

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

**LORRAINE ANN KELLY, Suite 5, Legal
House, 101 Gorbals Street, Glasgow**

Respondent

1. A Complaint was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that Lorraine Ann Kelly, Suite 5, Legal House, 101 Gorbals Street, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was no Secondary Complainer.
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 heard on 25 October 2019 and notice thereof was duly served upon the Respondent.
5. At the hearing on 25 October 2019, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was present and represented by Ian Ferguson, Solicitor, Glasgow.

6. The Respondent having no objection, the Tribunal granted the Fiscal's motion to amend the Complaint by deleting "Defender" where it appeared in the 11th line of paragraph 2.1 and substituting "Respondent", and deleting "Rule B1.12" where it appeared in the 4th line of paragraph 4.1(b) and substituting "Rule B1.2". A Joint Minute of Admissions was lodged whereby the Respondent admitted the averments of fact, duty and misconduct in the Complaint. The Respondent's Answers were withdrawn. Both parties made submissions.

7. Having given careful consideration to the terms of the Complaint, Joint Minute of Admissions and the parties' submissions, the Tribunal found the following facts established:-

7.1 The Respondent is a Solicitor enrolled in the Registers of Scotland. Her date of birth is 8 July 1974 and she was enrolled as a Solicitor on 3 September 2009. She was employed as a solicitor in the firm of Hamilton Burns, Carlton Buildings, 63 Carlton Place, Glasgow on 6 January 2014. She became an Associate in that firm later that year. On 29 July 2014, Hamilton Burns WS Limited, company number SC483134, was incorporated as an incorporated practice in having its registered office at said address. The Respondent was appointed as a Director of said incorporated practice on 2 March 2015. On 23 May 2017, the said incorporated practice entered administration and two members of FRP LLP were appointed as Joint Administrators. An estimated Statement of Affairs prepared by said Administrators dated 1 June 2017, showed a deficiency of £511,084.00. On 22 May 2017, the Respondent became a Partner of Moss & Kelly, Solicitors, Suite 5, Legal House, 101 Gorbals Street, Glasgow.

7.2 The Financial Compliance Department of the Complainers conducted an inspection of the financial records, books, accounts and documentation of the said practice unit of Hamilton Burns WS Limited on 1-3 November 2016. This inspection identified a number of concerns in relation to the administration of an Executry of the late Doctor L B or C (hereinafter "the Executry"). The Executors in said Executry were NM and RB. NM had been a partner of the said firm between 1 June 2002 and 31 October 2014, thereafter a Director of the incorporated practice between 1 November 2014 and 29 December 2015, and thereafter a Consultant with said incorporated practice between 30 December 2015 and 23 May 2017. RB was the said firm's and incorporated practices

external Accountant. The said Department identified various anomalies in regard to the rendering of fees, incomplete accounting records, and a number of general concerns regarding the administration of the Executry by the Executors and the said firm and incorporated practice. Said concerns were not addressed and at a meeting of the Complainers Client Protection Sub-Committee on 2 March 2017, they authorised a full investigation by the said Financial Compliance Department of the administration of the said Executry. Said investigation continued to raise a number of concerns and the Respondent was invited to an interview with the said Committee on 10 May 2017. At a further meeting of the said Committee on 17 May 2017, they determined to refer the issues hereinafter condescended upon to the Scottish Legal Complaints Commission.

7.3 In or around March 2014, the Respondent took over responsibility for the administration of the said Executry. She assumed said responsibility from a practitioner who had left the firm.

7.4 On 27 May 2015, the Respondent wrote to the residuary beneficiary (hereinafter referred to as "AC"). He was the deceased's spouse. Said letter narrated the following:-

"We refer to the above matter and confirm that we are now in a position to finalise the estate. We confirm that both Executors have now approved the final accounts and we can therefore pay out the residue of the estate to you.

We enclose herewith a cheque in the sum of £202,650.99 being the residue of the estate due to you after deduction of specific bequeaths, debts and funeral expenses and legal fees.

We would be obliged if you would sign the enclosed receipt and return it to us in order that we can proceed to close the file."

The terms of said letter were false and misleading.

7.5 The Respondent had met with NM on said date, being 27 May 2015, with a view to completing the administration of the estate. The Respondent advised NM that

further information was required from him to complete the accounts. NM instructed the Respondent to retain a sum of £5,000 and remit the balance to AC, and the accounts could be finalised at a later stage. As hereinbefore condescended upon, said letter to the said AC confirmed that both Executors had approved the final accounts and that a sum was to be payable to the said AC being the full balance due to him as the residuary beneficiary. Said statements were misleading and not true. The Executors, had not approved the final accounts and a sum of £5,000 was thereafter retained. During the course of the inspection and investigation by the Complainer's said Financial Compliance Department, it was noted that on the instruction of NM, the retained sums of £5,000 including interest, were taken to fees. The said Department instructed the said incorporated practice to re-credit said monies to the Executry client ledger. Said sums were re-credited in or around early May 2017.

8. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct in respect that:
 - (a) On 27 May 2015, she wrote to the residuary beneficiary in the Executry of the late Doctor L B or C, stating that both Executors had approved the final accounts for the administration of the said estate, and enclosed a cheque in the sum of £202,650.99 being the residue of the estate due to the said beneficiary, knowing that said Executors had not approved the said final accounts and that a sum of £5,033.33 had been retained by the Respondent's firm and incorporated practice, said letter thereby serving to mislead the said residuary beneficiary and in breach of Rule B1.2 of the Law Society of Scotland Practice Rules 2011; and
 - (b) On 27 May 2015, she wrote to the said residuary beneficiary in the said Executry, without taking reasonable steps to establish whether the terms of said letter were accurate, or whether there was any lawful basis for the retention of the sum of £5,033.33 and therefore in breach of Rule B1.2 of the Law Society of Scotland Practice Rules 2011.
9. Having heard the Solicitor for the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 25 October 2019. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Lorraine Ann Kelly, Suite 5, Legal House, 101 Gorbals Street, Glasgow; Find the Respondent guilty of professional misconduct in respect that (a) on the 27 May 2015, she wrote to the residuary beneficiary in the executry of the late Doctor L B or C, stating that both Executors had approved the final accounts for the administration of the said estate, and enclosed a cheque in the sum of £202,650.99 being the residue of the estate due to the said beneficiary, knowing that said Executors had not approved the said final accounts and that a sum of £5,033.33 had been retained by the Respondent's firm and incorporated practice, said letter thereby serving to mislead the said residuary beneficiary and in breach of Rule B1.2 of the Law Society of Scotland Practice Rules 2011, and (b) on 27 May 2015, she wrote to the said residuary beneficiary in the said Executry, without taking reasonable steps to establish whether the terms of said letter were accurate, or whether there was any lawful basis for the retention of the sum of £5,033.33 and therefore in breach of Rule B1.2 of the Law Society of Scotland Practice Rules 2011; Censure the Respondent; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person.

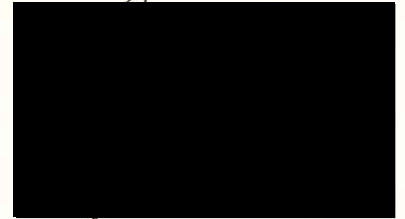
(signed)

Ben Kemp

Acting Vice Chair

10. 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 7 JANUARY 2020.

IN THE NAME OF THE TRIBUNAL



Ben Kemp
Acting Vice Chair

NOTE

At the hearing on 25 October 2019, the Tribunal had before it the Complaint as amended, a Joint Minute of Admissions and an Inventory of Productions for the Complainers. Submissions were made on behalf of both parties.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal noted that the Respondent's conduct came to light during a Financial Compliance Department inspection in November 2016. The issue was a narrow one and centred on a letter of 27 May 2015 which the Respondent sent to the residuary beneficiary in an executry. That letter was quoted in full in the Complaint and was Item 1 in the Complainers' Inventory of Productions. The Respondent accepted that the terms of that letter were false and misleading. The true position was that contained in the Respondent's note of her meeting with the executor contained at Item 2 in the Complainers' Inventory of Productions. The executor instructed that £5,000 should be retained and the balance paid to the residuary beneficiary. The executors had not approved the accounts. Eventually the money was recredited and the residuary beneficiaries suffered no loss. The Fiscal submitted that the Respondent's conduct breached Rule B1.2 of the Law Society's Practice Rules 2011 and constituted professional misconduct.

The Fiscal noted that the Respondent had fully cooperated. She had accepted her guilt very early in the proceedings. The Fiscal had helpful discussions with her agent leading to them lodging the Joint Minute of Admissions.

In answer to a question from the Tribunal, the Fiscal clarified that he did not aver dishonesty but that the Respondent's conduct showed a "lack of trustworthiness" and an "element of deception". The Respondent was aware the letter was inaccurate and false. In his submission, this demonstrated a lack of integrity.

SUBMISSIONS FOR THE RESPONDENT

Mr Ferguson noted that the Respondent admitted the averments of fact and law in the Complaint but that professional misconduct was a matter for the Tribunal. He intended to hold over his plea in mitigation until the Tribunal had made a decision on professional misconduct. The Tribunal indicated that it might be helpful to have some explanation regarding the circumstances of the offence at this stage.

Mr Ferguson explained that the Respondent was subject to bullying and harassment at work. She had not wanted to carry out executries but was forced to do them. Her only experience of executry work was during her traineeship (she qualified in October 2010). She knew the residuary beneficiary wanted to be paid but she received no cooperation from the executor. She prepared an account of charge and discharge but could not make the figures balance. The executor said the residuary beneficiary was not entitled to this and she should proceed without it. He demanded that £5,000 be retained. He dictated the terms of the letter for her. When told to take this particular action, she crumbled. The Respondent's motivation at all times was to please the client. If she had read the letter and analysed it properly, she would not have sent it. She thought she was sorting things out. She accepts now that the letter was misleading but at the time, she did not consider that to be its effect. Although the Respondent was a director of the company at the time of the professional misconduct, she was very much junior to the executor who was the main director.

Eventually, at the Law Society's request, the Respondent prepared an account of charge and discharge. The residuary beneficiary received the additional £5,000. The Respondent fully cooperated to get this matter resolved for the client.

DECISION ON PROFESSIONAL MISCONDUCT

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. 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.

The Respondent wrote to a residuary beneficiary stating that both executors had approved the final accounts for the administration of the estate and enclosing a cheque said to be the residue of the estate, knowing that the executors had not approved the final accounts and that £5,033.33 had been retained by the firm. This misled the residuary beneficiary and breached Rule B1.2 of the Law Society of Scotland Practice Rules 2011. This rule provides that a solicitor must be trustworthy and act honestly at all times so that his/her personal integrity is beyond question. The Respondent misled the residuary beneficiary without taking reasonable steps to establish whether the terms of the letter were accurate or whether there was any lawful basis for the retention of monies.

The Respondent must have known the letter was misleading. It was at odds with the note of her conversation the same day with the executor. The letter went directly to the client's interests and was misleading, regardless of her motivation. It is a basic and fundamental principle that a solicitor requires to be a person of integrity. If the public is to have trust in the profession, then solicitors must observe high standards of conduct. A solicitor cannot disregard the ethical consequences of his or her actions by blindly following the directions of a superior. Duties to employers or partners or fellow directors must be balanced with a solicitor's own professional responsibilities. The Tribunal accepted that all directors are not necessarily equal, and that the Respondent was subject to pressure from her colleague(s)/ superior(s). However, as a solicitor, the Respondent had to take responsibility for her actions. She knew, or ought to have known, the course of action that she ought to take; she ought not to have sent correspondence which was materially misleading to the residuary beneficiary. Solicitors must be able to resist undue pressure. The executor put her in a difficult position, but it was her duty to act with integrity. There is a critical relationship of trust between solicitor and beneficiary, as there is between solicitor and client. Misleading the residuary beneficiary was a serious and reprehensible departure from the standards of competent and reputable solicitors and therefore the Respondent was guilty of professional misconduct.

SUBMISSIONS IN MITIGATION

Mr Ferguson noted that the Respondent admitted the case against her at an early stage. She had not wasted the time of the Tribunal. She cooperated with the Fiscal and entered into a Joint Minute. She also resolved the situation with the residuary beneficiary. Mr Ferguson described the Respondent's family and personal circumstances at the time of the misconduct. He detailed her employment history and the obstacles she had overcome to qualify as a solicitor.

In 2012, the Respondent was offered a family law position at Hamilton Burns. Shortly after that a colleague left and all executries were passed to the Respondent. She was out of the office frequently at court and it was difficult to complete them. The ledgers in the executry which is the subject of this Complaint were very unclear. She was struggling with the case. She tried to get clarification from the executor who was her superior in the firm. However, he was frequently out of the office. The residuary beneficiary was keen to have the matter resolved. The Respondent prepared an account of charge and discharge but could not finalise it because the figures would not balance. She met the executor. He glanced at the account and said it was fine. However, he instructed her not to send the account to the residuary beneficiary as he was, he said, not entitled to it. He was the executor and also effectively her boss. He advised her of the terms of the letter which was to be sent.

When the Respondent was offered the opportunity to become a director at Hamilton Burns, the choice was to accept or leave the firm. She knew that she would be a director in name only. With hindsight, leaving would have been better, but she needed the income. She took advice from an accountant and experienced colleagues before becoming a director. The company had debts. She personally guaranteed loans. She spent all her savings and had to borrow money from her family. The firm went into administration. She had to enter a debt arrangement scheme. She is still in straitened financial circumstances as a result.

Her current firm receives civil legal aid referrals from other firms all over Scotland. The Respondent travels extensively and works long hours and has a significant commute to work from home. The Respondent is appreciative of her position as a solicitor. She is grateful to the colleagues who assisted her over the years. She is a good solicitor and doing family law work. She would be devastated if she could no longer help her clients.

Mr Ferguson submitted that the professional misconduct arose because the Respondent was forced to take on executry work in addition to her family law caseload. She was also subject to bullying and harassment at work. The executor made the Respondent feel as if the problem was due to her delay. The Respondent had an unblemished record. She knows that she should have trusted her own judgement and “stuck to her guns”. She should not have let her professional decision making be diverted by her boss.

Mr Ferguson referred to various references produced on behalf of the Respondent and quoted from these.

DECISION ON SANCTION, EXPENSES AND PUBLICITY

With reference to the indicative outcomes guidance, the Tribunal carefully considered the appropriate sanction, if any, in this case. Any sanction ought to be proportionate and not primarily punitive. It ought to reflect the gravity of the conduct, its effect on the reputation of the profession and the risk of harm to the public.

While a breach of integrity might typically lead to a sanction at the higher end of the scale, the Tribunal was satisfied that a Censure was appropriate and sufficient in this case which had particular mitigating features. The Respondent worked to return the money retained from the residuary beneficiary. She cooperated with the Fiscal and the Tribunal. She entered into a Joint Minute. She expressed remorse and demonstrated substantial insight. This was an isolated incident. She had worked satisfactorily before and

after this incident. Her intentions at all times were proper. There was no ongoing risk to the public necessitating restriction or any more serious sanction. She had been under particular professional and personal strain at the time of the misconduct and the Tribunal was content that, with the benefit of hindsight and greater experience, the Respondent would not make the same mistake again. The Tribunal noted that the Respondent was now working within her specialised area. If she happened to be pressurised again, she would have the resilience to resist. A fine would be inappropriate given the Respondent's financial circumstances. There was no element of public protection requiring a restriction or other more serious sanction.

The Fiscal moved for expenses and asked that publicity be given to the decision. Mr Ferguson said he had no comment to make on those motions. 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 recognising that publication of their personal data may damage or be likely to damage their interests.



Ben Kemp
Acting Vice Chair