

**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**

**JOHN JAMES RANKIN HODGE, Wallace  
Hodge & Company Ltd, 6 Killoch Place, Ayr**

**Respondent**

1. A Complaint dated 25 January 2019 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that John James Rankin Hodge, Wallace Hodge & Company Ltd, 6 Killoch Place, Ayr (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer, Ms A.
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 fixed a procedural hearing for 16 May 2019 and notice thereof was duly served upon the Respondent.
5. At the procedural hearing on 16 May 2019, the Complainers were represented by their Fiscal, Elaine Crawford, Solicitor, Edinburgh. The Respondent was present and represented by Norman Fraser, Solicitor, Ayr. Of consent, the Tribunal granted the Fiscal's motion to amend the Complaint by inserting "B" where it should appear before "2.1.7" where it appeared in line 1 and line 9 of paragraph 5.3. Of consent, the Tribunal granted the

Respondent's motion to amend his Answers by deleting the word "he" where it appeared in line 6 of Answer 4.2 and substituting the name of the deceased and by deleting the words "the respondent" where they appeared in line 1 of Answer 5.4 and substituting the name of the deceased. On the Respondent's motion, the Tribunal fixed a preliminary hearing at 10am on 21 August 2019 to debate the Respondent's preliminary plea contained within the Answers.

6. At the preliminary hearing on 21 August 2019, the Complainers were represented by their Fiscal, Elaine Crawford, Solicitor, Edinburgh. The Respondent was present and represented by Norman Fraser, Solicitor, Ayr. Following consideration of parties' submissions, the Tribunal repelled the plea to the relevancy, fixed a hearing for 19 November 2019 at 10am and reserved all questions of publicity and expenses to the conclusion of the case. A separate interlocutor and note were produced following this hearing and intimated to the parties.
7. At the hearing on 19 November 2019, the Complainers were represented by their Fiscal, Elaine Crawford, Solicitor, Edinburgh. The Respondent was present and represented by Norman Fraser, Solicitor, Ayr. The Fiscal moved the Tribunal to amend the Complaint to delete the words "*his clients*" where they appeared in paragraph 6.2.2 and substitute "*the other executors and the residuary beneficiaries*". Mr Fraser objected to the proposed amendment. The Fiscal also moved to delete the words "*honesty and*" where they appeared in paragraphs 6.2.2 and 6.2.3 of the Complaint. Following deliberations, the Tribunal amended the Complaint as moved by the Fiscal. The Fiscal led the Secondary Complainer. Parties made submissions. The Tribunal began its deliberations but due to lack of Tribunal time, continued the hearing to 10 January 2020. Parties were invited to attend at 12pm.
8. At the continued hearing on 10 January 2020, the Complainers were represented by their Fiscal, Elaine Crawford, Solicitor, Edinburgh. The Respondent was present and represented by Norman Fraser, Solicitor, Ayr.
9. Having given careful consideration to the Complaint, the Joint Minute of Admissions, the productions and the evidence of the Secondary Complainer, the Tribunal found the following facts established:-

9.1 The Respondent was appointed as one of three executors in the estate of the late Mr B. The other two executors were two of his children, Mr C and Ms D. Mr B's will excluded one of his children, the Secondary Complainer, and left the estate in equal parts to the Secondary Complainer's four siblings. Prior to writing his will, Mr B had granted a standard security over his house in favour of all five of his children, including the Secondary Complainer.

9.2 On 10 June 2016 the Respondent had a meeting with one of the executors, Mr C, to discuss the security over his late father's house. The Respondent explained to him that the security had to be discharged. The Respondent's file note stated that:

*"...next week we would send him a discharge for execution by all five and he can go round. Explaining that we would line it off for signature and each one would need a separate witness for which he could not be the person concerned."*

Mr C indicated that he thought that one of his brothers and the Secondary Complainer would be difficult.

The file note continued:

*"I have suggested to [Mr C] that what he does is get the documents signed by those who are willing to do so and failing that he simply needs to pass it back to me and I will write to them explaining why they have to sign failing which we will raise proceedings against them."*

9.3 On 21 June 2016 the Respondent sent a letter to Mr C enclosing the discharge document for signature stating: *"If possible, please have the remaining four siblings sign the deed as well..."*

In the letter to Mr C the Respondent did not advise him that his siblings should be informed that signing the discharge may have certain legal consequences and that they should seek independent legal advice prior to signing it, nor did the Respondent write to them himself advising them of this.

- 9.4 The Secondary Complainer signed the discharge on 22 June 2016 in the presence of her husband and two of her siblings who were also executors, Mr C and Ms D. The said executors, at the request of the Secondary Complainer, then signed a handwritten note which stated:
- “My sister [Ms A] will get her share from my Dad’s estate.”*
- 9.5 The discharge was returned to the Respondent by Mr C who advised that his brother Mr E had not yet signed the discharge.
- 9.6 On 29 June 2016 the Respondent sent a letter to Mr E enclosing the discharge for signature by him. The Respondent did not advise Mr E that he should seek independent legal advice prior to signing the discharge.
- 9.7 On 30 June 2016 Mr E attended at the Respondent’s office to sign the discharge and a secretary in the office witnessed his signature.
- 9.8 On 11 July 2016 the Secondary Complainer had a meeting with the Respondent at his office. The Secondary Complainer advised the Respondent that since her father’s death she had had no contact with her brother Mr C until he attended at her house with the discharge for signature. She was advised by her brother and her sister, Ms D, that she would get a full share of her father’s estate and they signed a note to this effect. The Respondent advised the Secondary Complainer that she would be entitled to legal rights in her father’s estate.
- 9.9 On or around 11 July 2016 the Respondent spoke to the Secondary Complainer’s daughter on the telephone and he advised her that he was not prepared to offer an opinion as to whether or not the circumstances surrounding the Secondary Complainer’s signing of the discharge could be challenged and that whether or not she sought advice from her own solicitor was a matter for her judgement.
- 9.10 On or around 12 July 2016 the Secondary Complainer attended at the Respondent’s office and advised him that she wanted to withdraw her name from the discharge. The Respondent advised her that this was not possible as the deed had already been sent for registration.

- 9.11 The Secondary Complainer instructed the firm McLennan Adam Davis who wrote to the Respondent on 15 July 2016 seeking clarification of the position. The Respondent replied on 20 July 2016 advising that the Secondary Complainer had willingly signed the discharge which had been registered.
- 9.12 On 20 July 2016 the Respondent spoke to Mr C on the telephone. Mr C advised that when he had attended with the Secondary Complainer he had played with words when he had indicated to her that she would get a share of her father's estate in order to persuade her to sign the discharge. Mr C stated that he was killing two birds with one stone as he knew that if the Secondary Complainer signed the discharge then his brother Mr E would also sign it.
- 9.13 The Secondary Complainer subsequently instructed the firm A.C. White to represent her in September 2016 and then the firm McCluskey Browne in October 2016.
- 9.14 On 28 October 2016 McCluskey Browne sent a letter to the Respondent noting that the Respondent had prepared a discharge of the standard security in circumstances where it was delivered to the Secondary Complainer for signature by her brother and sister and that the Respondent had failed to advise her that she ought to take separate legal advice.

The letter continued:

*“On the face of it this is in breach of Rule B2.1.7 of the 2011 Practice Rules. You will no doubt be aware that the Rule states that a solicitor shall not issue any deed, writ, missive or other document requiring the signature of an unrepresented party in any kind of transaction without informing that party in writing that such signature may have legal consequences and that he or she should seek independent legal advice before signature.”*

McCluskey Browne stated that the Secondary Complainer was entitled to receive one eighth of the free proceeds of sale of her late father's house which was the

purpose of the security being granted and that she had discharged that right without receiving any payment.

- 9.15 The Respondent met with Mr C on 7 November 2016 to discuss the letter from McCluskey Browne and spoke to him on the telephone on 8 November 2016. The Respondent noted that if the matter was not resolved immediately then he was of the opinion that both he and Mr C would require to resign as executors on the basis that Mr C obtained the Secondary Respondent's signature on the discharge by misleading her.
- 9.16 On 11 November 2016 the Respondent sent letters to the four beneficiaries under the will enclosing a copy of the letter from McCluskey Browne. He stated that the information given to him was that there was no money due to any party under the security and accordingly, in good faith, he drafted the discharge and gave it to Mr C and Ms D who arranged for the document to be signed. He sought confirmation from each beneficiary whether or not they were prepared to allow the Secondary Complainer a one eighth share of the free proceeds of sale of their late father's house.
- 9.17 The Respondent received instructions from the four beneficiaries that one eighth of the net value of their late father's house was to be paid to the Secondary Complainer. The final instructions from Mr E were obtained on 30 December 2016.
- 9.18 On 11 January 2017 the Respondent sent a letter to McCluskey Browne stating that:

*"We now have the agreement of all four Beneficiaries to your client receiving a one eighth share of the net free proceeds of the sale of the property..."*

The Respondent also sought confirmation as to whether or not the Secondary Complainer wished to claim her legal rights which would be relatively modest.

- 9.19 On 26 January 2017 the Respondent sent letters to the four beneficiaries proposing that an interim payment be made to each of them in the sum of £10,000

and in addition an interim payment to the Secondary Complainer in the sum of £5,000 in respect of the one eighth share of the net sale proceeds which she was to receive and any potential legal rights.

On the same date the Respondent sent a letter to McCluskey Browne advising that he proposed to make an interim payment to the Secondary Complainer and enclosing a cheque in the sum of £5,000 made payable to her, to be held as undelivered pending signature by the Secondary Complainer and return of the form of receipt.

The Respondent concluded the letter with the following:

*“This payment is made on the basis that your client raises no further issues in connection with the discharge of the standard security.”*

The form of receipt stated that the Secondary Complainer acknowledged receipt of the sum of £5,000 from the executors of her late father’s estate.

- 9.20 On 8 February 2017 McCluskey Browne sent a letter to the Respondent confirming that the Secondary Complainer was happy to accept the payment to account of £5,000 but was concerned that the form of receipt which they had asked her to sign did not explain the nature of the payment or reflect the fact that it was an interim payment.

McCluskey Browne asked the Respondent what was meant by the last sentence of his letter dated 26 January 2017.

- 9.21 The Respondent sent a letter to McCluskey Browne on 3 March 2017 stating that:

*“This interim payment to your client, along with the final payment to follow, is made on the basis that she raises no further issues in connection with the discharge of the standard security.”*

- 9.22 On 7 March 2017 McCluskey Browne sent a letter to the Respondent asking him to confirm what was meant by *“raises no further issues in connection with the discharge of the standard security.”*
- 9.23 The Respondent sent a reply to McCluskey Browne on 10 March 2017 stating that:
- “The interim payment to your client, along with the final payment to follow, is made in full satisfaction of all obligations of the executors of the late [Mr B] and this firm – and that she has no further dealings with the executors, this firm or the Law Society of Scotland – in connection with the discharge of the standard security.”*
- 9.24 On 20 March 2017 the Secondary Complainer made a complaint to the SLCC regarding the Respondent’s conduct.
- 9.25 On 4 April 2017 McCluskey Browne sent a letter to the Respondent advising that the Secondary Complainer did not accept payment on the terms stated in the Respondent’s letter of 10 March.
- 9.26 On 16 May 2017 the Respondent sent a letter to McCluskey Browne attaching a note of the net free proceeds of sale of the house in the sum of £78,000 and detailing the amount of the one eighth share thereof to be paid to the Secondary Complainer namely £9,312.37.
- The Respondent stated that the value of any legal rights claim was nil as the debts and expenses due from the moveable estate outweighed the moveable estate realised.
- The Respondent sought the return of the cheque which had been issued as an interim payment, but which the secondary complainer had not accepted, so that he could issue a fresh cheque for the total sum due.
- 9.27 On 19 May 2017 McCluskey Browne sent a letter to the Respondent enclosing the cheque and asking for sight of an account in relation to the estate so that the



Secondary Complainer could satisfy herself regarding the legal rights position. The Respondent forwarded this to McCluskey Browne on 22 May 2017.

- 9.28 On 23 May 2017 the SLCC sent a copy of the Secondary Complainer's complaint to the Respondent.
- 9.29 On 2 June 2017 McCluskey Browne sent a letter to the Respondent seeking a breakdown of the charges between the heritable and moveable estate and a cheque in respect of the sum due to the Secondary Complainer from the sale of the house.
- 9.30 On 5 June 2017 the Respondent sent a letter to McCluskey Browne stating that in view of the complaint made by the Secondary Complainer to the SLCC there may now be a conflict between the interests of the Respondent's firm and the interests of the executry. He advised that he had consulted the Law Society of Scotland regarding the position and was not prepared to enter into further correspondence at that stage.

The Respondent indicated that if he withdrew from acting this would impact on the completion of the matter in terms of delay and cost. He stated:

*"Should you wish to confirm to us within the next 48 hours that your client will withdraw the complaint we will complete matters on the basis previously intimated."*

- 9.31 McCluskey Browne sent a letter to the Respondent on 7 June 2017 stating that:

*"Unless you can tell us that the Discharge of the Standard Security had not been delivered there is no question but that you should be remitting [Ms A's] share of the proceeds to us by return."*

- 9.32 On 13 June 2017 Mr C sent a letter to the Respondent advising that as "Chief Executor" he was instructing the Respondent to withdraw the offer of one eighth of the sale proceeds of the house and to share that amount equally between the named beneficiaries in his father's will.

9.33 On 16 June 2017 the Respondent resigned as an executor in the estate of the late Mr B and sent letters to the other two executors advising them that, due to the conflict of interest which had arisen, he had resigned as executor and that his firm was withdrawing from acting in the executry with immediate effect.

9.34 On 19 June 2017 the Respondent sent letters to the other two beneficiaries and to McCluskey Browne advising that he had resigned as executor. He provided McCluskey Browne with the names and addresses of the remaining executors for the purpose of future correspondence.

10. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct in respect that:

10.1 He failed to write to the Secondary Complainer to advise her that legal consequences may arise from her signing the discharge and that she should seek independent legal advice prior to signing the document;

10.2 He failed to act with integrity in that he advised the Secondary Complainer that the other executors and residuary beneficiaries had agreed to pay her a one eighth share of the proceeds of sale of the house, but then made payment of the said sums conditional upon the Secondary Complainer taking no further action in respect of the circumstances surrounding her discharge of the standard security;

10.3 He failed to act with integrity in respect that he made payment of the sums due to the Secondary Complainer conditional upon her withdrawing the complaint which she had made to the SLCC regarding the Respondent thus delaying or hindering the advancement of the executry;

10.4 He placed himself in a conflict of interest situation by his actings at paragraphs 10.2 and 10.3 above.

11. Having heard the Solicitor for the Respondent in mitigation, and invited submissions on expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 10 January 2020. The Tribunal having considered the Complaint dated 25 January 2019 at the instance of the Council of the Law Society of Scotland against John James Rankin Hodge, Wallace Hodge & Company Ltd, 6 Killoch Place, Ayr; Find the Respondent guilty of professional misconduct in respect that (a) he failed to write to the Secondary Complainer to advise her that legal consequences may arise from her signing the discharge and that she should seek independent legal advice prior to signing the document, (b) he failed to act with integrity in that he advised the Secondary Complainer that the other executors and residuary beneficiaries had agreed to pay her a one eighth share of the proceeds of sale of the house, but then made payment of the said sums conditional upon the Secondary Complainer taking no further action in respect of the circumstances surrounding her discharge of the standard security, (c) he failed to act with integrity in respect that he made payment of the sums due to the Secondary Complainer conditional upon her withdrawing the complaint which she had made to the SLCC regarding the Respondent thus delaying or hindering the advancement of the executry, and (d) he placed himself in a conflict of interest situation; Censure the Respondent; Fine him in the sum of £6,000 to be forfeit to Her Majesty; 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; 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; and Continue consideration of the Secondary Complainer's claim for compensation to a hearing to be fixed.

(signed)

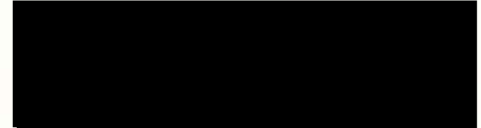
**Beverley Atkinson**

**Vice Chair**

12. 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

3 FEBRUARY 2020

**IN THE NAME OF THE TRIBUNAL**



**Beverley Atkinson**

**Vice Chair**

**NOTE**

At the hearings on 19 November 2019 and 10 January 2020, the Tribunal had before it the Complaint as amended, Answers as amended, a Joint Minute of Agreement, the Tribunal's Interlocutor and Note dated 21 August 2019, an Inventory of Productions for the Complainers, an Inventory of Productions for the Respondent, a List of Witnesses for the Complainers, a List of Witnesses for the Respondent and a List of Authorities for the Complainers.

On 19 November 2019, the Fiscal moved to amend the Complaint by deletion of the words "*his clients*" where they appeared in paragraph 6.2.2 and substitution of "*the other executors and the residuary beneficiaries*". Mr Fraser objected to the proposed amendment. The Fiscal also moved to delete the words "*honesty and*" where they appeared in paragraphs 6.2.2 and 6.2.3 of the Complaint. Mr Fraser said that the effect of the first proposed amendment would be to read something into a letter which was not there. It altered the substance of what was alleged against the Respondent. The Respondent had also not had fair notice of what the Complainers meant by lack of integrity. He had wasted time preparing the case on the basis of dishonesty.

The Tribunal adjourned to consider the proposed amendments. It noted that an amendment to "beneficiaries" had been suggested at the preliminary hearing. The Respondent therefore had notice of the Complainers' intention to move an amendment. However, on the morning of the hearing the Fiscal moved to amend to "the other executors and residuary beneficiaries" instead. The Tribunal considered that the amendment did not alter the nature of the case against the Respondent. The Respondent had notice of the case he was to meet, paragraphs 4.17 and 4.18 of the Complaint having particular relevance. The burden of proof was on the Complainers to prove their case. The Tribunal deleted the references to honesty. The Respondent had notice that the Complainers relied upon lack of integrity which is averred in the Complaint. Conduct which demonstrates a lack of integrity is a matter for evidence and submissions. The Tribunal indicated that expenses would be dealt with at the conclusion of the case in the usual way.

**EVIDENCE OF THE SECONDARY COMPLAINER, MS A**

The witness gave evidence on oath. She gave her full name, age and address to the Tribunal. She named her four siblings. Up until his death, she had thought her father was Mr B. She knew that during Mr B's lifetime, she had been named in a standard security granted by him. She thought the standard security gave her a full equal share of her father's estate and all money. She did not remember ever

seeing the standard security document. She was not aware of the contents of Mr B's will until after his death. Her family told her that her father had not included her in his latest will because he did not recognise her as his daughter.

After her father's death, her brother and sister (Mr C and Ms D) telephoned her asking to make an arrangement to meet. They visited her about an hour later. They asked her to sign a discharge of a standard security. She did not have any prior notice that they were going to ask her to do this. No solicitor's letter accompanied the document. At first, she refused, but then went on to sign the discharge. At that time her health was not good. She had been in and out of hospital. She was trying to come to terms with the will, the fact that Mr B was not her father, and that her siblings had known this before he died.

The Fiscal referred the witness to Production 69 for the Complainers. She was asked whether this was the document which was brought to her by her siblings. The witness said that she did not know as it was so long ago. She recognised her signature on it. Her signature was witnessed by her then husband. She also completed the form headed "Directions for Signing Deeds" contained at Production 71 for the Complainers. She explained that she signed the discharge because she thought she had to do it to get a share of her father's house. Her brother told her it was in her interests to sign it. She asked them to sign her notebook saying she would get a full equal share of the estate. Because they did this, she trusted them. She confirmed that a copy of the relevant page in her notebook was Production 89 for the Complainers.

A few days later, the witness decided to go and see the Respondent. He seemed a bit surprised that Mr C and Ms D had visited her at her house. She said she was there to see about her money. The Respondent asked her what she was talking about. She explained what had happened. The Respondent asked her to bring round the notebook. She did this a few days later and he took a copy of the relevant page. The Respondent explained to her that she was not due to get anything under the will. She felt upset and had to leave. She consulted various lawyers and ultimately a solicitor at McCluskey Browne assisted her. This solicitor showed her all correspondence between himself and the Respondent.

The Fiscal referred the witness to Production 619 for the Complainers which was a letter from McCluskey Browne to the Respondent's firm dated 28 October 2016. The witness confirmed that she always received copies of the correspondence between the Respondent and her solicitor. She agreed that in the letter McCluskey Browne raised concerns about her signing the discharge of the standard security. She was also aware of other letters between McCluskey Browne and the Respondent's firm.

She said an interim offer of £5,000 was made to her but it was conditional on her agreeing not to take any further action against the Respondent's firm or the executors. Another of her sisters tried to pressure her to take the payment. However, her lawyer advised her against this. The witness confirmed that on the advice of her solicitor, she made a complaint to the Scottish Legal Complaints Commission about the Respondent.

The witness was referred to Production 446 for the Complainers which was a letter from the Respondent to her solicitor dated 10 March 2017. Her understanding of the offer in that letter was that it was conditional on her having no further dealings with the executors, the Respondent's firm or the Law Society in connection with the discharge of the standard security.

The witness was referred to Production 351 for the Complainers which was a letter from the Respondent to the Secondary Complainer's lawyer dated 5 June 2017. She agreed this letter was sent after she made the complaint to the SLCC. This letter noted that if the Secondary Complainer withdrew her complaint, matters could be completed on the basis previously intimated. She did not withdraw her complaint.

The witness was aware that the Respondent resigned as executor. She did eventually receive payment of around £9,000. She could not remember when she received it. She had to pay her solicitor's fees from that sum. She was referred to Production 363 for the Complainers which was a letter from the Respondent to the Secondary Complainer's solicitor dated 16 May 2017. She agreed that it referred to a one eighth share of the property as £9,312.37.

The witness was cross examined. She confirmed that she had never loaned her father money. She was referred to the standard security contained at Production 2 for the Respondent. She agreed that it referred to money paid to her father but said that she had not loaned him any money. She was asked whether she understood that the security was granted because she loaned her father money. The witness repeated that she had never loaned money to her father. She was asked whether the document accurately reflected what happened within her family. She replied that "there was no money". She had told her solicitor that she had not loaned money to her father.

The witness was referred to the Respondent's file note contained at Production 4 for the Respondent. She agreed that she signed the discharge on 22 June 2016 and went to see the Respondent on 11 July 2016. She did not know why it took her so long to consult the Respondent. She agreed that she told the Respondent that after her father's death she had no contact with Mr C until he appeared to sign the discharge. She agreed that she told the Respondent that Mr C and Ms D told her she would get a full

share of her father's estate and they signed a note to that effect. She did not say that they indicated to her that she would be "called in and issued with a cheque". She did not remember the Respondent telling her that this was not the way the estate was planned out although she would be entitled to legal rights. She said she knew what legal rights were.

The witness agreed that her brother and sister misled her. They told her she would get her share and it was in her interests to sign the document. Mr Fraser asked whether they said that by signing the document, she would get her share. The witness said she was not sure. She agreed that the Respondent told her she would get nothing.

She was referred to a letter at Production 5 for the Respondent which was a letter from McCluskey Browne to the Respondent dated 28 October 2016. She agreed that the letter was sent in accordance with her instructions to her solicitor. Mr Fraser quoted the last sentence of that letter, "*We look forward to hearing from you with your proposal to resolve this matter after you have had the opportunity of considering same.*" She was asked what was "this matter". She said it was "the whole thing about Mr Hodge". She agreed with Mr Fraser that she made a complaint against Mr Hodge and alleged that his actions cost her money. She thought a "proposal to resolve" meant "to fix it all, come to an agreement." She was asked whether this meant bringing the complaint to an end and she agreed.

The witness was referred to Production 9 for the Respondent which was a letter from the Respondent to McCluskey Browne dated 10 March 2017. It referred to an interim payment. Mr Fraser asked the witness if she understood that the final payment was a one eighth share of the house provided for the in the standard security. The witness did not answer the question and became upset. Following a break, the witness confirmed that her desire had been to see a resolution to the matter. She was asked whether Production 9 for the Respondent was an effort to resolve. The Chair asked Mr Fraser whether the witness could properly express a view on that question. Instead, Mr Fraser asked the witness whether it would have been an end to the matter if she had agreed to the proposal. She said, "It should never have come to that". In her view it was not enough. She expected the Respondent to pay her compensation. The document should never have been issued to her in that way. It was not acceptable. For her, "to resolve" meant to be treated fairly. She wanted her full share of the estate. She lost out on money and personal items which had been in her father's house. Mr Fraser noted that there was no letter to the Respondent explaining how his proposal was insufficient. The witness said that was why she took her complaint to the Law Society. Mr Fraser asked whether the Respondent expressed surprise at what had happened. The witness said she thought he had to do that. However, she noted that he had prepared the legal document.



The witness was not re-examined. Mr Fraser indicated that he did not intend to lead any evidence on behalf of the Respondent.

## **SUBMISSIONS FOR THE COMPLAINERS**

The Fiscal submitted that there was sufficient evidence to meet the Sharp test for professional misconduct. The Respondent allowed the discharge of the standard security to be taken to the secondary complainer by her siblings. He did not comply with Rule B2.1.7 because he failed to write to her informing her that signing might have legal consequences and she should take independent legal advice.

The Fiscal referred to Item 1 on the List of Authorities for the Complainer which was Rule B2.1.7. She said that “transaction” includes a contract and any negotiations leading thereto. The discharge of the standard security falls within the remit of the rule. The discharge was required to enable the sale of the house and the winding up of the executry.

She also referred to Item 2 on the List of Authorities for the Complainer which was the Society’s “Vulnerable Clients Guidance”. She asked the Tribunal to look at paragraph 18 of that guidance. It says that where a solicitor issues any document for signature to a party or prospective party “to a transaction of any kind” the solicitor should consider Rule B2.1.7. “Issue” means issuing in any way, including giving the document to the client or other third party to take to the proposed signatory. In answer to a question from the Chair, the Fiscal clarified that this rule applied to the Secondary Complainer as an unrepresented party. The Complainers did not suggest that the Respondent ought to have assessed the Secondary Complainer as being vulnerable.

The Fiscal referred the Tribunal to Item 3 on the List of Authorities for the Complainer which was Law Society of Scotland v Ernest Ramsay. The Respondent in that case contravened the 1986 Practice Rule which is the equivalent of the present Rule B2.1.7. He acted on behalf of individuals who acquired properties and superiorities. The Secondary Complainer in the case was a trustee of a trust which owned a property and she also owned another property herself. The Respondent’s clients took her a document to sign. When the Respondent saw the document, he noticed it was not in the required format. He amended it and gave it to the clients to take to the Secondary Complainer for signature. The Tribunal found that this was professional misconduct. The Practice Rule was there to cover precisely such a situation, whatever the pressures may be on the solicitor. The Respondent had an ongoing professional

duty to consider his position as a solicitor and to have regard for the directions contained in the Practice Rule.

The Fiscal submitted that when the discharge was taken to the Secondary Complainer, she was not entirely clear what she was signing. She signed on the basis of assurances given to her and the fact that the notebook had been signed. It was apparent that her siblings misled her. The rule exists to avoid this situation occurring. All other consequences flowed from the Respondent's failure to comply with the Rule.

The beneficiaries came to some agreement that monies would be paid to the Secondary Complainer. The Respondent wrote to her solicitor with proposals to resolve the matter. However, the proposal included a condition that money would be paid if the Secondary Complainer took no further action regarding the circumstances of her signing the discharge. In so doing, in her submission, the Respondent lacked integrity.

When the Secondary Complainer made a complaint to the Scottish Legal Complaints Commission, the Respondent wrote again indicating that payment would only be made if the complaint was withdrawn. The Fiscal submitted that this lacked integrity. Any complaint regarding his conduct and his failure to comply with the rule should not have prevented payment to the Secondary Complainer. He placed himself in a conflict between himself and his firm against the executry.

The Fiscal said she had included Scott v Solicitors Regulation Authority [2016] EWHC 1256, Fyffe Petitioner [2017] CSIH 6 and Wingate & Others v Solicitors Regulation Authority and Solicitors Regulation Authority v Malins [2018] EWCA 366 in the List of Authorities for the Complainer because they contained definitions of lack of integrity. She submitted that the Respondent's attempt to include his own personal interests in the settlement demonstrated a lack of integrity. It was neither appropriate nor professional to prevent a party from complaining about a solicitor's conduct in this way.

## **SUBMISSIONS FOR THE RESPONDENT**

Mr Fraser said his first submission was that the discharge of the standard security did not satisfy the test of being a "transaction". The Chair indicated that the Tribunal had already decided this was capable of falling within the definition. Mr Fraser said that the Tribunal was wrong on the last occasion. The Secondary Complainer said she was owed no money and therefore she was obliged to grant it. She was a passive participant in an attempted fraud against a care home. The Chair noted that the Tribunal had

heard no evidence about this and suggested that the point was whether the Secondary Complainer had been given the opportunity to get independent legal advice. Mr Fraser said this was only relevant if the rule applied. In his submission transactions are exchanges and the Secondary Complainer's evidence was to the effect that this was not a transaction. The Chair indicated that the Tribunal did not think it was competent to decide the issue again. Mr Fraser said that if the Tribunal was satisfied the decision had been made unequivocally, he would have to appeal that decision. However, he interpreted the Tribunal's decision as indicating that it had to hear evidence on the issue. He said that to interpret words without hearing evidence, was not the correct approach. A document has to be construed in all the circumstances. The Secondary Complainer said she did not lend any money to the deceased. The standard security was false. It was not a situation where money was loaned and repaid. A Tribunal member noted that the Tribunal had heard no evidence regarding the standard security. Mr Fraser noted that the security document stated that Mr B would repay his children in varying proportions for advances made to him. He expected that it was drawn up on the instructions given to the solicitor who drafted it. Mr Fraser said that a transaction is an exchange. A discharge for no payment is not an exchange. A Tribunal member queried the use of the word "exchange". Mr Fraser said this was his interpretation of transaction although dictionary definitions varied. The Tribunal member noted that unilateral promises or collateral warranties would also fall within the definition of "transaction" even although there was no "exchange". The Chair noted that in exchange for signing, the Secondary Complainer was to receive money. However, Mr Fraser noted that this was not the reason the Secondary Complainer received money.

Mr Fraser submitted that the Vulnerable Clients Guidance was "appallingly drafted". He said that paragraph 1 "bangs on for ages" and he would stop reading it if he did not have a vulnerable client. Paragraph 18 is nothing to do with vulnerable clients. Rather, it is concerned with unrepresented parties. The guidance is therefore wholly misleading. If he had been the solicitor acting in this situation, he would have written to the Secondary Complainer telling her to sign or he would sue.

Mr Fraser submitted that there was confusion regarding why the Secondary Complainer received money. The residuary beneficiaries agreed to give it to her. He said that there had been a misunderstanding of the responsibilities of the beneficiaries and executors. The beneficiaries are entitled to receive what they are left. If they choose to receive less than that, then the executors have no interest to go against their wishes. The Secondary Complainer was excluded from the will and the estate was divided between her four siblings. They decided to vary the provisions of the will to include a one eighth share for her. Why they decided to do that was their business. Once the beneficiaries agree to do something like that, the executors must bring the estate to a conclusion.

The Secondary Complainer's solicitor made a complaint against the Respondent. She claimed to have suffered a loss. She was grossly misled by Mr C and Ms D. Unquestionably, she had a claim against them. If she is to be believed, they were dishonest. However, it would be wholly wrong for a solicitor to distribute funds without discharging all claims against the estate and the executors. If not, he would expose them to a claim.

Mr Fraser noted that there was no evidence led regarding any conflict of interest. The Respondent was an executor. Claims against him had to be addressed and resolved. He could have withdrawn and did so eventually. However, withdrawal would not solve the problem created by Mr C. The allegation of conflict was not supported by the evidence. The Chair referred Mr Fraser to Production 11 for the Respondent which was a letter from the Respondent to the Secondary Complainers' solicitor dated 5 June 2017 which referred to a conflict of interest between the firm and the executry. Mr Fraser said this letter was written days before withdrawal. At that time, Mr C insisted that the offer of payment to the Secondary Complainer be withdrawn. The means by which to wind up the estate was gone. The Respondent had to have the agreement of the beneficiaries. Once they said they were not going to give her a share, the Respondent had to withdraw.

Mr Fraser said that the Respondent was under a duty to ensure that any resolution covered the whole estate. The Chair asked how a complaint about a solicitor's conduct is relevant to that. Mr Fraser said it was his conduct as a solicitor and executor. These roles could not be separated. The Chair asked if the executry or the firm would have to pay for example, a fine for inadequate professional services imposed by the Scottish Legal Complaints Commission. Mr Fraser said this was hypothetical and he was not going to answer the question.

The Chair asked whether Productions 8 and 9 for the Respondent which were letters sent by the Respondent to the Secondary Complainer's solicitor, were sent on the instructions of the Respondent's clients. Mr Fraser said there was no evidence led by the Complainers regarding the Respondent's instructions and that was partly why the Respondent did not have to give evidence.

Mr Fraser repeated that the Tribunal ought to ignore the Law Society guidance. He suggested that the Ramsay case could be distinguished on the basis that it actually involved a transaction. The rule was plainly meant to apply in these circumstances. The Secondary Complainer in the Ramsay case had a choice whether to sign. The Secondary Complainer in the present case had an absolute legal obligation to sign the discharge because she was not owed any money.

Mr Fraser said that the Secondary Complainer in the present case was treated appallingly. If there was any way to settle, the Respondent would have done it. It does not seem as if there was ever a stage reached where the Respondent understood what the Secondary Complainer wanted to make things right. She was treated badly by her siblings. Mr Fraser asked the Tribunal whether the Respondent's behaviour was dishonourable and whether it constituted professional misconduct. He did not believe it was misconduct and said that the Tribunal's view would not affect his opinion.

## **DECISION**

The Tribunal carefully considered the evidence before it. It took account of the admitted facts and the Respondent's file. It accepted the evidence of the Secondary Complainer whom it found to be a credible and reliable witness.

The Practice Rules provide that when acting on behalf of a party or prospective party to a transaction of any kind, solicitors must not issue any deed, writ, missive or other document requiring the signature of an unrepresented party to that party without informing that party in writing that such signature may have certain legal consequences and the party should seek independent legal advice before signature (Rule B2.1.7). "Issue" means issuing in any way, including giving the document to the client or other third party to take to the proposed signatory (Paragraph 18 Law Society of Scotland Vulnerable Clients Guidance). Solicitors must act with integrity (Rule B1.2). Solicitors must not act in a conflict of interest situation.

The Respondent breached these Rules. He issued a discharge of a standard security to the secondary Complainer without advising her in writing that signature may have certain legal consequences and the party ought to seek independent legal advice before signature. He advised the Secondary Complainer that the residuary beneficiaries had agreed to pay her a one eighth share of the free proceeds of the sale of a property but made payment conditional upon her taking no further action in respect of the circumstances surrounding the discharge of the standard security. Later, he made payment of sums due to the Secondary Complainer conditional upon her withdrawing the complaint which she made to the Scottish Legal Complaints Commission.

The Tribunal rejected the Respondent's submission that discharge of a standard security in these circumstances was not a "transaction". The Tribunal made its decision on this matter clear in the note accompanying its Interlocutor of 21 August 2019. However, for the avoidance of doubt, the panel

hearing the case on 19 November 2019 concurred with that decision that the discharge of the security was a transaction for the purpose of the rule. On an ordinary understanding of the term, the discharge of the security was a transaction (which is defined as including a contract and any negotiation leading thereto). It was also a component of other transactions, such as the sale of the property and the winding up of the executry. The Secondary Complainer was an unrepresented party to the discharge, and the rule therefore applied to her. Whether the Secondary Complainer had a choice about granting the discharge was not a relevant consideration. The rule makes no such distinction and exists to protect the public so that they are reminded about their right to take independent legal advice.

The Tribunal was not able to establish on the evidence before it, the reason for the security being granted. On the face of it, the security was granted to secure loans made to Mr B. Mr Fraser suggested that the creation of the security was an attempt to avoid care home fees. However, the Tribunal heard no evidence on this matter. The Secondary Complainer gave evidence that she had not loaned money to her father, but no evidence was led regarding the other parties to the security. The Respondent's file contained references to loans having been made by the Secondary Complainer's siblings and money repaid (Productions 747, 748, 749 and 847 for the Complainers). However, these were not spoken to and the Tribunal was not clear what had been loaned and whether all monies had been fully repaid. Therefore, it did not include the first sentence of averment 4.3 of the Complaint in its findings in fact. However, the Tribunal did not consider that this was material when considering the Respondent's conduct. Regardless of whether money was owed, the Respondent's failings meant that the Secondary Complainer was not afforded the opportunity to take legal advice on the matter. This is the point of the rule. From her evidence, it was clear that the Secondary Complainer did not understand the purpose of the discharge of the standard security when it was presented to her. She was therefore vulnerable to being misled by her siblings. Adherence to the rule would have given her the opportunity to seek independent legal advice. On the information available to him, in the context of this difficult family situation, and the ambiguous history to the grant of the standard security, it was not for the Respondent to decide that the Secondary Complainer was obliged to grant the discharge and to issue the document without the proper letter under Rule B2.1.7.

The Tribunal rejected Mr Fraser's suggestion that it should disregard the Vulnerable Clients Guidance. Rule B2.1.7 is clear in its terms. This Tribunal has previously found a breach of the previous incarnation of this rule to be professional misconduct in Law Society of Scotland v Ernest Ramsay. The additional information provided at paragraph 18 of the Vulnerable Clients Guidance is widely known and adhered to by the profession.

The residuary beneficiaries decided to make provision for the Secondary Complainer, and it was appropriate for the Respondent as executor to give effect to their decision. The executors' duty was to wind up the estate. Part of the Respondent's duties as executor and solicitor would be to prevent future claims against the estate. However, the misconduct arose as a result of the Respondent attempting to exclude the liability of his firm and himself by making payment conditional upon the Secondary Complainer making no complaint to his professional regulator, taking action against his firm, or later, consequent upon her withdrawing her complaint to the Scottish Legal Complaints Commission. These potential actions by the Secondary Complainer would not affect the estate. The Respondent was attempting to protect his own interests and those of his firm. He therefore created a conflict between his own and his firm's interests against those of his clients and the executry. He allowed his own interests to usurp those of the clients in having the estate wound up. The Tribunal heard no evidence regarding whether this was done on the instructions of his clients. The condition about taking no action against the firm or taking a complaint to the Law Society of Scotland was of no benefit to his client. Nevertheless, the Respondent could not give independent or impartial advice if he was at the same time attempting to protect himself and his firm.

The Tribunal noted that all references in the Complaint to a lack of honesty were deleted by the Complainers. However, the Complainers averred that certain behaviour had lacked integrity. Following Wingate & Others v Solicitors Regulation Authority and Solicitors Regulation Authority v Malins [2018] EWCA Civ 366, it is clear that dishonesty and lack of integrity are separate concepts. Integrity is a broader concept than dishonesty and is a shorthand to express the higher standards expected of professionals. Integrity connotes adherence to the ethical standards of one's own profession. A professional is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse (paragraphs 95-100). That case refers to various examples of lack of integrity, one of which is subordinating the interests of the client to the solicitor's own financial interests. That is of relevance to the present case. The Respondent fell short of the standards of ethical standards of his profession. He prioritised his interests over those of the clients, creating a conflict of interest. He could not provide independent and impartial advice when his own personal interests were involved. This was a deliberate and repeated strategy which demonstrated a lack of integrity.

According to the test as set out within Sharp v The Law Society of Scotland 1984 SLT 313, there are certain standards of conduct to be expected of competent and reputable solicitors and 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. For the reasons outlined above, the Respondent's conduct constituted professional misconduct.

The Complainers made four averments of misconduct against the Respondent. The Tribunal used these as the basis for its findings of professional misconduct but made some deletions to them to better reflect the evidence and to clarify the basis of the misconduct which was established.

In relation to the second averment of misconduct, the Tribunal did not include reference to the Respondent knowing that the Secondary Complainer had been misled by one of the executors. The Respondent was aware of this information (Production 67 for the Complainers and finding in fact 9.12). However, the mischief was making payment of the sums conditional upon the Secondary Complainer taking no further action against the Respondent or his firm. This was misconduct regardless of his extent of knowledge of the other executor's actions. It impacted on the Respondent's ability to give independent and impartial advice. The Tribunal therefore deleted the words "knowing that she had been misled by one of the executors into signing the said discharge" where they appeared in the second averment of misconduct.

In relation to the third averment of misconduct, the Tribunal did not include reference to the Respondent failing to honour an agreement reached by the beneficiaries. On the evidence before the Tribunal, it was not clear that the offer of a one eighth share had been unconditionally accepted and agreement reached between executors, beneficiaries and the Secondary Complainer. In any case, the mischief was making payment of the sums conditional upon the Secondary Complainer withdrawing her complaint to the Scottish Legal Complaints Commission. The Tribunal therefore deleted the words, "by failing to honour and agreement reached between the executors and the beneficiaries of the estate and the Secondary Complainer to pay her the sum of £9,312.37" where they appeared in the third averment of misconduct.

In relation to the fourth averment of misconduct, the Tribunal did not include the Respondent's withdrawal from acting. He was obliged to withdraw. The failure to pay the Secondary Complainer was due to the residuary beneficiaries withdrawing their offer. It was not clear from the admitted facts or the file that there was a clear and formal agreement between the Secondary Complainer and the beneficiaries. The Tribunal therefore deleted the words, "and withdrawing from acting as an executor in the estate of the late [Mr B] and thus failing to pay the Secondary Complainer the sums which had been agreed" where they appeared in the fourth averment of misconduct.

The Fiscal produced the Respondent's Record Card which disclosed a previous finding of unsatisfactory professional conduct on 28 June 2018 which had been upheld by the Tribunal on appeal, although the compensation order had been varied. The finding of unsatisfactory professional conduct related to



failures to communicate effectively in a terms of business letter regarding fees and costs. The Respondent had failed to act in the best interests of the residuary beneficiary. Other issues related to the way fees were said to be calculated in terms of a table of fees which was abolished and law society guidance which was no longer extant.

### **SUBMISSIONS IN MITIGATION**

Mr Fraser noted that there was no evidence of any loss suffered by the Secondary Complainer. She was entitled to nothing from this estate. She was entitled to nothing from the standard security which was discharged. She was upset when giving evidence but her demeanour changed in the afternoon. Much of her distress is caused by the deterioration in the relationship with her family. There is nothing the Respondent could or should have done to change that.

Mr Fraser said that the Respondent acted in good faith throughout. He sought to resolve the interests of all the parties. He attempted to settle something he was asked to settle.

Mr Fraser indicated that the Respondent's firm has two directors and another two employed solicitors. There is a total staff of eleven. A fine imposed by the Tribunal would not put the Respondent in financial difficulty.

The Fiscal sought expenses and had no submission to make regarding publicity. Mr Fraser said there was nothing he could say about either issue.

### **DECISION ON SANCTION, EXPENSES AND PUBLICITY**

The Tribunal had regard to its Indicative Outcomes Guidance. The misconduct was at the middle of the scale. There was more than one facet to the misconduct although it was confined to one case. The Respondent lacked integrity although dishonesty was not present. The Respondent had taken the time to appear personally at the Tribunal. However, the Tribunal also noted the lack of insight and remorse displayed by the Respondent and the scant mitigation advanced by his representative.

The Tribunal considered whether a restriction was required to protect the public but was ultimately persuaded that it was not. The Respondent has had a lengthy career with only one finding of unsatisfactory professional conduct which was not analogous to the present case. The misconduct arose partly as a result of the actions of the other executor and the contentious family situation. This was an

unusual situation. The Respondent ought to take this opportunity to reflect upon his actions. However, there was no ongoing requirement for supervision. In all these circumstances a Censure and Fine was sufficient to uphold the reputation of the profession and protect the public.

The appropriate award of expenses was one in favour of the Complainers. They were the successful party at the preliminary hearing and the hearing on misconduct. The Tribunal saw no reason to depart from its usual practice in awarding expenses according to success on the usual basis. The decision will be given publicity but only the Respondent need be named in terms of paragraphs 14 and 14A of Schedule 4 to the Solicitors (Scotland) Act 1980. There was no requirement to name any other person as publication of third parties' personal data was likely to be detrimental to their interests.

The Tribunal indicated that its preference was to deal with the Secondary Complainer's compensation claim on 10 January 2020. However, Mr Fraser indicated that this was not suitable for the Respondent. The Tribunal therefore directed that the Tribunal would set a separate date for a hearing on the Secondary Complainer's compensation claim in due course.



**Beverley Atkinson**  
**Vice Chair**