Edinburgh; Sustains the Respondent's plea to the relevancy; Repels the Respondent's plea to the competency; Excludes from probation the sections of the Complaint set out in the Note accompanying this Interlocutor and in the copy of the amended Complaint sent to parties on 29 June 2023; Allows both parties a Proof of their respective averments; Reserves the question of expenses to the conclusion of the case; and Fixes a procedural hearing to take place virtually on 2 October 2023 at 10am.

Ben Kemp
Vice Chair

NOTE

At the preliminary hearing on 24 May 2023 and 29 June 2023 both held by video conference, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was not present but was represented by Gerry Moynihan, K.C., instructed by Nicola Irvine, Solicitor, Glasgow. The Tribunal had before it the Complaint, Answers and Joint Minute as well as Notes of Argument, Productions and Authorities from both parties.

Parties helpfully provided the Tribunal with an agreed factual position for the purposes of the debate. In summary, the Respondent acted for FDA and his son, MDA. FDA told the Respondent he had made a will in Italy. On FDA's death, MDA asked the Respondent to wind up his father's executry as an intestate estate. The Respondent declined to act for the executry on the basis that he knew of the will in Italy. However, he continued to act for MDA in relation to other matters, some of which were connected to the executry case which was being wound up by other solicitors on the basis of intestacy. MDA told the Respondent that the will was not valid in Italy because it was not signed before a Notary Public. The Complainers criticise the Respondent for continuing to act for MDA. They also criticise him for failing to disclose the existence of the will to the solicitors acting in the executry from 2003-2005, particularly when the Respondent was a Partner in that firm from 2010-2017.

The Respondent challenged the Complaint based on a lack of relevancy and specification. He said that the Complaint was irrelevant because there was no proper basis for the allegations that MDA or his siblings had committed a fraud. There was an absence of sufficient evidence to relevantly and responsibly make an allegation of concealment of a valid will against MDA and his siblings. The Respondent had made disclosures where appropriate. He was prevented from making other disclosures due to privilege and confidentiality. He said there was inadequate specification of the allegation in the Complaint that the Respondent had accepted improper instructions. The Respondent moved the Tribunal to dismiss the Complaint. Both parties submitted notes of argument which were supplemented by oral submissions on 24 May 2023.

SUBMISSIONS FOR THE RESPONDENT

Mr Moynihan adopted the Respondent's Answers and his Note of Argument. He said the critical issue was whether the Law Society alleged the existence of a valid Italian will. This matter had been repeatedly raised with the Complainers. The existence of the will was central to the allegation of fraud. That in turn was central to the proposition that the Respondent was free to speak to Balfour +

Manson without his client's consent. The evidence about the will was conflicting. It cannot be determined whether the will existed, let alone whether it was valid. Without evidence that a valid Italian will existed, the Complaint was irrelevant. In addition, there was an absence of evidence that MDA or his siblings were dishonest.

Mr Moynihan recognised the bureaucratic framework within which the Fiscal had to operate. However, he stressed to the Tribunal the responsibilities of a pleader to be personally satisfied that there was a proper basis for the allegations within the Complaint. It was a matter of law for the Tribunal to establish whether the Complaint had a proper basis. The Complainers were not entitled to lay inadequate material before the Tribunal and leave it to reach a determination (paragraph 23 Respondent's Note of Argument and McSparran McCormick-v-Scottish Legal Complaints Commission 2016 SC 413).

Mr Moynihan noted the gap in the allegations in the Complaint between 2005 and 2010 and the admission in the Joint Minute which showed that the Respondent had made disclosures to Turcan Connell in May 2006 (paragraph 24 of the Respondent's Note of Argument and paragraphs 22-24 of the Joint Minute). Having been given information about the potential Italian will, Turcan Connell continued to administer the executry on the basis of intestacy.

Mr Moynihan asked on what basis could it be responsibly alleged that MDA's sisters colluded in a fraud. He asked whether the Complainers disputed the factual accuracy of what had been averred in the Answers regarding the siblings (paragraph 25 Respondent's Note of Argument). He said it would be conspicuous that the furthest the Fiscal would go was to say that the siblings had a conflict of interest. It was agreed that the sisters raised the issue of another will with Turcan Connell. That firm was given full disclosure. This raises the obvious question of whether they were actually colluding with MDA. Nothing happened when Turcan Connell was given full disclosure. This was relevant to whether there was a practical result which was necessary for a fraud. Mr Moynihan suggested that the Complainers' submission deliberately stops short because the available information does not enable that next step.

Mr Moynihan said that if the Complainers did not have evidence of a valid will, they should explain what factual material, reasonably interpreted, justified the reasonable inference of fraud (paragraph 26 Respondent's Note of Argument). He highlighted the conflicting statements MDA made about an Italian will but noted that by 2 March 2003, the Respondent had recorded MDA as having reported, after discussion with a relative who was also an Italian lawyer, that FDA's will was not valid in Italy

because it was not signed before a Notary Public. In Mr Moynihan's submissions there would have to be a will to create a practical result. He said that the will would have to be valid.

Mr Moynihan said that professional responsibilities rested on lawyers making allegations of fraud. He invited the Tribunal to press the Fiscal on the basis for averring that there was a valid Italian will. Even if a will was drafted, if it was not properly executed, it is invalid and intestacy rules would apply. In these circumstances, the beneficiaries would have no entitlement.

Mr Moynihan turned to the nature of fraud. He drew the Tribunal's attention to HMA-v-Withey 2017 JC 249, a criminal case arising out of the acquisition of Rangers Football Club. The High Court determined that the charge of fraud against the financial adviser was irrelevant because it was not libelled that he knew what the true arrangement was, and it was not libelled that his involvement achieved a practical result. The essence of the charge of fraud is that there must be both a false pretence and that false pretence must cause a practical result.

Mr Moynihan made reference to paragraph 3.21 of the Complaint where it was averred that the Respondent knew that MDA and his siblings were colluding in ignoring the wishes of their father and seeking to avoid the will to their financial interest. It was alleged at paragraph 3.23 of the Complaint that the Respondent ought to have made certain disclosures to Mr Burns about the Italian will and the actions of MDA and his siblings. Paragraphs 3.7 and 3.8 of the Complaint referred to one sister (Mrs F) asserting that she had been told there was no will, and the Respondent setting out his knowledge of an Italian will. However, there is no averment regarding to whom she is said to have made a false pretence. If she proceeded on the basis of what her relative told her, how could this be dishonest?

Mr Moynihan referred to Production 1.14 for the Respondent which was a letter dated 16 May 2006 in which Turcan Connell wrote to MDA putting to him the allegation from his sisters that FDA had a will in Scotland and that it had been destroyed by MDA and the Respondent. He also referred to Turcan Connell's draft letter of 6 June 2006 to Mrs F which noted that the Respondent had disclosed that FDA had advised him that he had made a will in Italy. However, Turcan Connell understood that no trace of that will had been found. Mr Moynihan asked on what responsible basis could it be said that Mrs F and her sister colluded in a fraud. There was no statement that either was a party to any fraud. The furthest the Complainers go is to say that the sisters had a conflict. The situation set out at paragraph 17 of the Complainer's Note of Argument is insufficient to amount to fraud. There was no false pretence, made dishonestly for a practical result. The allegation of fraud also flies in the face of the queries they were raising with Turcan Connell. The terms of a potential Scottish will could also have been against their interests.

Mr Moynihan noted that the Complainers said that the Respondent did not check the validity of the Italian will and should have written to the Italian lawyer. Mr Moynihan said this was not the Respondent's responsibility but it is, now, the responsibility of the Complainers.

Turning to the involvement of MDA, Mr Moynihan asked whether it could be said that he made a false statement dishonestly to gain a practical result. MDA was told by the Italian lawyer that the will was not valid. For a false pretence made dishonestly to have a practical result, the will would have to be validly executed.

Mr Moynihan referred the Tribunal to Frank Houlgate Investment Co Ltd-v-Biggart Baillie 2010 SLT 527; 2012 SLT 256; 2013 SLT 993; 2016 SC 187 and the obligations of confidentiality on a solicitor. He noted that Lord Menzie's opinion in the decision of the Inner House starts with the stark finding that the client "is a fraudster". In that case the fraud was not in dispute. The solicitor's knowledge of the fraud was not in dispute because the fraudster confessed to him. The solicitor in that case was prosecuted before this Tribunal and found guilty of professional misconduct (Law Society of Scotland-v-Gregor Mair 2009). He acted when he had knowledge of a fraud and failed to report things to his money laundering reporting officer. In Mr Moynihan's submission, these cases were very different to the present Complaint.

Mr Moynihan asked the Tribunal to consider what the Respondent was at liberty and obliged to say. It is not simple, due to the solicitor's duty of confidentiality which may be heightened to legal professional privilege, as legal advice privilege. In such cases, the solicitor is impeded in what he may say but fraud is an exception to this. The issue can arise where a third party seeks disclosure of documents in the context of litigation (Various Claimaints-v-News Group Newspapers Ltd [2021] EWHC 680 and O'Rourke-v-Darbishire [1920] AC 581). To entitle third party access, that party must be able to say there is a strong *prima facie* case of fraud. As was discussed in McSparran McCormick-v-Scottish Legal Complaints Commission 2016 SC 413, fraud must not be lightly averred in pleadings or even in correspondence. The solicitor in that case was found guilty of professional misconduct for having made an allegation of fraud relating to the existence of a will without proper basis (Law Society of Scotland-v-John Bunny McGeechan 2019). Mr Moynihan asked the Tribunal whether in the present case there was satisfactory evidence of fraud. Was there a gap in the evidence? Did that gap relate to the validity of any Italian will?

Mr Moynihan noted that MDA had told the Respondent the Italian will was invalid shortly before he instructed Balfour + Manson. The Complainers say this statement is false. However, they are not in

a position to say that there was a valid Italian will. If they cannot do that, there is no basis for the Respondent to say to Balfour + Manson that MDA or MDA and his sisters were committing a fraud. The "fraud exception" would not have been established. The question of confidentiality is highly material. Mr Moynihan referred to SLCC-v-Murray 2023 SC 10. Confidentiality can be lifted by the Court if it is judged to be in the public interest. However, legal professional privilege can only be overridden in very narrow circumstances, one of which is fraud. There is a warning in that case to the profession that even to breach confidentiality is a grave matter. It is not a case that if in doubt one should speak out. If a solicitor speaks out without justification, it will be professional misconduct. This was the dilemma facing the Respondent. The Complaint does not set out that an exception would apply which would entitle the Respondent to make a disclosure.

In Mr Moynihan's submission, if there was no valid will, there was no false pretence. If MDA genuinely believed the will was invalid in Italy, he was not dishonest. If the sisters were told conflicting things but were informed by Turcan Connell that there were no wills, they were not dishonest. MDA did say originally that there was a will but how can the Tribunal square that circle? The charities would only lose out if they were named in the will and the will was valid. According to Mr Moynihan, there was not enough here to establish fraud or professional misconduct.

Referring to paragraph 17 of the Complainers' Note of Argument, Mr Moynihan said it might be said that the Respondent should have been sceptical because intestacy was to the siblings' benefit. However, what if the Respondent had taken steps to satisfy himself? What would he have learned if he had written to the Italian lawyer? He might have been sceptical. However, Turcan Connell had the same information, and still proceeded with the case as an intestacy. The bare facts heighten the need for clarity about what the Respondent would have discovered.

Mr Moynihan said that proof of fraud requires an examination of the mindset of the siblings, not the Respondent. In the light of what the siblings had told him, could fraud be responsibly averred? Mrs F was told there was no will and there is nothing to say that this is false. She cannot be dishonest. MDA was told there was a will but it was not validly executed and so it was invalid. If he was told that and believed it, he cannot be guilty of a fraud. Even if the Complainers had an Italian law expert to say this was not correct, they would have to consider MDA's belief.

Turning to the period from 2010 onwards, Mr Moynihan noted that the Complainers claimed that the Respondent ought to have made a disclosure to his partners on joining Balfour + Manson. However, he could only do that if there was a fraud. If there was no basis for disclosing that in 2003-2005, then there was no basis to do it now.

The Complainers alleged that the Respondent had acted on improper instructions. However, if there was no fraud, there were no improper instructions. There is a lack of specification as to the instructions in question. The Respondent withdrew initially but nevertheless carried on working. Paragraph 3.17 of the Complaint contains a list of correspondence and meetings. However, there is no specification of the improper instruction. It is not clear whether the Complainers allege that the Respondent's correspondence regarding DNA testing was improper. Another possibility is the Respondent's involvement with a transaction to sell a property in Florida as part of the disposal of the intestate estate. It is not clear whether the Complainers allege that to act for MDA regarding the Florida property was to take improper instructions.

Mr Moynihan said it was not clear that what the Complainers alleged should have been disclosed to the Balfour and Manson partners. How could it be professional misconduct to fail to tell Balfour + Manson something which they already knew? It could also have been contrary to section 333 of the Proceeds of Crime Act 2002 to "tip off" the suspect.

Mr Moynihan's submission to the Tribunal was that it should dismiss the Complaint as irrelevant because there was not basis on the facts to draw the inference of fraud. He noted that the Complainers would address the Tribunal on unsatisfactory professional conduct. However, the question to be addressed at this stage was whether the Complainers had set out the facts required to support the allegation against the Respondent. If there is not a relevant and specific case for professional misconduct, the same arguments would apply to unsatisfactory professional conduct. The proper thing to do was to dismiss the Complaint completely.

The Tribunal asked some questions. It was clarified that the Respondent's question for the Tribunal was whether there was a sufficiency of pleadings to bridge the gap regarding the allegation of fraud.

The Tribunal noted the Respondent's submissions regarding the obligation to make a disclosure in relation to fraud. It asked Mr Moynihan about the possibility of some wider professional obligation on the Respondent arising from the information originally obtained from FDA. It asked whether the Respondent was on notice that he needed to make further inquiry before continuing to act.

Mr Moynihan referred the Tribunal to Lord Drummond-Young's opinion in the Houlgate case. In Mr Moynihan's submission, where a solicitor has suspicion, he has at least two options. If the test is met, he can disclose that suspicion to the relevant authorities or the other side in a transaction. If he is in doubt about whether that level is met, the test of integrity would require the solicitor to withdraw

from acting but say nothing. He is under no duty to positively progress matters. In this case, the issue fell between those two options. The Respondent withdrew from acting in the executry. The duties incumbent on him came down to whether the allegation had sufficient substance.

Mr Moynihan said that if there was substance to the allegation of fraud, the solicitor would be obliged at the very least to withdraw from acting. Continuing to act would be professional misconduct. If he continued to act, for example, to attempt to correct the problem, the solicitor must make a frank disclosure to the opposing party. A hypothetical example was where the solicitor had suspicion, decided to withdraw but found himself doing progressively more and more work on unrelated matters, although as it turned out, there was no proper basis for fraud, or on a proper analysis there was no proper basis to blame the client. In these circumstances there could be no blame on the solicitor. The proper analysis was that there was never a proper basis to blame the client so the solicitor cannot be criticised even if he had suspicions. If it was otherwise, it would be impossible to apply the correct standard. If a solicitor had a suspicion, he could never act. That would be difficult to maintain. The acid test was whether there was a proper basis to accuse the solicitor of Professional Misconduct or Unsatisfactory Professional Conduct based on the conduct of the client. If the allegation against the client is groundless, there is no criticism of the solicitor. Mr Moynihan said that if there was a rumour that a client was committing a fraud, a solicitor did not act wrongly if there were no grounds for his suspicion.

The Tribunal asked whether a solicitor in such a case was reckless or was lucky as to the outcome. It asked if a solicitor had a responsibility to test his basis for suspicion or concern in such a case? Mr Moynihan said that if the solicitor was put on notice of a problem or was "blind eye reckless" to it, he would be guilty of professional misconduct. Blind eye recklessness engages luck. However, if the solicitor asks the question and gets a clear favourable answer, he cannot be guilty of professional misconduct. It was not that the solicitor was lucky or not, rather there was no objection to him acting in the first place.

The Tribunal noted that the Respondent in this case decided to withdraw. There was then a course of conduct where he continued to act. It asked Mr Moynihan whether it should attach no significance to that if there was no underlying basis for him to withdraw. Mr Moynihan said that the decision was taken to withdraw from the executry matter but not personal matters. The Respondent did engage in some further correspondence in relation to the executry. Over time the boundary about what he would do and what he would not do became confused. However, Mr Moynihan's submission was that there was nothing wrong in him doing something more on the executry side than the personal side because

the disqualifying circumstances (fraud by MDA) had not been proven. As it turned out, there was no obligation on him to withdraw in the first place.

The Tribunal asked whether it was significant what duties of confidentiality or legal professional privilege were owed to a deceased client. Mr Moynihan said that the basis of the Complaint was not that the Respondent had a duty to communicate to Balfour + Manson what FDA had told him. The basis of the Complaint is that the Respondent should have communicated what MDA said to him. It is difficult to separate those things. However, the Complainers aver that the Respondent should have communicated what MDA told him.

SUBMISSIONS FOR THE COMPLAINERS

Mr Stewart noted that the Tribunal's duty was to look at the professional and ethical duties on the Respondent, not just delictual obligations. The Tribunal must look at the conduct of the Respondent and consider a solicitor's obligation to act with integrity.

Mr Stewart submitted that the obligations on a pleader before the Tribunal are not the same as those on a pleader before a court. In terms of its rules, the Tribunal only requires the Complainers to set out the facts. However, averments of duty and misconduct are typically provided to assist the Tribunal.

Mr Stewart submitted that the Complainers did not have to establish fraud to be successful in all parts of its Complaint. There was an element of dishonesty by MDA. The Complainers did not aver that the Respondent had been dishonest.

Mr Stewart accepted the duties on professionals set out in McSparran McCormick-v-Scottish Legal Complaints Commission 2016 SC 413 but said that case could be distinguished. The Tribunal can only judge the Respondent on his own knowledge. That knowledge was set out at paragraph 3.9 of the Complaint. The Respondent knew there was a will. He was very definite about it. He knew it existed. That knowledge has to be displaced for the Respondent to be successful. The Respondent was aware MDA intended to avoid the will and ensure that the charities did not benefit.

Mr Stewart referred the Tribunal to paragraph 21 of Lord Drummond-Young's opinion in Frank Houlgate Investment Co Ltd-v-Biggart Baillie 2010 SLT 527; 2012 SLT 256; 2013 SLT 993; 2016 SC 187 in which it was said that if a solicitor becomes aware of some fact that points toward a fraud, he should refuse to act in the transaction. The solicitor does not have to be satisfied beyond reasonable doubt that there was a fraud. The Respondent was aware of a fact because FDA had told him about

the will. This needs to be assessed by the Tribunal. The case should not be dismissed today. If it could amount to unsatisfactory professional conduct, the matter must continue.

Mr Stewart said that when the Respondent failed to withdraw from acting, he also failed to exercise the appropriate level of skill to the matter. It can reasonably be inferred that Bruce Ritchie's advice had been to withdraw. This averment of misconduct must survive and be dealt with on another day.

With reference to improper instructions, Mr Stewart noted that he should not plead evidence, but rather was only obliged to give proper notice. He said that the improper conduct is contained in the Complaint and the correspondence set out there.

Mr Stewart said that he can succeed on the averments made in the Complaint. He noted that the test for unsatisfactory professional conduct was lower than that for professional misconduct. This might be a key factor in the Tribunal's decision.

Mr Stewart set out the basis for the Respondent's knowledge that there was a will and asked the Tribunal whether there were "enough rocks thrown" at the Respondent's knowledge to weaken it. The Respondent had been told by the horse's mouth that there was a will. This was the primary and most important fact. The Respondent was told by one sister that there was no will. This was manifestly unsupported and contrary to what he knew from FDA and MDA. There is only one source of evidence that there was no will, and that was MDA himself. MDA's first position was that the will could be destroyed with the agreement of all the surviving offspring. His second position as that FDA gave MDA authority to destroy the will. His third position was that MDA signed a will but was told by someone in Italy that it was not validly executed. There must have been a will for these propositions to be correct. Can the Respondent's knowledge be brought into significant doubt by what MDA subsequently said? On a reasonable interpretation of the facts, there was a will in Italy. This case needed to go to an assessment of the evidence. The Tribunal needed to consider whether the evidence was sufficient to establish the Respondent's knowledge that there was a will. The Tribunal needed to decide what weight had to be attached to MDA's explanations that the will was not valid.

Mr Stewart referred the Tribunal to McSparran McCormick-v-SLCC 2016 SC 413 and submitted that the circumstances were very different to the present case. The case could be distinguished on the basis of the different timescales, the huge change in circumstances, and Mr McGeechan's continued insistence of his position in the face of contrary evidence.

Mr Stewart said the averments in the Complaint were sufficient to survive. There were sufficient averments of primary fact or inferences of fraud to support the case. The case should therefore go to a full hearing.

Mr Stewart said the Respondent should have withdrawn from acting and should not have taken other instruction. A solicitor must not assist a client in a criminal or fraudulent matter. The Complainers did not have to establish fraud to a criminal standard, just raise sufficient evidence to look at the Respondent's conduct. The pleadings were not all hung on fraud. There were sufficient primary facts for an inference to be drawn.

Mr Stewart referred the Tribunal to SRA-v-Wingate [2018] 1 WLR 3969 and the examples of lack of integrity described at paragraphs 95 onwards.

Mr Stewart said that if the Respondent had withdrawn and did not re-engage, then there might not have been an obligation to make enquiries with the Italian solicitor. To displace the Respondent's knowledge of the will, he would have to check what the Italian solicitor had said. If he had done that, he would have been in a different position when joining Balfour + Manson. Mr Stewart said that when the Respondent joined Balfour + Manson, there were different obligations on him. There are duties on partners and these go to the integrity of the Respondent. If he knew their client did something wrong, he owed them an obligation of good faith. His files became Balfour + Manson's files. Had Balfour + Manson continued to act when the Respondent joined the firm, there would have been two instructions to the firm, one based on fraud. In 2010 there was longstanding litigation regarding the Florida property. All these things need to be considered at a full hearing.

Mr Stewart said that the Respondent's Note of Argument placed too much weight on the evidence and not enough on the source of that evidence. Just like Mr Mair in the Houlgate case, the Respondent was aware there was a will.

Mr Stewart said he did not have to prove there was a validly executed will. He could proceed on the basis of the knowledge of the Respondent and the steps he had taken on the basis of that knowledge. He could properly have pointed the finger at MDA. He should have written a letter to say there was a fraud ongoing.

Mr Stewart said that he was constrained by the complaint which was made to the SLCC and the timescales set out in that complaint.

Mr Stewart suggested that all the Respondent had to do was write to Balfour + Manson and say that his client had told him he had written a will in Italy. However, he did not do that and instead compounded the error by re-engaging with the matter and representing MDA with regard to his interest in the executry. While debates on relevancy and specification can be important, sometimes the Tribunal needs to hear evidence.

Mr Stewart noted that the Respondent told MDA's siblings about the will. They were in correspondence with Balfour + Manson. At the lowest, they tacitly agreed that the estate should be dealt with as an intestacy thus defrauding the charities. It was quite clear that they engaged and wanted money. That amounted to a collusion. The Tribunal might not decide there is enough for that following proof, but the averments are proper and relevant and can stand.

Mr Stewart said the improper instructions were narrowly restricted to those in paragraph 3.17 of the Complaint. These were exchanges between the Respondent and MDA. There has been proper notice to the Respondent. A full hearing is required for the Tribunal to ascertain if there has been professional misconduct.

The Tribunal asked some questions. It noted that the Respondent had knowledge of "a will". It asked whether that was predicated on taking FDA at his word that there was both a will and that it was validly executed. Mr Stewart said the Complainers' case was based on the Respondent's own words in his letter to MDA. The Tribunal noted that according to that approach, a Scottish lawyer would have to take a view on an Italian will he has never seen. Mr Stewart said it was similar to the <u>Houlgate</u> case. The Tribunal noted that in <u>Houlgate</u>, the client admitted fraud. Mr Stewart said that FDA told the Respondent there was a will. A competent and reputable solicitor would not ask if it was validly executed. He would take his client at his word. If he had thought the Italian will was not valid, he would have suggested a Scottish will. The Tribunal asked whether the Complainers were proceeding on a presumption that the will was valid. Mr Stewart said he proceeded on the basis of the Respondent's knowledge.

The Tribunal asked Mr Stewart the basis upon which he said MDA's siblings were colluding with him in a fraud. It noted there were no averments in the Complaint regarding Ms J. The Fiscal referred the Tribunal to paragraph 3.21 of the Complaint. The siblings knew about the Italian will and proceeded to wind up the estate as an intestacy. Ms J tacitly agreed to proceed in that way. The Respondent told Ms F about the will and the charity beneficiaries. She then engaged with Balfour + Manson about an intestacy. Up to 2005 there was tacit collusion.

The Tribunal noted that the Respondent had been told three times by FDA that there was an Italian will. It asked whether there was any other evidence supportive of a valid Italian will. Mr Stewart said there was no reason why the Respondent should not rely on FDA's statements.

The Tribunal asked whether there had been any criminal investigation into the matter. Mr Stewart said he was not aware of the Complainers reporting the matter to the police. He had not been asked for advice on this.

The Tribunal asked about the Florida property transaction. Mr Stewart said a case was raised in Florida and MDA paid his sisters a significant sum after he accepted a sale at undervalue.

The Tribunal noted the allegation that the Respondent was acting on improper instructions. It asked whether that meant that he continued to act at all. Mr Stewart agreed. Mr Stewart said the Respondent did not have to stop acting regarding MDA's business affairs. However, he should have also withdrawn from acting for MDA personally in the pursuit of recovery under the intestate estate.

The Tribunal asked about the period when Turcan Connell was acting. It noted that the Complainers criticised the Respondent for not making a disclosure to Balfour + Manson when he joined the firm. However, he had earlier made a disclosure to Turcan Connell. It asked whether that sufficiently discharged any obligation to share information at that stage. Mr Stewart said the Respondent was required to tell Balfour + Manson about the Florida property dispute. It was an adminicle of evidence that MDA was not acting above board.

FURTHER SUBMISSIONS FOR THE RESPONDENT

Mr Moynihan noted that the Complaint is split between two periods, 2003-2005 and 2010 onwards. There is no suggestion that Turcan Connell did anything wrong. He suggested that in order to draw fair and reasonable inferences from the fact, the Tribunal had to look at the period as a whole, without artificial boundaries. It is unrealistic not to consider what was done in 2006. The Respondent informed Turcan Connell of his knowledge and the case still proceeded as an intestacy. When the Respondent made his disclosures to Turcan Connell, he had the consent of the client to make them.

Mr Moynihan said it was clear the Complainers were acting on an assumption. However, the question of the validity of the will is raised in the Complaint. Mr Stewart had said the Complainers did not have a position on the validity of the will but it might lead evidence on this later. Mr Moynihan said he was entitled to notice of this.

Mr Moynihan noted that Mr Stewart had submitted that a hint of fraud would be sufficient in this case to create a duty of disclosure based on Lord Drummond-Young's opinion in Houlgate. Mr Moynihan invited the Tribunal to look at paragraph 21 of that decision carefully. He said Lord Drummond-Young was looking at circumstances where a solicitor might be liable as an accessory to the fraud. However, if there was no fraud, there was no liability. A solicitor must not further a fraud or a dishonest purpose. However, a solicitor does not have a duty to assume deceit and made investigations. Mr Moynihan referred the Tribunal to Lord Menzies' opinion at paragraphs 39 and 40. There is no duty to disclose or confess that you may be wrong. The duty arises when there is wrongdoing, and the solicitor knows it is wrong or is guilty of blind eye recklessness. None of that applies in the present case.

DECISION

The Tribunal's task was not to determine the issue of professional misconduct but rather to examine the Complaint and decide whether a sufficiently relevant and specific case had been pled against the Respondent. The Respondent challenged the relevancy of the averments of fraud (on the basis of general relevancy and as an exception to legal professional privilege). He also criticised the specification of the allegation that he had accepted improper instructions.

The Tribunal bore in mind some general principles when considering the preliminary pleas. The pleadings should be read as if they are completely true and interpreted broadly in favour of the pleader. The Complaint could only be dismissed if, reading the averments as if they were true, the Complaint was bound to fail, even if the Complainers proved everything in the Complaint.

The Tribunal considered the plea to the relevancy first. The Complaint proceeded upon the assumption that there was an Italian will and that it was valid. However, there were insufficient relevant facts averred to support these assumptions. The Complainers did not offer to prove that a valid Italian will existed. They merely averred that FDA had told the Respondent about it, and that MDA made inconsistent statements about the existence of the will and its validity. These included latterly an assertion on 2 March 2003 that the will was not valid in Italy because it was not signed before a Notary Public (Paragraph 3.13 of the Complaint).

The Complaint averred a fraud on the part of MDA. It was said that he knew there was a valid Italian will but that he was instructing solicitors to wind up the estate based on the rules of intestacy. The Complainers relied on the Respondent's file. It recorded the information the Respondent had received

from FDA about a will, the inconsistent information he had received from MDA about the existence and validity of the will, and the Respondent's own correspondence which outlined his belief about the will at the time of writing. This was an insufficient basis for an allegation as serious as fraud, particularly in the light of the information the Complaint averred he received on 2 March 2002 that the will was not valid in Italy (paragraph 3.13 of the Complaint).

The Complaint averred that the siblings had colluded to defeat the terms of an Italian will. There were insufficient relevant facts averred to support this allegation. In addition, there were averments to the contrary at paragraph 3.26 of the Complaint to the effect that one of the siblings had alleged that the Respondent had prepared a Scottish will. Paragraph 3.6 of the Complaint also averred that there was "no love lost between the surviving siblings". There was therefore an insufficient basis for an allegation of collusion in a fraud.

Without a proper foundation for fraud, there was no basis upon which to ground the allegation that the Respondent should have made disclosures to Balfour + Manson. On the basis of what is set out in the Complaint, privilege and confidentiality applied. As fraud was not relevantly averred, the fraud exception to privilege did not become operative. The Tribunal also noted that it was averred that disclosures were made to Turcan Connell in 2006 with MDA's permission. These were contained in the file which eventually passed to Balfour + Manson. Turcan Connell continued to administer the estate as an intestacy. Upon the basis of the case as averred by the Complainers, the Respondent had disclosed the information which had been provided to him about the possible existence of an Italian will, to the solicitors then acting in the administration of the estate, in any event.

Therefore, taking all that into account, the Tribunal was not satisfied that the Complainers had averred a relevant case of fraud, or therefore a relevant basis upon which the Respondent might be professionally criticised for failing to adhere to an obligation of disclosure, notwithstanding duties of confidentiality and legal professional privilege. To that extent, the Tribunal partially sustained the Respondent's plea to the relevancy.

Following on from its decision to uphold the plea to the relevancy, the Tribunal deleted the following words at paragraph 3.21 of the Complaint:

"The respondent knew that MDA and his sisters were colluding in ignoring the wishes of their father and seeking to avoid the will to their financial interest. He knew the charities FDA advised he was leaving his estate to would not receive their legacies."

In addition, the Tribunal deleted all of paragraphs 3.23 and 3.24. Parties had indicated to the Tribunal that references to Mr Bruce should be to Mr Burns. The paragraphs which the Tribunal deleted were as follows:

"3.23 The respondent should have told Mr Bruce that

3.23.1 MDA knew of his (the respondent's) knowledge of an Italian will,

3.23.2 there were charitable beneficiaries,

3.23.3 the intestacy was defeating the charitable legacies,

3.23.4 MDA & his siblings were knowingly seeking to avoid paying the legacies to the charity beneficiaries.

3.24 The respondent should have told Mr Bruce of this either at the time of Mr Bruce's instruction by MDA and, or in the alternative, when he entered into communication with Mr Bruce on behalf of MDA."

Following on from its conclusions above, the Tribunal also deleted some sections from the averments of misconduct. The Tribunal deleted the words in paragraph 5.2.5,

"and therefore was aware MDA was acting upon his intention to defraud the charity legatee"

It deleted part of paragraph 5.2.6 which was as follows:

"Failed to disclose to the solicitors acting for the intestate estate of the MDA, FDA's fraudulent intent/actions."

The Tribunal assumed that that this was meant to refer to the intestate estate of FDA, and MDA's fraudulent intent/actions.

The Tribunal also deleted the following words from paragraph 5.2.6:

"he failed to act with his fellow solicitors in a manner consistent with person having a mutual trust and confidence; he failed to advise Mr Bruce of his client's criminal intention and acts".

The Tribunal deleted the following words from paragraph 5.4:

"He was aware of MDA's past and ongoing fraudulent intentions and acts as executor dative."

The Tribunal deleted the following words from paragraph 5.5:

"he failed to declare information about past and ongoing criminal acts, he failed to act with integrity in not addressing his fiduciary obligation to his new firm and with his new fellow partners with mutual trust and confidence."

The Tribunal considered whether this was sufficient to necessitate dismissing the Complaint in its entirety, on grounds of relevancy. It stopped short of doing so, because it considered that the Complaint as framed was capable at least of being construed somewhat more widely. The Complaint contemplated the possibility at least that the Respondent might nonetheless be subject to criticism arising from the extent to which he proceeded to act, notwithstanding the Respondent's own concerns as a result of the information which had been provided to him by FDA. Mr. Moynihan had accepted that the boundary between what the Respondent became involved in, and not involved in, had become unclear. It seemed to the Tribunal that, while there was no sufficient or relevant basis to support an obligation of disclosure, the question whether the Respondent continued to act appropriately, in accordance with proper instructions, was less clear and could only ultimately be determined following an evidential hearing. It had a reservation in particular about the suggestion that, even had the Respondent acted recklessly in continuing to act, he would not be susceptible to criticism unless and until a fraud were actually established. This proposition it seemed to the Tribunal might not fully or sufficiently capture the extent of the professional obligation on the solicitor in these circumstances. Again, however, whether or not there were grounds in this respect for criticism in this case would be more appropriately considered following proof of the evidence.

The Tribunal considered the plea to the specification relating to the allegation that the Respondent had accepted improper instructions by continuing to act for the Respondent in matters connected to the executry. The Tribunal noted that at paragraph 3.17 of the Complaint, the Complainers had outlined the correspondence, meetings and telephone calls upon which they relied. It also noted that the Respondent had written to Balfour + Manson on behalf of MDA on 29 October 2004, 17 November 2004 and 22 November 2004. It was alleged that he had advocated for MDA in respect of his personal obligations as executor-dative. He provided two draft letters for MDA to send to Balfour + Manson on 12 January 2005 and revised MDA's letter on 21 January 2005 (paragraph 3.18 of the Complaint). In January or February 2005 MDA asked for advice about how to respond to Balfour + Manson regarding the transfer of FDA's property in Florida. He provided advice to MDA at a meeting in March (Paragraph 3.19 of the Complaint).

The Tribunal was satisfied that the averments relating to the Respondent continuing to accept improper instructions were sufficiently specific to allow that part of the Complaint to proceed to proof. The Complaint contained averments that the Respondent was aware at one stage that there might be something improper going on. He consulted the Professional Practice team at the Law Society. He wrote letters in terms which were very certain about the will. There was therefore a question to be answered about his subsequent actions (even although the Tribunal was satisfied that this did not extend to reporting a fraud). Although the Respondent's suspicions were raised, he

continued to act. An evidential hearing is required to ascertain the extent of his actions so it can be determined if these were improper. It will be a matter for proof what information the Respondent had, what was on his mind, and what he did. It will be for the Complainers to establish the case against the Respondent at a substantive hearing. Therefore, the Tribunal repelled the Respondent's second preliminary plea regarding the specification of the Complaint.

The Tribunal reserved all other matters meantime and fixed a virtual procedural hearing for 2 October 2023 at 10am.

Ben Kemp
Ben Kemp (Aug 29, 2023 17:04 GMT+1)

Ben Kemp

Vice Chair