

**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**

**DAVID JOHNSON, Johnson Family & Property  
Law Ltd, 22a Rutland Square, Edinburgh**

**Respondent**

1. A Complaint dated 16 February 2023 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the Complainers") averring that David Johnson, Johnson Family & Property Law Ltd., 22a Rutland Square, Edinburgh (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer. The Secondary Complainer did not seek an award of compensation.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged for the Respondent.
4. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 19 July 2023 and notice thereof was duly served on the Respondent. An amended Complaint dated 12 July 2023 and Joint Minute were lodged with the Tribunal in advance of the hearing.
5. At the virtual hearing on 19 July 2023, the Complainers were represented by their Fiscal, Gavin Whyte, Solicitor, Edinburgh. The Respondent was present and represented by William Macreath, Solicitor, Glasgow.

6. Having given careful consideration to the terms of the Complaint, the Tribunal found the following facts established:-

- 6.1 The Respondent is David Johnson. He was born on 25 June 1959. He was enrolled and admitted as a solicitor on 11 January 1983. He is currently employed with Johnson Family and Property Law Ltd as a director. The Respondent commenced his employment with the firm on 5 January 2012 and currently possesses a full unrestricted practising certificate.
- 6.2 The Respondent's firm was instructed by Mr S and his wife, Mrs S, in relation to the arrangement of a will, initially for Mr S only. The Respondent was, and currently remains, the principal solicitor at Johnson Family and Property Law Ltd (hereinafter known as 'the firm'). He delegated the matter to be handled by a first-year trainee with the firm. The Respondent was the supervising solicitor for the Trainee.
- 6.3 On 20 February 2020, the Trainee attended Edinburgh Royal Infirmary to take instruction from Mr S in relation to his will. Mr S was terminally ill at the time. Whilst in the company of his wife, Mr S informed the Trainee that he wished to disinherit his daughter (the Secondary Complainer) and set up a discretionary trust which would be overseen by his nephew as executor. His primary concern was to ensure that Mrs S was cared for and that the Secondary Complainers' access to assets held by him was minimised as far as possible. Mr S informed the Trainee that he had several assets of value but the most significant of these was a property held in the name of himself and his wife (hereinafter known as 'the property'). It was observed by the Trainee that there was a survivorship clause contained within the title deeds of the property and that in order to carry out the requested work a discretionary trust would likely need to be constructed and an evacuation clause would need to be composed to remove any survivorship clause present in the title deeds. After the meeting the nephew who was to become executor of the discretionary trust informed the Trainee that Mrs S wished to speak to her in relation to her options regarding her share of the estate. The Trainee informed the nephew that she would discuss this with Mrs S the following week.
- 6.4 On 21 February 2020, the Trainee composed a letter and draft will to Mr S. The letter explained the position in respect of legal and prior rights and the effect this would have on Mr S's estate on his passing specifically the availability of funds to his estranged

daughter. The letter advised the terms of the will provided for a discretionary trust be made on his passing as this would facilitate his wishes and instructions as to the dispersal of his estate. The letter concluded by indicating steps had been taken in furtherance of the evacuation of the survivorship clause in the title deeds.

- 6.5 The will was signed by Mr S at Edinburgh Royal Infirmary on 21 Feb 2020, it was explained by the Trainee that his daughters would still have an entitlement to his estate if they elected to claim their legal rights. It was reiterated that an evacuation clause was needed to remove the survivorship clause and that plans for the property were required and that these had been requested. The Trainee further explained that when these plans were received a draft disposition would be prepared which required to be signed by both Mr S and Mrs S. This would then be sent to the Registers of Scotland for registration. During this meeting Mrs S mentioned her will to the Trainee during this time and was informed that the matter of her will would be dealt with shortly.
- 6.6 A draft disposition was composed and was signed on 25 February 2020 by Mr S and Mrs S. The signing was witnessed by the nephew of Mr S who was the designated executor for the discretionary trust and the Trainee. This disposition was then sent to the Registers of Scotland by the Trainee the same day.
- 6.7 On 29 February 2020 the Trainee attended at the home of Mr S and Mrs S in order to take instruction in relation to the will of Mrs S. Upon arrival she was informed that Mrs S had taken ill and was in hospital.
- 6.8 On 06 March 2020 the firm received notification that the Registers of Scotland had rejected the application to register the disposition as elements of the application were defective.
- 6.9 On 10 March 2020 the Trainee attended the property in order to rectify the defects but was told that Mr S had passed away during course of the morning.
- 6.10 On 12 March 2020 the Secondary Complainer contacted the firm. She stated that her mother had signed documents she did not understand and that she wished to obtain a copy of them. The Secondary Complainer was informed that as she was not a client of the firm that they were unable to provide her a copy of any documentation signed.

- 6.11 On 26 March 2020 the Secondary Complainer's solicitor, Mr X, emailed the Respondent. He stated that he was instructed by the daughter and son in law on behalf of Mrs S. He claimed that Mrs S had been in an abusive relationship with Mr S although they had remained living under same roof and had not at any point separated. He requested a copy of the documents signed by Mrs S in relation to the disposition that she had signed.
- 6.12 On 30 March 2020 Mr X emailed the Respondent once more requesting the signed documentation.
- 6.13 On 31 March 2020 the Respondent replied to Mr X via email and advised that the Secondary Complainer and her husband were not executors and therefore not entitled to receive a copy of the documentation.
- 6.14 On 03 April 2020 Mr X advised the Respondent via email that he had confirmed instructions from Mrs S and had authority to act. He enquired as to whether Mrs S had been told to seek independent legal advice when signing the disposition. He advised that as the disposition was rejected, he was proceeding on the basis that the survivorship clause was intact. The email also enquired as to the "significant differences" of the signatures on the disposition and the plan annexed to it. He requested an undertaking from the Respondent not to make any further attempts to register the disposition. He advised that he was instructed to seek interim interdict to preserve his client's position should any additional attempts to register the disposition be made. A further request for the signed documents was made.
- 6.15 On 09 April 2020 the Respondent replied to Mr X via email stating that he had spoken with the executor and would release a copy of the will signed by Mr S.
- 6.16 On 14 April 2020 Mr X emailed the Respondent and requested a summary of the estate and asked the Respondent to clarify if Mrs S had been advised to seek independent legal advice. Mr X also enquired as to whether or not if there were any other deeds.
- 6.17 On 21 April 2020 Mr X emailed the Respondent and requested a response to his email of 14 April 2020.

- 6.18 On 28 April 2020 Mr X emailed the Respondent and requested a response to his email of 14 April 2020 and 28 April 2020.
- 6.19 On 06 May 2020 Mr X raised a complaint the SLCC regarding the lack of communication from the Respondent.
- 6.20 On 21 May 2020 Mr X emailed the Respondent with a mandate signed by Mrs S requiring all files, deeds and other papers, including title deeds and wills, held in the name of or on behalf of Mrs S should be “immediately” delivered to the firm of Mr X.
- 6.21 On 03 July 2020 Mr X emailed the Respondent and informed him that if the mandate had not been acted upon and all documentation received imminently then an additional complaint would be lodged with the SLCC.
- 6.22 On 06 July 2020 an additional complaint was submitted by Mr X to SLCC regarding the lack of implementation of the mandate by the Respondent.
- 6.23 On 17 July 2020 the Respondent emailed Mr X stating that all titles now delivered but that the terms of engagement letter prepared by the Trainee remained outstanding and would be forwarded shortly.

7. Having considered the foregoing circumstances, the Tribunal found the Respondent not guilty of professional misconduct in relation to the conflict of interest matter contained in the first averment of misconduct at paragraph 6.2 of the Complaint. The Tribunal considered that the Respondent’s actions may amount to unsatisfactory professional conduct and accordingly remitted the Complaint in relation to the first averment of misconduct under Section 53ZA of the Solicitors (Scotland) Act 1980 to the Council of the Law Society of Scotland as follows:

- (a) The Respondent, in his capacity of supervising solicitor of a trainee solicitor of Johnson Legal, acted on behalf of Mr S and Mrs S in relation to the preparation and execution of a deed where their individual interests were in conflict on 25 February 2020.

Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of professional misconduct in relation to the matter of failure to comply with a mandate contained in the second averment of misconduct at paragraph 6.3 of the Complaint in respect that:

- (b) The Respondent failed to timeously implement the terms of a mandate issued on 21 May 2020 requesting delivery of all files, deeds, wills and other papers held by them on behalf of Mrs S, said items not being made available by the Respondent until 20 July 2020.

8. Having heard the Solicitor for the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 19 July 2023. The Tribunal having considered the Complaint as amended dated 12 July 2023 at the instance of the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh against David Johnson, Johnson Family & Property Law Ltd., 22a Rutland Square, Edinburgh; Find the Respondent not guilty of professional misconduct in relation to the first averment of misconduct which related to a conflict of interest; Remit the Complaint in relation to the first averment of misconduct to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980; Find the Respondent guilty of professional misconduct in respect of the second averment of misconduct which related to failure to implement a mandate timeously; Censure the Respondent; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person.

**(signed)**

**Kenneth Paterson**

**Vice Chair**

9. 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

**IN THE NAME OF THE TRIBUNAL**

**Kenneth Paterson**  
**Vice Chair**

**NOTE**

At the Hearing on 19 July 2023, the Tribunal had before it the Complaint as amended and the Joint Minute. The copy of the Joint Minute lodged with the Tribunal had not been signed, but both parties indicated that it represented the terms of their agreement. By way of the Joint Minute, the Respondent admitted all the averments of fact, duty and misconduct in the Complaint as amended. During the course of the hearing, at the request of the Tribunal, the Fiscal also provided the mandate in question dated 19 May 2020 and signed by Mrs S.

**SUBMISSIONS FOR THE COMPLAINERS**

The Fiscal referred to the terms of the Complaint and Joint Minute. He noted that the Respondent admitted the averments of fact, duty and misconduct contained in the Complaint. There were two aspects to the Complaint. Firstly, the Respondent as supervisor of a trainee, had acted on behalf of Mr S and Mrs S when their individual interests were in conflict on 25 February 2020. The Respondent had also failed to comply with a mandate. The Complainers alleged that the Respondent had breached the Practice Rules relating to conflict of interest, communication and the guidance on mandates.

The Fiscal said that Mr S gave clear instructions regarding his will, a discretionary trust and the evacuation of a survivorship destination when speaking to the Trainee at Edinburgh Royal Infirmary on 20 February 2020. Mrs S was present and indicated that she wished to speak to the Trainee separately, but this did not happen. In the Fiscal's submission, the Trainee ought to have exercised caution and spoken to Mrs S without her husband being present. There was a conflict of interest because Mrs S was signing away her right to her property. There was not adequate supervision of the Trainee. The Fiscal referred the Tribunal to paragraph 1.17 of Paterson and Ritchie's *"Law, Practice and Conduct for Solicitors"* regarding the degree of supervision required. The Fiscal acknowledged the difficult situation which existed. Mr S was in poor health. There was an element of urgency. However, in these circumstances, the Respondent ought to have exercised extra vigilance, even in circumstances where the Trainee had extensive experience as a paralegal. If the Trainee had been properly supervised, the conflict should have been identified.

The Fiscal noted that the Respondent failed to timeously implement a mandate. The items were not received until 20 July 2020 although he said he would action them the day after he received the mandate.



The Fiscal referred to the test for professional misconduct in Sharp-v-Council of the Law Society of Scotland 1984 SLT 313. He noted that there was no question of lack of integrity and no suggestion that Mr or Mrs S lacked capacity.

## **SUBMISSIONS FOR THE RESPONDENT**

Mr Macreath noted that the Secondary Complainer had made a number of complaints to the Scottish Legal Complaints Commission in 2020. These were only considered by the Professional Conduct Sub Committee in October 2022.

With regard to the Trainee, Mr Macreath noted that she was 55 years old in February 2020. She had worked for many years as a paralegal prior to undertaking a traineeship.

Mr S was introduced to the firm by a client. Mr S wished to see someone urgently because he was terminally ill. The Respondent knew the Trainee was very experienced. It was not unreasonable to delegate responsibility for the case to her.

The Trainee met Mr S at Edinburgh Royal Infirmary on 20 February 2020. When the Trainee arrived, Mr S was in bed. His wife and one of his daughters were initially present but went for a coffee. Mr S confirmed his wishes to the Trainee. He was concerned to look after his wife who had her own health issues. He was worried that one of his daughters (the Secondary Complainer) might manipulate his wife with regard to finances. Mr S had always controlled the couple's money. He did not want the Secondary Complainer to benefit from the estate, but he did want her children, his other daughter and her children to benefit. Liferents and discretionary trusts were discussed. Mr S was adamant he wanted his wife protected and he wished to do that by putting his property in trust. The title to the property was discussed the title and the destination was not confirmed at that stage. The Trainee explained that if there was a survivorship, an evacuation would be required. The daughters' legal rights were discussed. These were not significant as the biggest asset was the house.

The title deeds were delivered to the office by a friend of Mr S. He told the Trainee that Mrs S wished to discuss her will and her interest in the property. On 21 February 2020, the Trainee returned to hospital with a will for Mr S. His wife was present again. Mr S insisted that Mrs S remain for the discussion. He signed his will in his wife's presence. There was a discussion with Mr and Mrs S regarding the title process. If the survivorship remained, the title would pass to Mrs S outright. Both Mr and Mrs S advised that they did not want that to happen. They both understood the consequences. The Trainee agreed to

prepare the evacuation and have parties sign it. Mrs S asked the Trainee about her own will. It was arranged that a will questionnaire would be sent to her.

The Trainee drafted the evacuation to the survivorship. It was collected by Mr S's friend and taken to Mr and Mrs S for their signature. The covering letter indicated that it was to be read over to both before they signed. The papers were returned to the Trainee with identification. On 10 March 2020, the Trainee attended at the family home and discovered that Mr S had died that day.

Mr Macreath said there was no sign that Mr or Mrs S had failed to understand the consequences of the evacuation. However, the Trainee was dealing with a vulnerable person in the last days of his life. He had strong views about the Secondary Complainer. He wanted to protect his wife. She needed separate advice. However, in practical terms, the title remained as it was. Mrs S became the outright owner. The evacuation did not occur. The estate was wound up by other solicitors.

Mr Macreath noted that while solicitors can employ trainees, the work must be carried out to the same standard as a qualified solicitor. Standards must be maintained. He made reference to Law Society-v-Houlihan (2017). Ms S should have been told to get independent legal advice. However, there was no dishonesty or lack of integrity. The Respondent trusted the Trainee. She was consulting with someone introduced by an established client. Solicitors need to be cautious when dealing with dying people. Supervision must be rigorous. If the Respondent had been aware of what was going on he might have been able to suggest separate representation or advice for Mrs S.

With regard to the mandate, Mr Macreath said the Respondent's initial response to refuse to provide the file was not unreasonable since the Secondary Complainer was not a client. The solicitor got a formal mandate from Mrs S but there was an undue delay in delivering the papers. A suggestion was made to the Respondent that Mrs S had been cowed in her marriage and her husband had dealt with all financial matters.

## **QUESTIONS BY THE TRIBUNAL**

Parties confirmed that Mr S and Mrs S were both clients of the solicitor.

The Tribunal asked when the Respondent should have identified the conflict. Mr Macreath noted that the averment of misconduct in the revised complaint only referred to a conflict on 25 February 2020. This was when the document was prepared and collected for signature.

The Tribunal asked about the conflict of interest between Mr and Mrs S. Mr Macreath said that on 21 February 2020, as soon as the evacuation was raised as a possibility, although she was present in the room, Mrs S's interests were separate to that of her husband. He asked why she should give up the survivorship. She ought to have been advised that she did not have to do that and could take separate advice. By 25 February 2020, the Trainee knew that a survivorship was in place. The reason for the plea was that in the circumstances of a dying man and an emotionally distressed wife, Mrs S needed to be offered the opportunity to take separate advice.

The Tribunal asked about the relationship between Mr S and Mrs S. Mr Macreath noted that there were allegations that Mr S had been controlling. However, this came at a later stage when Mr X became involved. There was nothing to suggest this on 20 February 2020. He said it was merely background and not part of the averments of misconduct.

The Tribunal asked questions about previous wills made by the couple. Mr Macreath said Mr and Mrs S were new clients to the firm. Mr S was free to make his will in any terms he wished. He communicated his wishes clearly to the Trainee. The only conflict of interest related to the evacuation of the survivorship.

## **DECISION**

The Complainers alleged that the Respondent, in his capacity of supervising solicitor of a trainee, acted on behalf of a married couple in relation to the preparation and execution of a deed where their individual interests were in conflict on 25 February 2020. The Complainers also alleged that the Respondent failed to timeously implement the terms of a mandate issued on 21 May 2020, the documents requested not being made available until 20 July 2020.

The Tribunal considered whether the Respondent's conduct met the test set out in Sharp v Council of the Law Society of Scotland 1984 SLT 313. According to that definition,

*“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.”*

The Respondent accepted that he had breached the Law Society’s Practice Rules on conflict of interest (B1.7.1, B1.7.2, B2.1.2), communication (B1.9.1) and the guidance on mandates. Rule B2.1.7 did not apply since both Mr S and Mrs S were represented by the firm. Although the Respondent admitted professional misconduct, it remained for the Tribunal to consider whether the admitted conduct met the test as set out within Sharp v The Law Society of Scotland 1984 SLT 313.

The Tribunal considered the averment of misconduct relating to conflict of interest first. A conflict of interest existed between Mr and Mrs S. Before she was invited to sign the evacuation, Mrs S should have been given the opportunity to take separate legal advice. However, the wider context of this omission was important in assessing the degree of culpability involved.

The conflict issue was a very narrow one, relating only to conduct on 25 February 2020. The Respondent’s firm was asked to become involved in testamentary arrangements for Mr S because he was very close to the end of his life. There was therefore a degree of urgency. The first year Trainee in question was a very experienced paralegal. Mrs S was present at the hospital on 20 February 2020 and 21 February 2020. The consequences of the evacuation of the survivorship were explained to the couple. Provision was made for Mrs S to remain in her home while the property was in trust. On the face of it, Mrs S was agreeable to the evacuation and the property being placed in trust. On the information available to the Trainee and therefore the Respondent, the couple had come to a joint decision that evacuation of the survivorship and the creation of a discretionary trust, which was appropriate for them in their circumstances. When considering the whole context in which the conduct occurred, the Tribunal did not consider that the Respondent’s failure to intervene was a serious and reprehensible departure from the standards of competent and reputable solicitors.

Although not serious and reprehensible, the Tribunal considered that the Respondent’s conduct may still represent a departure from the standards of conduct to be expected of competent and reputable solicitors. The behaviour might therefore constitute unsatisfactory professional conduct which is professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor but which does not amount to professional misconduct and which does not comprise merely inadequate professional service. Accordingly, the Tribunal found the Respondent not guilty of professional misconduct in relation to the conflict issue and remitted that complaint to the Law Society under Section 53ZA of the Solicitors (Scotland) Act 1980.

The Tribunal went on to consider the averment of misconduct relating to failure to obtemper a mandate. Failure to implement a mandate breaches the Law Society guidance. It hampers the new solicitor instructed by the client. It inconveniences the client. It is prejudicial to the reputation of the profession and can cause harm to the public. Although the period in which the Respondent had delayed in dealing with the mandate was not as long as is sometimes seen in misconduct cases, the Tribunal was satisfied that a two-month delay was a serious and reprehensible departure from the standards of competent and reputable solicitors. The Respondent was therefore guilty of professional misconduct in relation to this aspect of the Complaint.

### **SUBMISSIONS IN MITIGATION**

Mr Macreath noted that the Respondent was a senior partner in a well-known firm. He is 63 years old. He has been in practice on his own account since 1993. He is a man of good character. The case has drifted for many months with the Law Society. The Secondary Complainer made no claim for compensation. Mr Macreath invited the Tribunal to deal with the Respondent as leniently as possible. Mr Macreath conceded that the Respondent would be liable in expenses. The Fiscal moved for expenses.

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

The Tribunal considered that the established misconduct was at the lower end of the scale. It appeared to be an isolated incident. The Respondent had shown insight and had cooperated with the Complainers and the Tribunal. A censure in these circumstances was therefore sufficient.

The Tribunal decided that the appropriate award of expenses was one in favour of the Complainers. The Tribunal ordered that publicity should be given to the decision and that publicity should include the name of the Respondent. However, there was no requirement to identify any other person as publication of their personal data may damage or be likely to damage their interests. It was noted that the Secondary Complainer did not wish to claim compensation.

**Kenneth Paterson**  
**Vice Chair**