

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

F I N D I N G S

in Complaint

by

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

Complainers

against

**SHAGUFTA GHAFAR, Ghafar & Co Ltd, 538
Cathcart Road, Govanhill, Glasgow**

Respondent

1. A Complaint dated 22 November 2022 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 Shagufta Ghafar, Ghafar & Co Ltd., 538 Cathcart Road, Govanhill, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer, Saleem Khalid Anwar, 36 Dalkeith Avenue, Glasgow.
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 appointed the Complaint to be set down for a virtual procedural hearing on 2 March 2023 and notice thereof was duly served on the Respondent.
5. At the virtual procedural hearing on 2 March 2023, the Complainers were represented by their Fiscal, Gavin Whyte, Solicitor, Edinburgh. The Respondent was present and represented by David Burnside, Solicitor, Aberdeen. The parties having waived the usual notice period, the Tribunal fixed a further virtual procedural hearing for 15 March 2023.

6. At the virtual procedural hearing on 15 March 2023, the Complainers were represented by their Fiscal, Gavin Whyte, Solicitor, Edinburgh. The Respondent was present and represented by David Burnside, Solicitor, Aberdeen instructed by Johnston Clark, Solicitor, Dundee. The Tribunal fixed a virtual preliminary hearing for 24 April 2023 to deal with the Respondent's preliminary plea to the competency and notice thereof was duly served on the Respondent.
7. On 19 April 2023, the Fiscal indicated that the Complainers were no longer opposing the preliminary plea to the competency contained in the Respondent's Answers. On 21 April 2023, the Fiscal lodged a revised Complaint.
8. At the virtual preliminary hearing on 24 April 2023, the Complainers were represented by their Fiscal, Gavin Whyte, Solicitor, Edinburgh. The Respondent was present and represented by David Burnside, Solicitor, Aberdeen instructed by Johnston Clark, Solicitor, Dundee. The Tribunal set the matter down for a hearing in person yet to be fixed.
9. Answers to the revised Complaint were lodged on 30 April 2023. The hearing was set down for 1 September 2023 and notice thereof was duly served on the Respondent. A Record dated 18 August 2023 was lodged with the Tribunal.
10. At the hearing in person on 1 September 2023, the Complainers were represented by their Fiscal, Gavin Whyte, Solicitor, Edinburgh. The Respondent was present and represented by David Burnside, Solicitor, Aberdeen instructed by Johnston Clark, Solicitor, Dundee.
11. Having given careful consideration to the terms of the Record, Joint Minute, Productions and Authorities, the Tribunal found the following facts established:-
 - 11.1 The Respondent is Shagufta Ghafar. She was born on 26 July 1983. She was enrolled and admitted as a solicitor on 9 March 2010. She was employed by E Coogans & Co as a trainee solicitor from 27 May 2008 to 9 July 2010. She remained at the firm as a solicitor until 30 September 2010. She thereafter worked as an associate with Buchanan Macleod from 12 October 2010 to 31 March 2014. She obtained a position with Ghafar & Co Ltd (hereinafter known as 'the firm') as a cash partner and director from 01 April 2014 and currently remains employed with the firm.

Instruction, minutes of agreement, mandates and dispositions

- 11.2 The Respondent was instructed by the Secondary Complainer in February 2016 on behalf of West Construction UK LLC. The Secondary Complainer at the time was the sole director and owner of the aforementioned company. The Respondent was instructed to act on behalf of the Secondary Complainer in relation to the purchase and transfer of Greenhill Lodge, 1 Old Humbie Road, Newton Mearns, Glasgow, (hereafter known as “the property”) to Mr X, who was to become trustee of the property.
- 11.3 A minute of agreement between the Secondary Complainer and Mr X was drafted and witnessed by the Respondent, this was signed on 25 March 2016. The minute of agreement set out the following terms:
- The Secondary Complainer would purchase the property and on the day of purchase would transfer title to Mr X, who would provide part funding for the purchase.
 - The title of the property would be in the name of Mr X, however upon request from the Secondary Complainer, the property would be transferred back to him without delay.
 - The Secondary Complainer could at any time ask for the property to be sold or mortgaged.
 - Mr X was prevented from burdening the property with any heritable security or otherwise dispose of the property without the Secondary Complainer’s consent.
 - The agreement provided that both parties had elected not to seek independent legal advice in relation to their interest prior to signing the minute of agreement.
- 11.4 During the course of the transaction three mandates were prepared by the Respondent, signed by the Secondary Complainer and held on the Respondent’s file.
- 11.5 The first mandate dated 25 March 2016 states that the Secondary Complainer consents to a minute of agreement of even date between himself and Mr X and that he is aware the firm acts on his behalf and that they do not represent Mr X who has elected not to take legal advice and as a result is unrepresented. This mandate further states that in the event of Mr X breaching the minute of agreement by selling or encumbering the property with securities, he will not hold the firm liable. The mandate also confirms that the firm advised the Secondary Complainer of all the risks involved and advised him against the transaction.

- 11.6 The second mandate, dated 5 April 2016, is a land and buildings transaction tax authority mandate which states that the Secondary Complainer authorised the firm to submit online the land and buildings transaction tax form on his behalf in relation to his purchase of the property.
- 11.7 The third mandate was signed on 2 March 2018, authorising the release of the Secondary Complainer's papers to his new agent.
- 11.8 During the course of the transaction, seven mandates were prepared by the Respondent, signed by Mr X and held on the Respondent's file:
- 11.9 The first mandate, dated 25 March 2016, confirms that Mr X consented to the terms of the minute of agreement, stated the firm did not act on his behalf and he was aware under the terms of the minute of agreement that he could not sell, transfer or dispose of the property and he was aware of the consequences if he was in breach. He stated he had elected not to take independent advice and that if he breached the terms of the lease, he would not hold the firm liable for the outcome and he consented to the terms of the minute of agreement.
- 11.10 The second mandate, also dated 25 March 2016, confirmed that the firm did not act for Mr X and that they would be submitting the land and buildings transaction tax and application for registration of the disposition in his favour. This mandate stated that Mr X had been advised to seek independent legal advice and that he elected not to have an independent person witness the minute of agreement. The mandate further confirmed that if Mr X breached the terms of the minute of agreement, he would not hold the firm liable.
- 11.11 The third mandate, also dated 25 March 2016, stated the firm did not act for Mr X, that he was fully aware of the terms of the minute of agreement, that he had elected not to have an independent party witness the minute of agreement and he was also aware the minute of agreement did not permit him to sell, transfer or dispose of the property. The mandate stated he was aware of the consequences if he was in breach. The mandate also made clear that Mr X was aware that the registration of title in his name would take some time and that he would not amend or withdraw the application himself or through solicitors and would not jeopardise the position of West Construction UK LLC unless asked to do so in which case he would amend or withdraw the application immediately. The mandate also

stated that Mr X had elected not to take independent legal advice and that if Mr X breached the terms of the minute of agreement, amended or withdrew any applications to the Land Register of Scotland without the knowledge or consent of West Construction UK LLC that he would not be entitled to hold the firm liable for the outcome.

- 11.12 The fourth mandate, also dated 25 March 2016, stated that Mr X had been advised by the firm that they acted on behalf of West Construction UK LLC and not on behalf of him in relation to the transfer of title of the property. The mandate also once again stated that Mr X had elected not to take independent legal advice and would not hold the firm liable for any issues or conflicts arising as a result of the transfer as he was fully aware of his position.
- 11.13 The fifth mandate, dated 8 April 2016, confirmed Mr X gifted a total of £374,000 to the Secondary Complainer to enable him to purchase the property. It further confirmed that Mr X had no interest in the property and that he paid the firm two instalments of £324,000 on 31 March 2016 and £50,000 on 5 April 2016.
- 11.14 The sixth mandate dated 18 January 2018 authorised other agents to ‘liaise with my solicitors’ and ‘discuss any matters relative to my security over the property’.
- 11.15 The seventh mandate, dated 19 April 2018, confirmed that Mr X had asked the firm to withdraw his application for registration of the disposition in his favour by West Construction LLC in respect of the property. This mandate also stated that Mr X had been advised to seek independent legal advice and that had elected not to do so and that he would not hold the firm liable for the consequences of his withdrawal of the application.
- 11.16 On 26 February 2016, the seller’s agent sent a qualified acceptance in respect of the property to the Respondent. Missives concluded on the same day by the seller’s agent. Thereafter a disposition dated 16 March 2016 was prepared from the sellers Mr and Mrs B to West Construction LLC. This disposition was in order and conveyed “*the whole subjects registered in the Land Register of Scotland under Title Number REN47822*”. The consideration was £550,000 and the date of entry was described as 8 April 2016. This was signed by Mr & Mrs B on 16 March 2016.

- 11.17 A second disposition dated 16 March 2016 from the sellers to West Construction LLC had been altered by hand and conveyed '*part of the subjects registered in the Land Register of Scotland under Title Number REN47822*'.
- 11.18 A third disposition dated 25 March 2016 from West Construction LLC to Mr X conveyed '*part of the subjects registered in the Land Register of Scotland under Title Number REN47822*'. This disposition contained handwritten alterations. The Date of Entry was 8 April 2016. This disposition was signed by the Secondary Complainer and witnessed by the Respondent on 25 March 2016.
- 11.19 A fourth disposition dated 25 March 2016 from West Construction LLC to Mr X conveyed '*part of the subjects registered in the Land Register of Scotland under Title Number REN47822 edged and numbered '1' in blue on the Title Plan.*' This disposition contained handwritten alterations.
- 11.20 The fifth disposition from West Construction LLC to Mr X conveyed '*ALL and Whole the subjects Greenhill Lodge, 1 Old Humbie Road, Newton Mearns, Glasgow, G77 5DF being part of the subjects registered in the Land Register of Scotland under Title Number REN47822 and edged red in the plan annexed and executed relative hereto*'. The property description had been typed and contained no handwritten alterations.
- 11.21 On 7 April 2016, the sellers' agent wrote to the firm enclosing the signed disposition by Mr & Mrs B to be held as undelivered pending completion and under separate cover on the same day the settlement cheque was enclosed to be held as undelivered.
- 11.22 On 12 April 2016, the firm sent a cheque to Revenue Scotland for the sum of £28,350 being the land and buildings transaction tax payment due by West Construction LLC in respect of the property. Applications for registration of the Disposition from Mr & Mrs B to West Construction LLC were made unsuccessfully by the Respondent on 12 April 2016 and on 17 June 2016. An unsuccessful application was made by the Respondent to register the Disposition from West Construction LLC to Mr X on 8 July 2016.
- 11.23 On 24 May 2016, Revenue Scotland wrote to the firm regarding the property and described the effective date of the transfer as 8 April 2016. It explained that Additional Dwelling Supplement was due on buy to let properties and second homes. It was also due

in every purchase by a non-natural person such as a company and this rule had applied since 1 April 2016.

- 11.24 On 16 June 2016, the Respondent emailed the Secondary Complainer to explain she had been trying to register the title to the property but there was an issue with the land and building transaction tax and that an additional dwelling supplement was due to be paid.
- 11.25 The Secondary Complainer responded on 20 June 2016 to say, *'let me think about it. Maybe I can register it in my own name and then transfer it or I may register it on Mr X's name.'*
- 11.26 On 29 June 2016, Revenue Scotland wrote to the firm referring to a previous request on 24 May 2016 for information in relation to the land and building transaction tax return. It stated this letter was not replied to nor their call of 27 June 2016 to the firm's office.
- 11.27 On 8 July 2016 Revenue Scotland wrote to the firm regarding the property to say the land and building transaction tax return was submitted after the due date and requested an explanation by 29 July 2016. On the same date, an application for registration of the disposition was sent by the firm to the Registers of Scotland which described Mr X as the applicant and West Construction LLC as the grantee.
- 11.28 On 26 July 2016, Revenue Scotland wrote to the firm and noted that the original return had been voided and a new return had been submitted on behalf of Mr X. The letter commented the buyer's identity on the return had changed and asked why the additional dwelling supplement was no longer included within the application.
- 11.29 On 26 July 2016, the Registers of Scotland emailed the firm acknowledging receipt of the application 16 REN13739. This described the property and identified the applicant as Mr X and the grantor as West Construction LLC. The application detailed the date of application as 11 July 2016 and noted the application type was a 'Transfer of Part.'
- 11.30 On 12 October 2016, Revenue Scotland wrote to the firm referring to Mr X as the firm's client. The letter requested payment of a Penalty of £1659 (comprised of £100 late return penalty, £1417 failure to pay initial penalty and £142 interest) 'because we did not receive a Land Building Transaction Tax return and payment from your client Mr X on time.'

- 11.31 On 12 October 2016, Revenue Scotland wrote to Mr X to notify him a penalty was due in respect of the property because a return had not been provided within 31 days of the transaction in accordance with the Land Building Transaction Tax (Scotland) Act 2013.
- 11.32 On 8 December 2016, the firm emailed the Secondary Complainer referring to their numerous telephone calls to him without success asking him to contact the office urgently. The same email was sent that day by the firm to Mr X.
- 11.33 On 11 April 2017, Mr X entered into a Facility Agreement for £300,000 with an Edinburgh based company known as WSL which was to be secured by a Standard Security over the property. The loan was to be drawn down in one amount on or within 14 days of the date of the agreement and was to be repaid 6 months after this drawdown. The sum secured had to be repaid to the lender within three months of execution with an interest payment of £52,000 or within six months with an interest payment of £72,000. The loan is described as being for business purposes. Mr X was represented in this matter by another agent.
- 11.34 On 28 August 2017, the Registers of Scotland rejected the firm's registration of the disposition application for two reasons. The first was that the plot could not be clearly established from the description in the disposition from West Construction LLC to Mr X and the second reason was that the disposition did not appear to be valid by virtue of s43 (1) of the Land Registration etc (Scotland) Act 2012.
- 11.35 In an email of 30 August 2017, the agent who acted for Mr X's lender WSL, emailed the Respondent regarding Mr X and the property. This email stated, *'I refer to the above transaction in which you acted for the purchaser, Mr X. We acted for the lender in a subsequent loan over the property and have received the attached rejection letter from Registers of Scotland. Could you please confirm that you are attending to this, as we understand your Disposition application has been rejected causing rejection of our application. We will require confirmation as to when you have re-submitted your application so that we can send our own back. We will require reimbursement of the £30 rejection fee and will likely have to submit a further Advance Notice due to this. We would therefore be grateful if you could transfer the sum of £40 to our client account using*

reference WATER01-02, account details attached. Kindly let us have a response today in order that we may update our client.'

- 11.36 On 27 September 2017, the firm returned the application for registration to Registers of Scotland following their rejection letter of 28 August 2017. The firm was however notified of a further rejection on 4 October 2017 and the reason given was that the property was not owned by the granter WC.
- 11.37 The Respondent emailed the lender's agent on 17 January 2018 with an email entitled with the property address and the name of Mr X, requesting a copy of '*your client's security documents that you were registering at this time*'.
- 11.38 On 26 April 2018, the lender's agent again wrote to the Respondent about the secured loan over the property expressing concern about the legal implications of the apparent situation which had arisen. This read:

'I refer to our telephone conversation moments ago. I have considerable difficulty with what you told me. You claimed that you were acting for [West Construction Limited LLC] in their sale to Mr X but that Mr X was not represented at the time of the purchase. Can you confirm who presented the deeds to the registers because I believe you were acting in a conflict of interest.

There have been three attempts to register the disposition and at no time, until I insisted on having a telephone call with you today, did you disclose the existence of an agreement between West Construction LLC and Mr X which prevented him from borrowing against the property.

So since 30 August 2017 you have been aware that Mr X was contractually obliged not to borrow money against the property but knowing he was doing so you have failed to advise us and proceeded with attempts at registration.

Without warning you advised the registration application has been withdrawn and you have resigned from acting. You will be aware that misleading another agent is professional misconduct.

Your central involvement in creating a position whereby our clients fail to have security begins to look deliberate.

I have invited you to have the representative of West Construction LLC attend a meeting with representatives of my client so that the matter can be resolved without the need to make a claim against the master policy and from there raise questions of professional misconduct and further with Police Scotland.

I have never in my entire career had to write a letter like this and hope the matter can be resolved without any more correspondence.'

11.39 An email from the lender's agent's representative, addressed to the Respondent and dated 17 May 2018, referred to the Respondent's client in the property transaction as Mr X and also the Secondary Complainer, being both buyer and seller. It stated that by presenting a disposition for registration in the name of Mr X, this held out the Respondent to be acting for him. It stated that while the Respondent withdrew the disposition on the instructions of West Construction LLC, she was now in breach of her obligations to Mr X and suggested the disposition was re-presented immediately. The letter accused the Respondent of acting in a conflict of interest situation and that by withdrawing the disposition, the Respondent had compromised the lender's security.

11.40 On 15 November 2018, the Secondary Complainer wrote a letter of complaint to the Respondent.

Conflict of Interest

11.41 The Respondent acted for the Secondary Complainer throughout the purchase of the property in accordance with his instruction, contrary to the clause in the minute of agreement which was signed by both the Secondary Complainer and Mr X on 25 March 2016 and stated that neither party would obtain independent legal advice in relation to their interest.

11.42 The Respondent did not notify Mr X as an unrepresented party, in writing, that he should obtain independent legal advice.

11.43 The Respondent had acted for Mr X in submitting the disposition in his favour for registration and in the related taxation forms to HMRC.

11.44 The Respondent withdrew the application to register the property in the name of Mr X in 2018.

Failure to register dispositions

11.45 The Respondent re-presented dispositions to the Registrars of Scotland on several occasions during the course of the purchase.

11.46 The Respondent made multiple handwritten changes to the dispositions without the knowledge and/or consent of the Secondary Complainer.

Failure to act in the best interests of client – Secured Loans

11.47 The Respondent received an email from a lender instructed by Mr X on 30 August 2017. This email indicated that Mr X had taken out a loan against the property. This was in breach of the minute of agreement signed by Mr X and the Respondent on 25 March 2016.

11.48 The Respondent first informed the Secondary Complainer of this approximately six weeks after the email of 30 August 2017.

12. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of professional misconduct singly in respect that:

12.1 The Respondent acted in a conflict of interest situation in that she represented the Secondary Complainer and Mr X in the purchase of a property, and in respect of the execution of a minute of agreement which was signed on 25 March 2016 in terms of which Mr X was contracted to keep the property in his name but was prevented from selling it or borrowing against it;

And in cumulo in respect that:

- 12.2 The Respondent failed to act in the best interests of her client in that she failed to notify the Secondary Complainer that Mr X had taken out a loan against the property in question as soon as they became aware of this on or after 30 August 2017, despite being fully aware that his actions were in breach of the minute of agreement signed between parties on or around 25 March 2016; and
- 12.3 From August 2017, the Respondent made multiple failed attempts to register the title of the property and in doing so each time the application was rejected made multiple handwritten changes to the disposition without the consent of the Secondary Complainer.
13. Having heard the Solicitor for the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh, 1 September 2023. The Tribunal having considered the revised Complaint dated 18 August 2023 at the instance of the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh against Shagufta Ghafar, Ghafar & Co Ltd., 538 Cathcart Road, Govanhill, Glasgow; Find the Respondent guilty of professional misconduct singly in respect that (1) she acted in a conflict of interest situation, and *in cumulo* in respect that (2) she failed to act in the best interests of her client and (3) presented a disposition for registration multiple times with her handwritten changes made without the consent of the Secondary Complainer; Censure the Respondent; Find the Complainers liable in the expenses of the Respondent in relation to preparation for and attendance at the preliminary hearing on 24 April 2023, and otherwise find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, all expenses being 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 this publicity should include the name of the Respondent but need not identify any other person.

(signed)

Kenneth Paterson
Vice Chair

14. 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 *30 OCTOBER 2023*.

IN THE NAME OF THE TRIBUNAL



Kenneth Paterson
Vice Chair

NOTE

At the Hearing on 1 September 2023, the Tribunal had before it the Record dated 18 August 2023, a Joint Minute, and a List of Productions and a List of Authorities for the Respondent.

On the Fiscal's motion, which was not opposed, the Tribunal amended the Record by deleting "8 April 2016" where it appeared in paragraphs 10.2 and 10.3, and substituting "25 March 2016".

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal noted that the facts in the Complaint were agreed. The first significant event occurred on 25 March 2016 when the Secondary Complainer and Mr X signed a minute of agreement. The Secondary Complainer's company was to purchase a property. Title was to be transferred to Mr X, who was to provide part-funding for the transaction. Mr X was to transfer the property back on request. He was not to sell or burden the property. It was noted in the minute that neither party had sought independent legal advice regarding the purchase and transfer. The Respondent drafted three mandates for the Secondary Complainer to sign and seven mandates for Mr X to sign. Mr X went on to get a secured loan using the property as security. There were numerous failed attempts made by the Respondent to register the dispositions.

In relation to the averment of misconduct relating to conflict of interest, the Fiscal drew the Tribunal's attention to the fact that the Respondent submitted deeds for registration on behalf of Mr X without authority. This kind of transaction cannot be entered into without a solicitor. The Respondent was the only solicitor acting. The disposition of 8 July 2016 described Mr X as the applicant and West Construction LLC as the grantee. The firm was informed on 28 August 2017 that the subsequent attempt to register the disposition from West Construction to Mr X was unsuccessful. The application of 27 September 2017 was rejected on 4 October 2017. This attempt was made almost one month after the Respondent had received an email from the agents for the lender WSL informing her that Mr X had granted a security over the property in return for a loan. This was contrary to the minute of agreement of 25 March 2016. On 12 October 2016 Revenue Scotland wrote to the Respondent referring to Mr X as her client. The mandate of 18 January 2018 authorised other agents to "liaise with my solicitors". On 17 May 2018, the agents for WSL referred to Mr X as the Respondent's client in an email to her. All this suggested that the firm acted for Mr X while the Respondent had knowledge of the security granted by Mr X. The Fiscal said that signing the mandate which referred to the lack of legal representation for Mr X did not absolve the Respondent of her professional duties regarding conflict of interest. Mr X required

his own representation. The Respondent should have withdrawn. There was an inherent conflict of interest between the minute of agreement and the mandates. The minute of agreement recorded that both parties were not seeking legal advice, but the mandates explicitly say that the firm was only acting for the Secondary Complainer. The Fiscal submitted that the Respondent's conduct was a breach of Rule B1.7 of the Law Society of Scotland Practice Rules 2011.

In relation to the averment of misconduct relating to acting in the best interests of the Secondary Complainer, the Fiscal noted that the Respondent became aware on 30 August 2017 that Mr X had arranged a loan secured on the property. However, she failed to notify the Secondary Complainer even though she knew that Mr X was not allowed to do this in terms of the minute of agreement. It was admitted in the Answers that the Respondent told the Secondary Complainer about this about 6 weeks later. The security was of significant detriment to the Secondary Complainer. It was against his interests, but this was not communicated to him. This was a breach of Rule B1.4.

In relation to the averment of misconduct relating to the failed attempts to register the disposition, the Fiscal noted that the Respondent had made various handwritten changes to the deed without seeking the consent of the Secondary Complainer. It is the Complainers' position that a party should be aware of any amendments to a disposition. The Fiscal alleged that the Respondent's conduct breached Rule B1.2. The Complainers did not allege dishonesty or lack of integrity. However, by failing to obtain the consent of the Secondary Complainer, it might be said that the Respondent's integrity could be questioned.

The Fiscal referred the Tribunal to the test for professional misconduct contained in Sharp v Council of the Law Society of Scotland 1984 SLT 313. The Respondent had breached the Practice Rules. Breach of a rule may constitute professional misconduct, although the Tribunal has a wide degree of latitude when determining the matter. The Fiscal invited the Tribunal to make a finding of professional misconduct in this case, singly in the case of the conflict of interest, and *in cumulo* in relation to the other matters.

SUBMISSIONS FOR THE RESPONDENT

With reference to the conflict of interest matter, Mr Burnside referred the Tribunal to Paragraph 19 of Part 6 of Schedule 18 to the Land and Buildings Transaction Tax (Scotland) Act 2013, which provides a meaning of "bare trust" and "bare trustee". He noted that in contrast to the situation in Law Society-v-Crearie, the Respondent did advise the Secondary Complainer against proceeding with the transaction. However, the Secondary Complainer was very forceful and adamant that the Respondent should proceed as he requested. The Secondary Complainer had an existing relationship with Mr X. He appeared to

respect him. They seemed to have a sound business relationship. There was a relationship of trust which would not ordinarily make the solicitor of ordinary competence believe that there was likely to be a conflict. Nonetheless, the Respondent took steps to protect the Secondary Complainer by obtaining mandates from Mr X which in particular recorded his absence of interest in the property. Mr Burnside submitted that all these aspects created a trust. He asked the Tribunal what the arrangement could be called if it was not a trust.

The Respondent's position was that a bare trust was established, and in these circumstances, Mr X was simply "in the shoes" of the Secondary Complainer, to his knowledge and on terms and conditions which he had accepted. Even if the Tribunal considered that the Respondent was wrong in the assessment of the bare trust, and that Mr X was interested in the transaction as a private individual, it was clear on the face of the mandates that Mr X accepted that the firm did not act for him. Mr Burnside asked how the transaction could have proceeded other than by obtaining of a mandate by the Respondent.

So far as removing the property from the Register was concerned, Mr Burnside submitted that if the Respondent's position regarding the bare trust was accepted, this inevitably meant that Mr X was in bad faith and his heritable creditor did not know about the arrangement. The Respondent was therefore, at least in her view, acting in the best interest of her client by withdrawing the disposition and effectively invalidating the standard security which might have led to a repossession.

In summary, Mr Burnside said that the Respondent was dealing with a bare trust which was clearly established, and to that extent, the actings of the Respondent were not in conflict between the Secondary Complainer and Mr X, his bare trustee.

With regard to the alterations to the disposition, Mr Burnside noted that the first rejection was erroneous. There were then several attempts to alter the deed. The Respondent should not have done that. However, she was relatively inexperienced, having only qualified in 2010. She was attempting to put the matter right without troubling the client. The Secondary Complainer frequently worked abroad. He was difficult to contact. It was a matter for the Tribunal whether that conduct met the Sharp test. It was unfortunate. However, she had not acted in a fraudulent or deceitful manner. There was merely an administrative delay due to the practicalities of getting in touch with the Secondary Complainer.

Mr Burnside said that the Fiscal was incorrect to say a solicitor was required to register title and directed the Tribunal to the Registers of Scotland website which says merely that:

"Land registration is a complex process that requires legal knowledge. We recommend that you use a solicitor."

DECISION

On the basis of the admitted facts, the Tribunal was satisfied that the Respondent had acted in the manner set out in the Complaint. The Complainers alleged that the Respondent had breached several rules contained in the Law Society of Scotland Practice Rules 2011. According to Rule B1.2, solicitors must be trustworthy and act honestly at all times so that their personal integrity is beyond question. They must not behave, whether in a professional capacity or otherwise, in a way which is fraudulent or deceitful. Rule B1.4.1 provides that solicitors must act in the best interests of their clients. According to Rule B1.7.1 and B1.7.2, solicitors must not act for two or more clients in matters where there is a conflict of interest between the clients. Even where there is only a potential conflict of interest, solicitors must exercise caution. Where the potential for conflict is significant, the solicitor must not act for both parties without the full knowledge and express consent of the clients. Although the Respondent admitted the facts set out in the Complaint, she denied professional misconduct, which in any event is a matter for the Tribunal to determine.

According to the definition of professional misconduct contained in Sharp v Council of the Law Society of Scotland 1984 SLT 313,

"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."

With regard to the allegation relating to conflict of interest, the Tribunal noted that the mandates set out that the Respondent was not acting for Mr X. The Tribunal also carefully considered the circumstances which the Respondent said pointed to the existence of a bare trust.

The Respondent drafted and Mr X signed mandates setting out that the Respondent was not acting for Mr X. However, the Respondent's subsequent actions suggested that she was in a solicitor-client

relationship with Mr X. She did not correct Revenue Scotland or the agents for Mr X's lender when they referred to Mr X as her client. The mandate of 18 January 2018 signed by Mr X authorised other agents to "liaise with my solicitors". Submission of an application to register a disposition is always done on behalf of the disponee. Having a mandate signed by Mr X accepting that the Respondent did not act on his behalf did not overcome these indications that Mr X was the Respondent's client.

An unusual situation existed between the Secondary Complainer and Mr X. Mr Burnside referred to it as a bare trust. However, a bare trust did not appear to be in the Respondent's contemplation in March 2016. When the agent for the lender challenged the Respondent about acting for Mr X, she did not explain that Mr X was acting as bare trustee. The description of the arrangement between the Secondary Complainer and Mr X as a bare trust appeared to have been applied considerably after the fact. The existence of a bare trust is not set out anywhere in the documents described in the Complaint or in the productions lodged with the Tribunal, until it appears in the summons in the cause *Anwar and West Construction UK LLC v Ghafar and Co Limited* signeted on 6 December 2022. The Tribunal noted that it had not had sight of the Minute of Agreement but observed that its terms were the subject of agreement between the parties. The Tribunal was satisfied therefore that although parties had come to some arrangement regarding the property, Mr X was acting as a private individual, and that the Respondent represented both parties in this conveyancing transaction.

There was a conflict of interest between Mr X and the Secondary Complainer at the time the Respondent was instructed. The unusual features of the proposed transaction ought to have made the Respondent examine it carefully. The Secondary Complainer was proposing to give title to the property to Mr X, his position only being protected to the extent that the minute of agreement could be enforced. The multiple mandates prepared by the Respondent suggested she was aware of the potential problems. However, she did not identify the conflict. The risk identified in the minute of agreement that Mr X might borrow using the property as security did transpire. When the Respondent became aware of that on 30 August 2017, the conflict of interest was obvious, yet the Respondent did not withdraw, and instead continued to act by presenting and then withdrawing the application for registration. In acting in a conflict of interest situation, the Respondent breached Rule B1.7.1. The Respondent's actions were a serious and reprehensible departure from the standards of competent and reputable solicitors and therefore constituted professional misconduct.

On 30 August 2017, the Respondent knew that Mr X had arranged a loan using the property as security. She knew this was in breach of the minute of agreement signed on 25 March 2016. She did not contact the Secondary Complainer as a matter of urgency to explain the situation to him. In the Answers to the

Complaint, the Respondent said that was because she thought the Secondary Complainer was aware of Mr X's actions. Mr Burnside told the Tribunal it was because she was not able to contact the Secondary Complainer. The Respondent ought to have made every effort to contact the Secondary Complainer immediately. The Tribunal did not accept that steps could not have been taken to communicate the issue to him even if he was working abroad. Her failure to do this meant that she did not act in his best interests, contrary to Rule B1.4.1. This failure flowed from the Respondent's conduct in acting in a conflict of interest situation. The Tribunal considered that this aspect of the case constituted professional misconduct *in cumulo* with the finding of misconduct related to the conflict of interest.

A party to a deed should be consulted about any alterations to it before it is presented for registration. The Tribunal noted that the handwritten amendments to the dispositions occurred after the application was rejected by the Registers in error. The amendments were carried out with the intention of better identifying the property to be conveyed. The Respondent attempted to solve a problem which was not of her making, without troubling the Secondary Complainer. While appreciating the background to the amendments, the Tribunal noted that the Secondary Complainer should have been consulted regarding these changes. The Respondent should not have acted as she did. However, the Tribunal considered that this aspect of the case constituted professional misconduct *in cumulo* with the finding of misconduct related to conflict of interest.

SUBMISSIONS ON SANCTION, PUBLICITY AND EXPENSES

The Fiscal confirmed that there were no previous findings of professional misconduct on the Respondent's record.

Mr Burnside noted that the misconduct had occurred when the Respondent was a relatively inexperienced solicitor dealing with a rather dominating client who was "calling the shots" and seemed to be well acquainted with Mr X. The Respondent is a sole practitioner. Her means are modest. Mr Burnside submitted that her transgressions were at the lower level on the scale of misconduct.

The Fiscal moved for expenses and said the matter should be given publicity in the usual way, with the Respondent and the Secondary Complainer identified in the decision. Mr Burnside said that expenses were conceded except for those incurred in preparation for and attendance at the preliminary hearing which should be awarded to the Respondent. The Fiscal indicated that he agreed that those expenses should be paid by the Society.

DECISION ON SANCTION, PUBLICITY AND EXPENSES

The Tribunal noted the aggravating and mitigating factors in the case. There were no previous findings of misconduct on the Respondent's record. She was relatively inexperienced when the misconduct occurred. She stumbled into a conflict of interest. There was no benefit to her. In all the circumstances, the Tribunal was satisfied that the appropriate sanction was a censure.

The Tribunal found the Complainers liable in the expenses of the Respondent in relation to preparation for and attendance at the preliminary hearing on 24 April 2023, and otherwise found the Respondent liable in the expenses of the Complainers and of the Tribunal on the usual basis. The Tribunal directed that publicity would be given to the decision, naming the Respondent and the Secondary Complainer. The Fiscal confirmed that the Secondary Complainer did not wish to make a claim for compensation in these proceedings.



Kenneth Paterson

Vice Chair