

**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 GEORGE HOGG, 14 Meiklehill Loan,  
Kirkintilloch**

**Respondent**

1. A Complaint dated 27 February 2019 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that David George Hogg, 14 Meiklehill Loan, Kirkintilloch (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was no Secondary Complainer identified in the Complaint. However, on 3 July 2019, the Tribunal granted the Complainers' motion to amend the Complaint to add a Secondary Complainer, namely, Robert Fitzpatrick, Solicitor, The Glasgow Law Practice, 100 Cumbernauld Road, Muirhead, Glasgow.
3. In accordance with its Rules, 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 hearing for 21 June 2019 and notice thereof was duly served upon the Respondent.

5. At the hearing on 21 June 2019, the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented himself. Of consent, the Tribunal granted the Fiscal's motion to amend the Complaint by deleting the word "Road" where it appeared in the instance and substituting the word "Loan". A Joint Minute of Admissions was lodged. The Fiscal having no objection, the Tribunal received late the Respondent's Third Inventory of Productions. The Respondent gave evidence. At the conclusion of the Respondent's case, the Fiscal moved the Tribunal to amend the Complaint by adding the words "The Respondent was the executor in terms of his will" at the end of averment 11. The Respondent having no objection, the Tribunal granted the Fiscal's motion and made the amendment. Due to lack of Tribunal time, the case was adjourned to 3 July 2019.
6. On 3 July 2019, the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented himself. The Tribunal granted the Fiscal's motion to amend the Complaint by adding a final averment, namely "There is a Secondary Complainer. He is Robert Fitzpatrick, Solicitor, The Glasgow Law Practice, 100 Cumbernauld Road, Muirhead, Glasgow who brought this complaint on behalf of the beneficiaries of the estates of the late [Mr O and Mrs O]."
7. The Tribunal found the following facts established:-
  - 7.1 The Respondent's date of birth is 26<sup>th</sup> November 1949. He was enrolled as a solicitor on 28<sup>th</sup> August 1973. The Respondent was a partner in David G Hogg & Co from 1<sup>st</sup> June 1982 until 30<sup>th</sup> September 1998. He was an employee of and latterly a consultant, although still an employee, to Alder Hogg & Co, Solicitors, 45 Townhead, Kirkintilloch, Glasgow between 5<sup>th</sup> September 2000 and 5<sup>th</sup> October 2012. Since then he has not been employed by any legal firm.
  - 7.2 Mrs O died on 24<sup>th</sup> July 2001. In terms of her will, her surviving spouse and the Respondent were appointed as executors. Mr O lacked capacity to act so the Respondent alone was able to take up the office of executor.
  - 7.3 The firm in which the Respondent was employed as a consultant employed an experienced law accountant, Kenneth Greer, who regularly undertook executry

work. He was the husband of the sole proprietrix of the firm of Alder Hogg & Co., Mrs Alison Greer. Mrs Greer was the firm's executry partner and she delegated to her husband the administration of the late Mrs O's estate. Mrs Greer is the Respondent's sister. Their sibling, Philip Hogg, also worked for the firm and was a partner for a period. The Respondent held restricted practising certificates from 5<sup>th</sup> September 2000 until 10<sup>th</sup> November 2002. Items 1 to 8 of the Respondent's second inventory of productions were true copies of the practising certificates issued by the Counsel to the Respondent on 5<sup>th</sup> September 2000, 1<sup>st</sup> November 2000, 9<sup>th</sup> November 2001 and 10<sup>th</sup> November 2002. The certificates covering the period from 5<sup>th</sup> September until 10<sup>th</sup> November 2002 each contained a restriction so that the Respondent was required to receive full supervision of his actings and was not entitled to intromit with client funds. The certificate covering the period between 9<sup>th</sup> November 2001 and 10<sup>th</sup> November 2002, in common with the previous two certificates, provided that the Respondent should only be entitled to act as a professional assistant to Messrs Alder Hogg & Co or to a firm approved by the Council.

- 7.4 On 31<sup>st</sup> July 2001, Mr Greer was contacted by a friend of Mr & Mrs O (Mr S) who provided him with several folders of financial papers pertaining to the deceased and her husband which allowed him to value their combined assets at about £750,000. On 31<sup>st</sup> July 2001 Mr Greer wrote a file note in which he mentioned the folders of papers and recorded that these folders "all looked to be reasonably well organised and, at a rough tally, the assets would probably reach around £750,000, although at this stage it is unclear how much of this is Mr O's money, how much is Mrs O's money and how much is joint money". The file note concluded by saying that "it would be necessary to proceed with a curator as quickly as possible in order that we could sell the house this side of winter".
- 7.5 Nursing home fees were being invoiced to the firm of Alder Hogg in respect of Mr O's care.
- 7.6 On 24<sup>th</sup> October 2001, Mr Greer made a file note which stated that he had already spent several days at the home of Mr and Mrs O and felt that he had barely scratched the surface as there was so much paperwork to review. He stated to an employee

of East Dunbartonshire Council that the information available suggested that Mr O had three to four times as much in assets as Mrs O. Mr Greer also stated that recent financial information appeared to be missing.

- 7.7 On 23<sup>rd</sup> January 2002, Mr Greer made a file entry which recorded his attendance at the Post Office seeking a mail redirection. This recorded that there was still a large volume of mail going to the house and that it needed to be reviewed as it would shed light on various assets and by this date Mr Greer had completed a review of all of the papers located in the house.
- 7.8 On 11<sup>th</sup> March 2002 Mr Greer wrote to the Bank of Scotland in connection with obtaining loan finance to cover nursing home fees. Along with his letter he enclosed a draft inventory of Mrs O's estate prepared by him which valued the estate at £198,000.
- 7.9 On 22<sup>nd</sup> May 2002, Mr Greer attended a case conference concerning Mr O's residence at the nursing home. Social workers, mental health officers and nursing staff were present. It was noted that Mr and Mrs O were a secretive couple in respect of finances and that the Respondent had been given the bare minimum of information to complete their wills. Mr Greer stated that the estate of Mrs O was worth around £200,000. The mental health officer present suggested a guardianship order rather than an intervention order would be required due to the complexities of the financial situation, and said that she would order medical reports.
- 7.10 On 27<sup>th</sup> June 2002, Mr Greer advised the Bank of Scotland that he anticipated being in a position to apply for confirmation to Mrs O's estate towards the end of July 2002.
- 7.11 On 27<sup>th</sup> June 2002, Mr Greer sent a note to the Respondent (addressing the Respondent as "David") stating that he had numerous separate files in relation to the actual estate itself. Mr Greer also stated that he was seeking a two month extension on a bridging loan which had been set up for the executry to allow sufficient time to obtain confirmation on Mrs O's estate and ingather funds to repay an overdraft facility which had been set up.

- 7.12 Mr O was admitted to nursing home care on 25<sup>th</sup> July 2001, the day after his wife's death.
- 7.13 By 31<sup>st</sup> July 2001 the firm of Alder Hogg had by implication from their actions accepted responsibility for making the necessary legal arrangements to manage Mr O's ongoing financial affairs. At that time the sole proprietrix of Alder Hogg was Mrs Alison Greer. On that date Mr Greer made a note that the firm would proceed with a curatory as quickly as possible to sell the house "this side of winter". However, Mr Greer also stated in this note that the property was generally in a very poor state of repair and any future purchaser will require to do some significant upgrading.
- 7.14 On 24<sup>th</sup> October 2001, an officer of East Dunbartonshire Council spoke with Mr Greer who suggested an intervention order under the recently enacted Adults with Incapacity (Scotland) 2000. At least by 5<sup>th</sup> November 2001 Mr Greer was aware that this statutory provision would not come in to effect until April 2002. Production number 4 for the Council is a true copy of Mr Greer's file note of 5<sup>th</sup> November 2001. Mr Greer indicated to the council employee that while a curator bonis under the old law would be required to access funds for Mr O's benefit, at that time, by the time he had sorted through all the O's papers they might as well wait for the new legislation and stated that there was little point trying to rush everything through to put the property on the market in the middle of winter. The intention of the new legislation and the principles of the Adults with Incapacity (Scotland) Act 2000 (the Act) was to provide the least intrusive option. The act aims to protect people who lack capacity to make particular decisions, but also to support their involvement in making decisions about their own lives as far as they are able to do so. Accordingly the new provisions were more flexible than a curatory.
- 7.15 At the case conference called under the Act condescended upon on 22<sup>nd</sup> May 2002 it was resolved that a financial guardian required to be appointed for Mr O. The mental health officer undertook to arrange two medical reports for Mr O. The Respondent had agreed to take on the responsibility of guardianship.

- 7.16 On 27<sup>th</sup> June 2002 Mr Greer wrote to the Bank of Scotland stating that the firm was in the process of seeking to have the Respondent appointed as financial guardian to Mr O. From the terms of the file note dated 27 June 2002, the Respondent was aware of that. Said file note was written by Mr Greer to the Respondent wherein the Respondent is designated as “David”. Shortly thereafter a draft summary application craving a financial guardianship order was prepared. On 9<sup>th</sup> December 2002 Mr Greer wrote to the local authority stating that the Respondent was willing to act as financial guardian, and suggested that the local authority would require to seek appointment of a welfare guardian. On 8<sup>th</sup> January 2003 the local authority responded saying that it would not be necessary to have a welfare guardian appointed. The letter states that the letter by Mr Greer of 9<sup>th</sup> December confirmed the willingness of the Respondent to act as financial guardian to Mr O.
- 7.17 Mr O died on 24<sup>th</sup> February 2003. As at the date of his death no application had been presented to the court in connection with the appointment of a financial guardian. The Respondent became the sole executor due to the fact that Mrs O predeceased her husband.
- 7.18 Mr O’s executry was not without complication. In addition to Mr Greer’s concerns about the true nature of the assets, Mr O, having been predeceased by his wife and having no surviving issue, it was necessary to trace beneficiaries. Initially Mr Greer carried out his own research, which included attendance at Register House, Glasgow Family History Centre and checking Census returns. There appeared to Mr Greer to be six groups of potential beneficiaries on the maternal side of Mr O’s family tree and three groups on the paternal side. A document entitled “O Family Tree” was produced by Mr Greer on 26<sup>th</sup> June 2003.
- 7.19 On 25<sup>th</sup> June 2004 Mr Greer, in response to an enquiry from a beneficiary, advised that the firm would “just about be ready” to apply for confirmation in Mrs O’s estate by the week beginning 12<sup>th</sup> July 2004. He stated that he, Mr Greer, was dealing with the day to day administration of the estates under the supervision of a solicitor. Mr Greer also stated that the Respondent had not been directly involved in the initial stages of the administration as this had involved a considerable amount of research into the family’s history. He went on to give some detail of his research indicating

that there were nineteen potential groups of beneficiaries but that his research was ongoing. Mr Greer pointed out that he was a law accountant and not a solicitor but that his work was supervised by a solicitor. The letter of 25<sup>th</sup> June 2004 was signed by the Respondent “pp David G Hogg for Kenneth Greer”. It was dated 25<sup>th</sup> June but issued on 28<sup>th</sup> June. On 28<sup>th</sup> June 2004 the Respondent made an entry in the file which read “I have been nagging Mr Greer to get on with this for the last six months. I didn’t know anything about the letter from the beneficiary until I signed Mr Greer’s letter of 25<sup>th</sup> June which went out today, Monday 28<sup>th</sup> June. I have sent the letter as per the copy on file”.

7.20 On 7<sup>th</sup> January 2005 solicitors acting for one of the beneficiaries wrote to the firm of Alder Hogg asking the firm to give specific reasons for the perceived delay in the winding up of Mr O’s estate. The letter indicated that should no reasons be given, a complaint would be made to the present complainers. In the absence of a response the solicitors wrote again to the firm on 26<sup>th</sup> January 2005. On 31<sup>st</sup> January 2005 a letter bearing Mr Greer’s reference was sent to these solicitors. The letter acknowledged that an undertaking had been given to beneficiaries to keep them advised of developments, but stated that they did not wish to be increasing the expense of administration by sending out unnecessary correspondence. The letter said that Mr O appeared to have destroyed a lot of his incoming mail which had led to difficulties in tracing live financial investments, and there was very little information relating to transactions in the decade or so prior to Mr O’s death. The letter stated that the firm expected to be in a position to apply for confirmation “within the course of the next month or so”. However, the letter went on, as the estate fell to be divided in accordance with the laws of intestacy, the firm could not be expected to commence the distribution of the estate until such time as the firm had identified all of the beneficiaries. Mr Greer stated that there were still a number of lines of enquiry which remained open in relation to identifying all the beneficiaries.

7.21 Meantime, on 28<sup>th</sup> January 2005, Mr Greer had instructed contractors to clear Mr & Mrs O’s house. This was done early in February 2005. The property was marketed with GSPC. Various offers were received. On 19<sup>th</sup> May 2005 the firm wrote to one of the beneficiaries to say that an offer had been accepted. The next

entry was a note from Mr Greer dated 22<sup>nd</sup> July 2005 indicating that a meeting had taken place involving Alison Greer, the Respondent and Kenneth Greer. Mr Greer stated that “we (referring to himself and Alison Greer) are acting for the Respondent as executor in the estate”. It was agreed to meet again to discuss problems which had arisen in relation to the missives on 25<sup>th</sup> July 2005. Regard had to be paid to ethical considerations. The file recorded that the Respondent having been satisfied that he was proceeding ethically gave instructions in his capacity as executor to rescind the contract with the original purchaser and to invite an offer from one of the unsuccessful offerors.

7.22 Missives were concluded on 28<sup>th</sup> October 2005.

7.23 On 9<sup>th</sup> December 2005 an application for confirmation was made in relation to Mr O’s estate. Production 30(a) for the Council is a true copy of the letter sending the application to Glasgow Sheriff Court. The letter enclosed an inventory in form C1 and form C5. There was a copy of the will left by Mr O which had been certified by the Respondent. The Respondent was the deponent on form C1. The only item of property mentioned in the inventory attached to form C1 was the heritable property. Confirmation was issued on 12<sup>th</sup> December 2005 and the sale of the heritable property settled on 21<sup>st</sup> December 2005.

7.24 On 20<sup>th</sup> February 2006 Mr Greer prepared a memo of that date which referred to a meeting the previous Friday to discuss fees. Fees were taken on 2<sup>nd</sup> May 2006.

7.25 No steps were taken to ingather or administer the estates of either Mr O or Mrs O between December 2005 and May 2007.

7.26 The file contains a note dated 9<sup>th</sup> May 2007 recording that the Respondent had spent two hours going over the family group chart file with Mr Greer and looking at the application for confirmation. The Respondent disputes the provenance of this note. The file contains a copy of a letter dated 9<sup>th</sup> May 2007 to Blackadder & McMonagle, Solicitors which bears to have been prepared by the Respondent. The Respondent disputes the provenance of this document. The letter stated that the Respondent had discussed the matter with Mr Greer who had been dealing with the winding up of



the estate. The letter described the estate as complex and outlined the difficulties experienced in identifying and ingathering details of the estate. The letter stated the intention was to obtain an Eik to the confirmation previously obtained in December 2005. The letter went on to say that Mr Greer had advised the Respondent that it was likely that the value of the estate, over and above the sale price of the heritable property, would amount to approximately £500,000.

- 7.27 The said letter stated that the firm's intention was to instruct Title Research to carry out a search in the public records in Ireland and England and in the absence of further progress to seek out terms for a missing beneficiaries insurance policy. The file contains what bears to be a copy of a letter dated 18<sup>th</sup> May 2007 in which the Respondent instructed Title Research to carry out further enquiries. The Respondent disputes the provenance of this document. The firm of Alder Hogg used Title Research in the more difficult of the cases where genealogical research was required.
- 7.28 The file contains what bears to be a copy of a letter dated 29<sup>th</sup> May 2007 written by the Respondent to solicitors representing another beneficiary and advising that his firm were satisfied that they now had full details of Mr O's estate and would commence preparation of the Eik to the confirmation obtained on 10<sup>th</sup> December 2005. The Respondent disputes the provenance of this document. The letter refers to a "GEDCOM" file of which the Respondent had no knowledge.
- 7.29 Between 3<sup>rd</sup> June 2007 and 4<sup>th</sup> June 2007 an Eik to confirmation and an inheritance tax account were prepared. The file references indicate that Alison Greer was the person who prepared these documents. The Respondent who was ultimately responsible for them signed them. The interest of Mr O in the estate of his wife was not included. Although reference was made to the deceased's beneficial estate in the unadministered portion of Mrs O's estate, it showed only a value of £4,609.54. Confirmation in favour of the Respondent as executor nominate of Mrs O was granted on 11<sup>th</sup> June 2007. Production 72-77 for Council is true copy of said confirmation. An Eik relative to Mr O's confirmation was granted on 10<sup>th</sup> July 2007.

- 7.30 Additional inheritance tax of £23,281.79 required to be paid by Mr O's estate, by way of interest. The Respondent signed the inheritance tax account. Box J10 records interest of £20,034.87. The file contains a copy of the calculation of inheritance tax prepared by HMRC and addressed to Alder Hogg & Co under cover of a letter of 28<sup>th</sup> June 2007. Additional interest of £3,153.13 was payable. Mr Greer wrote on 4<sup>th</sup> July 2007 to the Capital Taxes office enclosing a cheque for the balance due of £93.79 representing interest.
- 7.31 Mr Greer received an interim report from Title Research which he reviewed on 23<sup>rd</sup> January 2008 at which time he instructed Title Research to proceed with further investigations. Mr Greer stated that he had reviewed the report but that he had not yet examined the extract certificates. By 1<sup>st</sup> May 2009 Title Research had reached the stage where sufficient evidence had been obtained by them to enable an approach to be made to an insurance company to obtain a missing beneficiaries insurance policy.
- 7.32 On 2<sup>nd</sup> December 2009 Mr Greer advised one of the beneficiaries that he would expect to distribute funds early in the new year. On 16<sup>th</sup> March 2010 Mr Greer wrote to each of the beneficiaries advising that a missing beneficiaries insurance policy was being sought. He also stated that he had not had a response from some of the beneficiaries and that this had caused matters to stall. By 14<sup>th</sup> February 2011, the missing beneficiary insurance was in place. In a letter to a beneficiary dated 14<sup>th</sup> February 2011, Mr Greer also narrated the difficulties he had encountered in trying to finalise the estate. He stated that even nine years after Mr O's death other assets were coming to light.
- 7.33 On 1<sup>st</sup> July 2011 Mr Greer wrote to Barclays Wealth instructing them to proceed to realise Mr O's share portfolio which by virtue of the confirmation obtained in both the estates of Mrs O and Mr O, included all shares held formerly by Mrs O. Confirmation in the estate of Mrs O was included with this letter along with the eik to the confirmation and separate certificate for confirmation in the estate of Mr O. The letter also explained that some shareholdings were only identified by reference to the receipt of dividend vouchers as the share certificates were not available.

7.34 On 8<sup>th</sup> July 2011 the Respondent spoke to one of the beneficiaries and advised that a payment would likely be made within four or five weeks, but qualified that by saying that he did not have the exact detail of the case as Mr Greer was dealing with it on a daily basis. On 8<sup>th</sup> July 2011 the Respondent spoke to Philip Hogg to query the position with regard to payments to beneficiaries.

7.35 Payments in relation to shares were received on 20<sup>th</sup> July, 25<sup>th</sup> July, 28<sup>th</sup> July and 2<sup>nd</sup> August 2011 and the first distribution took place on 5<sup>th</sup> August 2011. On or about 23<sup>rd</sup> August 2011 a payment of £250,810.37 was received from Barclays Wealth and a further distribution took place on 1<sup>st</sup> and 2<sup>nd</sup> September 2011. On 15<sup>th</sup> June 2012 Mr Greer advised one of the beneficiaries that a number of additional items of estate had come to light. By the time of the appointment of a judicial factor to the firm in October 2012, no further progress had been made in relation to the winding up of the two estates.

8. Having considered the foregoing circumstances and having heard submissions from the parties, the Tribunal found the Respondent guilty of Professional Misconduct *in cumulo* in respect of his failure to act with appropriate diligence and his delay in the administration, winding up and distribution of the estates of Mrs O and Mr O from 24 July 2001 and 24 February 2003 respectively until the appointment of the Judicial Factor on 5 October 2012 and his failure to keep the beneficiaries of the estates adequately and timeously informed of developments. The Tribunal found the Respondent not guilty of the remaining three averments of misconduct.

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

Edinburgh 3 July 2019. The Tribunal having considered the Complaint dated 27 February 2019 at the instance of the Council of the Law Society of Scotland against David George Hogg, 14 Meiklehill Loan, Kirkintilloch; Find the Respondent guilty of professional misconduct *in cumulo* in respect of his failure to act with appropriate diligence and delay in the administration, winding up and distribution of the estates of Mrs O and Mr O from 24 July 2001 and 24 February 2003 respectively until the appointment of the Judicial Factor on 5 October 2012, and his failure to keep the

beneficiaries of the estates adequately and timeously informed of developments; Censure the Respondent; Find the Respondent liable in respect of 75% of 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 and any other witnesses but need not identify any other person; and Allow the Secondary Complainer 28 days from the date of intimation of these findings to lodge a written claim for compensation.

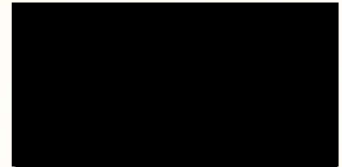
**(signed)**

**Kenneth Paterson**

**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 **23 AUGUST 2019** .

**IN THE NAME OF THE TRIBUNAL**



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

**NOTE**

At the hearing on 21 June 2019, the Tribunal had before it the Complaint dated 27 February 2019 as amended, Answers for the Respondent, a Joint Minute of Admissions, two Inventories of Productions for the Complainers, a Joint Inventory of Productions, three Inventories of Productions for the Respondent, a List of Witnesses for the Complainers and a List of Witnesses for the Respondent. The Fiscal indicated that in view of the Joint Minute, he did not intend to lead any evidence. The Respondent and one witness gave evidence for the Respondent. At the hearing on 3 July 2019, the Tribunal also had before it written submissions from both parties.

**EVIDENCE OF THE RESPONDENT**

The Respondent gave evidence on oath. He said he was an employee in the firm. He said the firm did not treat him well. There were tensions and the Respondent sought work elsewhere but was not successful in securing another position. When he left the firm, he was owed arrears of salary. Between 2000 and 2002, he held a restricted practising certificate.

The Respondent explained that his sister was struck off and his brother suspended for five years for failing to supervise Mr Greer. It was mentioned in both these Tribunal cases that Mr Greer had hidden matters from the solicitors in the firm. The Respondent had not expected Mr Greer to have been dishonest. The family also understood Mr Greer to have maintained his SOLAS membership.

The Respondent referred to Production 1 in the First Inventory of Productions for the Respondent. This was the minute of the Professional Conduct Sub Committee from 13 March 2014 relating to a complaint that he failed to challenge the overcharging of fees by the firm in the executries of Mr and Mrs O. The Sub Committee noted that the solicitor was not acting as a solicitor in the winding up of the estate which was carried out by a non-qualified member of staff who was supervised by another. The Sub Committee also noted that there was no evidence that the Respondent had received any fee notes and that Mr Greer had deliberately hidden matters from the Respondent. There was therefore insufficient admissible evidence to show the solicitor knew or ought to have known what was going on and he had no basis for challenging the fees deducted. The Respondent referred to various text messages between himself and his brother, Philip Hogg, regarding Mr Greer's alleged dishonesty. These noted that Mr Greer had confirmed to the Law Society that the Respondent did not know of the fees he had taken in Mr and Mrs O's executries.

The Respondent explained that Mr and Mrs O were his clients from 1974. Mrs O died before her husband. The Social Work Department were working towards a guardianship rather than a curatory. When Mr O died his estate fell into intestacy. The two estates were complicated. The Respondent believed that Mr O had destroyed some recent paperwork regarding his shareholdings. The Respondent described the amount of work that went into genealogical research. There were fourteen bundles of papers. The Respondent did not deal with complicated or high value executries. However, he was not concerned about Mr and Mrs O's cases. If he had practical problems, he would have taken advice from the Law Society or other contacts. It was clear now that there were "holes" in the executries between 2001 and 2012. However, Mr Greer was highly plausible, and the Respondent did not see the problems at the time.

The Respondent highlighted that he was not the solicitor winding up the estate. Mr Greer took the papers and he was working under the supervision of Alison Greer. Philip Hogg and Alison Greer, as the partners of the firm, were responsible for Mr Greer and they had been sanctioned by the Tribunal for their failures to supervise him. The Fiscal had accepted in those cases that it appeared that Mr Greer was managing these files and fixing the fees and that there was no suggestion that the Respondent was involved. Executries were his sister's area of work. He was merely an employee of the firm. He tended to do court work, divorces, powers of attorney, wills and small executries which did not involve inheritance tax.

The Respondent explained the health issues he and his wife experienced. He described his work ethic and referred to the testimonial lodged on his behalf. He has not been employed since he left the firm. He and his wife have state pensions and a small private pension.

### **CROSS-EXAMINATION OF THE RESPONDENT**

During cross-examination the Respondent accepted that he was responsible for the estates as executor. However, he maintained that responsibility for the administration of the estates fell to others. Kenneth Greer was winding up the estates, supervised by Alison Greer.

The Respondent accepted that the Law Society's decision in 2014 related only to the fees which were taken, not the general conduct of the executries. However, he wished to highlight that the duty of supervision fell on his siblings and not him.

During cross-examination, the Fiscal attempted to refer the Respondent to a production which had not been intimated to him. Following submissions from the parties, the Tribunal did not allow the production to be received and no questions were put to the Respondent regarding this document.

The Respondent said appointment as an executor was a regular feature of his professional life. He would be appointed in about twelve cases a year. He would deal with the estates if no inheritance tax was due. The Fiscal asked the Respondent why Mr and Mrs O had asked him to be executor. He said it was due to their personal contact with him and their knowledge of him. He said that obviously, they hoped he would "get it right and look after them". The Fiscal asked the Respondent whether he thought he was appointed because he was a solicitor. The Respondent said that this could partly explain the appointment. However, on other occasions, clients will reject a solicitor as executor. The Respondent agreed that Mr and Mrs O would have expected the executry to be done well. He was not happy with the way things had turned out.

The Fiscal suggested that special responsibilities attach to solicitor executors rather than "ordinary" executors. The Respondent said his lawyer is of the view that he should be treated as the client, but he did think the public would expect a solicitor acting as executor to be more involved. He agreed that he could have resigned had he wanted to do so. There were periods of non-progression, but it did not feel like that "on the ground". If he had known there was a problem, he could have gone to Harper MacLeod and said, "we've got a really awkward executry and our guy isn't hacking it". However, he did not know that was the situation. If he had really understood what was going on, rather than being misled, he would have dealt with the situation differently.

The Respondent accepted that during this period he became aware that Kenneth Greer had hidden letters from his wife. The Respondent said that this had occurred during a very difficult time for his sister and he had thought that Mr Greer's behaviour was explained by his desire to protect Alison Greer.

The Respondent said that he agreed to become Mr O's financial guardian. However, he was never appointed. Between May 2002 and Mr O's death in February 2003, the Respondent said that he understood that Mr Greer was obtaining medical reports and a report from a mental health officer. The



petition was drafted. He said he did not know why that process took so long. He agreed that taking on the role of financial guardian is a significant responsibility. There was an urgency to get it completed. However, the file shows that the firm was trying to agree the appropriate way forward with the Local Authority. The Respondent agreed that it was not satisfactory that Mr O was without a guardian in the last nine months of his life. However, it was not his file. Mr Greer was dealing with the case.

The Respondent agreed that Mr and Mrs O made wills in 1983. Mr O died in February 2003. The Respondent was his sole executor. It was suggested that between June 2003 and June 2004 no steps were taken to ingather the estate. The Respondent said that he knew that Mr Greer was dealing with matters. He was going back and forward to collect mail from the property. The mail did not match the shareholdings. Mr Greer produced a family tree. He could not trace certain members of the family. It became clear that an indemnity insurance policy would be required. The insurer required a family tree produced by professionals. Title Research was engaged to produce a family tree in May 2007. The Respondent agreed that this was a long time after Mr O's death but said the case involved a very complicated genealogy.

The Respondent was asked about certain items on the file. He accepted that he had signed a letter on 25 June 2004 to a beneficiary which referred to the delay in winding up the executry. There was reference to a file note which said the Respondent had been "nagging" Kenneth Greer. The Respondent said he had "no idea" why he was "nagging" Mr Greer. It was suggested that the letter of 25 June 2004 put the Respondent on notice that a professional genealogist was required. The Respondent said the letter indicates that work and investigations were continuing. He must have been satisfied.

It was suggested to the Respondent that he should have been concerned. It was over a year since Mr O's death. The Respondent was aware that Mr Greer had hidden correspondence in the past. He had not given the beneficiary's complaint letter to the Respondent. The Respondent said that there were no "red flags". If he had been concerned, he would have talked to his siblings. He must have felt Mr Greer was making sufficient progress.

The Fiscal noted that in December 2005, the Respondent signed the application for confirmation. The only item of estate was the house despite the fact he knew there was significant other estate. The Respondent said that he only definitely knew about the house. He was told by Alison and Kenneth Greer that they could confirm the house and do an eik for the rest of the estate. He believed that they had discussed this with the Sheriff Clerk. There was no covering letter to the confirmation statement

explaining that an eik would follow. He agreed that the application for confirmation stated that “the Inventory (on pages 3 and 4) is a full and complete inventory...”. He agreed that he signed the application with that declaration on it.

The Fiscal said that the Respondent had accepted that no work was done between December 2005 and May 2007. The Respondent said he always asked about progress and he was always assured that work was ongoing.

The Fiscal referred to a file note dated 9 May 2007. The Respondent said that he had not produced this document although it bore his reference. He did not accept the provenance of that file note and productions 33-35 and 38 of the First Inventory of Productions for the Law Society. He suggested they had been prepared by Kenneth Greer.

The Fiscal noted that it was accepted by both parties that Alison Greer prepared the inventory for confirmation of Mrs O’s estate and the eik to confirmation for Mr O’s estate. The Respondent noted that Mrs Greer had spent a lot of time on the cases and she was competent. There was no reason to doubt that his sister was wrong. He signed them because he trusted her.

The Fiscal noted that confirmation was obtained in 2007 and asked what steps were taken to ingather the estate between July 2007 and July 2011. The Respondent “could not tell what had happened”. He thought genealogy work was being done. It was a long time ago and he could not recall now what was in the file. He said that something must have been getting done or he would have been concerned about it. By February 2011 the missing beneficiary insurance was in place. The Respondent agreed that he spoke to some of the beneficiaries in July 2011. He was aware that one of them had complained in writing that she was “appalled” by the delay. He spoke to Philip Hogg and asked him to speak to Kenneth Greer. Philip Hogg told the Respondent that the beneficiaries were causing the delay.

The Respondent agreed that he did not take any steps to complete the executry between confirmation and 2011. He was doing his usual work. He did nothing to progress the executry other than ask what Mr Greer was doing. With hindsight he accepted he should have done more but it was difficult to see that at the time. He was misled and misinformed. Mr Greer was working to “a totally different agenda”. He did not want to complete the executry. He was so plausible. He was his sister’s husband.

The Fiscal suggested that as a solicitor executor, the Respondent's responsibility was to ensure that the estate was wound up. The Respondent said that as an employee, he was entitled to expect the members of the executry department to do their jobs properly and not allow him to be misled. The Chair asked whether the Respondent thought he should have taken the initiative. The Respondent said that he did not anticipate this situation. He thought action was being taken.

## **RE-EXAMINATION OF THE RESPONDENT**

During re-examination of the Respondent, it was established that the Fiscal accepted that the Respondent did not know about the GEDCOM files which were referred to in one of the disputed productions.

## **EVIDENCE OF JENNIFER HOGG**

The witness gave evidence on oath. She is the Respondent's wife. She worked as a paralegal secretary for her husband. He did wills, powers of attorney, child custody welfare cases, conveyancing, commercial leasing and conveyancing, and lots of divorces. He had a very heavy case load.

She described the files of Mr and Mrs O as the "executry from hell". Fifteen boxes from Mr and Mrs O's home were dumped in the office. What could go wrong, did go wrong. She was aware of problems selling the house but was not directly involved in the case which was being dealt with by Mr Greer and his secretary. She was aware of lots of share certificates. Mr O had got everything in a mess and the staff were trying to get it organised. Mr Greer was heavily involved in genealogy. She was aware that the firm had used Title Research before but did not know anything about their involvement in this case. The Respondent did not ask Mr Greer about the executry in her presence, but sometimes she would type up the Respondent's file notes detailing the conversations between them. The witness indicated that she had not typed productions 32, 33 or 36 in the Complainers' First Inventory of Productions.

The witness said that she was not treated well at the firm. She was ill in November 2009 and her pay was docked. She was "livid". Just before the firm closed, her computer broke and Mr Greer did not make any attempt to fix it. She believes he sabotaged her computer. Mr Greer was a law accountant. He worked as the office manager and IT manager for the firm. She trusted him. However, she does not trust him now.

She said her husband was a “great lawyer”. He was hardworking and honest. He had integrity. He took care over his work and tried to please his clients. She had read the reference provided to the Tribunal on her husband’s behalf and agreed that its terms were accurate.

### **CROSS-EXAMINATION OF JENNIFER HOGG**

During cross-examination, the witness indicated that the firm used software called Technology for Business. The witness was challenged regarding her claim that she had not produced letters 32, 33 or 36 in the Complainers’ First Inventory of Productions but continued to assert that she had not typed them. She agreed that the firm used Title Research in its more difficult cases.

At the close of the witness’s evidence, the Fiscal moved to amend the Complaint to include the words “The Respondent was the executor in terms of his will” at the end of averment 11 of the Complaint. The Respondent had no objection and the Tribunal made the amendment. The case was adjourned to 3 July 2019 at 10am for the parties to make submissions.

### **SUBMISSIONS FOR THE COMPLAINERS**

On 3 July 2019, the Respondent having no objection, the Tribunal granted the Complainers’ motion to amend the Complaint to add a Secondary Complainer. The Fiscal noted that the Complainers accept that the Respondent was not involved in any dishonesty which might have taken place in the firm. The Fiscal went through his written submissions which were as follows:

“On behalf of the Council it is submitted that the Tribunal should make findings in fact in terms of the numbered paragraphs of the joint minute. The Tribunal is also invited to make additional findings, which have been inserted into the copy of the joint minute attached to this note, and are highlighted.

Thereafter the Tribunal is invited to make findings of professional misconduct in line with paragraphs 1 – 5 inclusive of page 10 of the complaint, being the averments of professional misconduct which are made against the respondent.

I will deal firstly with the second of those paragraphs which is directed to the failure of the respondent to secure his own appointment as financial guardian.

There are averments and there was some brief discussion in evidence about the appointment of a curator bonis. I say nothing more about that because it seems clear that while there may have been some initial exploration of that, by early 2002 the only appropriate course would have been to appoint a financial guardian.

It is clear from the productions and seems to be accepted in evidence by the respondent that by the date of the case conference on 22<sup>nd</sup> May 2002 but undoubtedly by the date of his receipt of the memo of 27<sup>th</sup> June 2002, the respondent had accepted that he was to be appointed as financial guardian to JO.

That involved a significant assumption of responsibility in the affairs of an incapacitated adult, as was acknowledged by the respondent in his evidence.

It can only be the case that the respondent accepted and assumed this responsibility in the context of his practice as a solicitor.

He was the only solicitor within the firm who was dealing with the matter of the guardianship. He was not entitled to delegate that responsibility to Mr Greer.

The failure to make any progress in relation to the appointment (apart from the drafting at an early stage of a summary application) continued right up until the date of Mr O's death in February 2003 and in the circumstances amounts to professional misconduct. In this situation the respondent found himself essentially in the same situation as a solicitor executor. He was in effect the firm's client. But he was also the person who had ultimately assumed responsibility for obtaining the appointment as guardian.

On the wider failures of the respondent which relate to the two executries, the Tribunal is invited to approach this matter on the basis that particular responsibilities fall upon the shoulders of a solicitor executor and that is all the more so where, as was the case in relation to these two executries, the solicitor was the sole executor. It matters not whether he was in practice as a principal or an employee or as a consultant, whether employed or self employed.

In the joint bundle which the Tribunal has before it there are excerpts from Law Practice and Conduct for Solicitors, Second Edition, Bruce Ritchie & Alan Paterson and from Smith & Barton, Procedures and Decisions of the Scottish Solicitors Discipline Tribunal, reproduced between pages 42 and 47 of the joint bundle. The starting point is the passage at page 43, where the learned authors set out the professional duties owed to beneficiaries by solicitors acting *for* executors, particularly in relation to communication and keeping beneficiaries informed.

These duties are included within the responsibilities of a solicitor executor. The passage in the middle of page 44, is worth repeating. The learned authors say:-

“In an executry where the solicitor is an executor, particularly if the sole executor, not only is there a professional duty to correspond with beneficiaries, there is also a legal obligation to account to them for the estate. Failure to do so within a reasonable time has led to findings of professional misconduct and in a case in 1985 the Discipline Tribunal commented that it was particularly significant that the solicitor complained of was the sole executor.” The footnote refers to case number 625/85, and to Smith & Barton at page 141.

Page 141 of Smith & Barton is reproduced as numbers 46 and 47 of the joint bundle. At the top of the page there are quotations from that case but since the Tribunal has before it a redacted copy of the decision in case number 625/85 I will go straight to that decision.

The relevant findings begin on the middle of page 2 and the bottom of page 5 of the decision. Between the demise of the deceased on 4<sup>th</sup> August 1968 and July 1969 the first respondent in that case who was the solicitor executor dealt with the administration of the estate. He obtained confirmation. Between July 1969 and May 1977, when the second respondent left the firm, it was he, the second respondent, who was responsible for dealing with the estate. He failed adequately to do so. The finding of professional misconduct against the first respondent was restricted to the period from 1977 to July 1983, in other words, after he had taken the executry back from his erstwhile partner.

(It is submitted that the Tribunal sitting today might have convicted the first respondent of misconduct over the whole period of the executry.)

The significant passage is to be found on page 9, starting four lines from the top of the page. The solicitor executor in this case finds himself on much the same position, having been on notice since at least since June 2004 that Mr Greer was not dealing with matters in a satisfactory manner.

On behalf of the Council I seek convictions for professional misconduct in respect of all five charges set out on page 10 of the complaint. In relation to charge 2 (guardianship) I would submit that that should be in cumulo with other findings.

Charges 1 and 3 can amount individually to professional misconduct. Charge 4, I would submit, merits an in cumulo finding.

Despite his status as an employee of the firm rather than a principal, the respondent as solicitor executor had duties in relation to the administration of the estate which it is submitted included the control and supervision of Mr Greer in circumstances in which he had been charged with the day to day administration of the estate.

Charge 5 may of course be seen as an aspect of charge 1 and the Tribunal may take the view that it would be appropriate to make an in cumulo finding in relation to charge 5.

It has to be born in mind that the respondent in this case could as he has admitted himself, instructed another firm of solicitors and in evidence he suggested the name of such a firm. He could equally well have resigned office as executor. He did neither and in those circumstances gave rise to a continuing failure in his duties as solicitor executor and accordingly is guilty of professional misconduct."

## **SUBMISSIONS FOR THE RESPONDENT**

The Respondent referred to his written submissions which were as follows:

- "1) The first instructions in Mrs. O's Estate was given directly by Mr S. a family friend who contacted Mr Greer direct. This was on the 30<sup>th</sup> July 2001.( page no. 1 of the Inventory of Productions for the Council and item Number 4 of the Joint Minute of Admissions) This was in a year that the Respondent held a Restricted Practising Certificate whereby said Certificate states inter alia "The holder of this Practising Certificate must receive full supervision of his actings." Accordingly the Respondent was a subordinate at the time of first instruction and in the years thereafter which shall be discussed hereinafter .The Respondent's wife of 46 years, Mrs Jennifer Kathleen Hogg, who resides with him and who in evidence confirmed she had been the Respondent's legal secretary during his time in the firm of Alder Hogg & Co (hereinafter referred to as the firm) said," She saw fifteen boxes, at least, dumped in front of [Mr Greer's secretary]".
- 2) Mr Greer was an experienced Law Accountant who regularly undertook Executry work. (Joint Minute of Admissions paragraph 3) who was the husband of the sole proprietrix of Alder Hogg&Co until 2007 when she assumed Mr. Philip Hogg as a partner. They then remained partners until the Judicial Factor was appointed to the firm. Mr Greer holds a Bachelor of Engineering (Honours) from Glasgow University and was a member of The Society of Law Accountants (hereinafter referred to as SOLAS) in Scotland from 1997 to 2006 according to the Respondent's Second Inventory of Productions pages 12 to 15 inclusive. The Respondent gave evidence stating that he had not been told by Mr. Greer that his SOLAS membership had expired. Mr. Greer was also the firm's Office Manager and Cashier. (see page 23 paragraph 7.2 of the Bundle).
- 3) Mr Greer carried out the day to day work on the numerous files he stated he had in his possession. (Production number 11 in the First Inventory of Productions for Council). The executry files were in the possession of Mr Greer as was the file relating to the proposed Guardianship for Mr O.
- 4) The Respondent was not the solicitor involved in the winding up of the Estates of Mr. and Mrs O. Although the respondent was the executor the solicitor involved in the winding up of the estates was Mrs Alison

Greer who together with her husband formed the firm's Executry Department. (see pages 32, 33 and 34 of the Bundle). Until the Respondent became aware of the Guarantee Sub-committee meeting in April 2012, as mentioned in Clause 21(i) herein, (the text message), Mr. Greer was a trusted fellow employee. The Respondent's wife, in evidence, who stated that she had acted as the Respondent's legal secretary, confirmed that she was not involved in the winding up of the estates. She also confirmed in her evidence that she trusted Mr. Greer.

- 5) Mrs Greer was responsible for supervising her husband, particularly in executry matters which was her area of expertise. She had apparently failed to do so for a "significant period of time" (see last paragraph of page 33 of the Bundle).
- 6) The Respondent was not responsible for the supervision of Mr. Greer. Mrs Greer was the solicitor responsible for such supervision. The Respondent was at all times an employee of the firm. The Respondent's Second Inventory of Productions contains copies of the Respondent's original Practising Certificates for the period when he joined the firm (pages 1 to 8), the Respondent's P45 (page 11). The Respondent's Third Inventory of Productions contains a copy of the Respondent's P60, a copy of his notification of Redundancy and correspondence relating to his calculation of holiday pay (see pages 8 to 13 inclusive). The Respondent gave evidence that he was an employee at all times. The Joint Minute of Admissions states that the Respondent was an employee at paragraph number 1.
- 7) The Respondent gave evidence that he had been unhappy in his employment and had sought employment elsewhere at the start of 2010. He produced an Abstract of his health records (page 1 of his Third Inventory of Productions) which shows that he had a severe chest infection, thought by him to be pneumonia, in late October 2009. He produced email correspondence with Kevin W A Davidson in response to an advertisement in the Journal in February 2010 (see items 19 to 23 inclusive of the Respondent's Second Inventory of Productions). The Respondent's wife, in evidence, when asked how she had been treated at the firm replied, "Not very well." She also gave evidence that she had found out at the end of November 2009 that part of her own and the Respondent's salaries had been deducted the sum of £800. The Respondent's wife had, in fact, been off work with a splenic infarction (see Abstract of Medical Records page 2 subparagraph 5 in the Respondent's Third Inventory of Productions) although she did not specifically mention this in her evidence. Accordingly it can be shown that, although the Respondent was a close family member, the family relationships at times could be strained. The Respondent was never, at any time, part of a controlling group or given any special treatment.
- 8) The Respondent has no direct memory of the files or their content because he simply wasn't the solicitor involved in the winding up of either of the Estates of Mr. and Mrs. O. What memory he has is of talking to Mr Greer while the estates were being wound up and of being told of the various problems that had arisen. He has no memory at all of there being gaps in the process as he said in cross-examination. The Respondent's wife in response to a question by the Chairman also confirmed that she wasn't aware of a gap in work being done in the Estates. The Respondent was reliant on the abilities of Mr. and Mrs. Greer who formed the executry department in the firm.
- 9) The Respondent's main duties were dealing with Civil Court Work (mainly debt collection, contract disputes, separation, divorce and guardianships) as stated in the Respondent's email to Kevin W A Davidson dated 24<sup>th</sup> February 2009 (page of the Respondent's Second Inventory of Productions). The Respondent's wife gave evidence that the Respondent, "Did General work, wills, Powers of Attorney, child



custody, commercial leasing". Divorce was added as a response to a further question by the Respondent to his wife. The Respondent gave evidence under cross examination that he did not deal with the IHT forms in executries which he believed had come into effect in 2003.

- 10) The Respondent's wife gave evidence that Mr. Greer held the password to her computer. She said he used her computer when she wasn't there. She also stated that her computer stopped working at the September Weekend before the firm collapsed and she suspected Mr. Greer of sabotaging it.
- 11) One of the main difficulties in winding up both estates was that it had fallen into intestacy and this resulted in Mr Greer having to carry out extensive genealogical work himself and also using his father Mr James Greer who also has experience in genealogical research. The Respondent and his wife both gave evidence that both Mr. Greer and his father had experience in genealogical research. See also Paragraph 18 of the Joint Minute of Admissions. Some beneficiaries could not be found. This meant that Missing Beneficiaries Insurance would be required. This in turn meant instructing Title Research and following that up with Missing Beneficiaries Insurance. The report by Title Research was checked by Mr Greer against his own work (Production 39 of the Council's Inventory of Productions). Eventually Missing Beneficiaries Insurance was obtained.
- 12) The other problem was the sheer volume of paperwork which Mr Greer said he had to review. See page 3 paragraphs two and three of the Council's Inventory of Productions. This note stated that Mr Greer said "he had barely scratched the surface as there was so much paperwork to review". He also went on to state "that recent financial information seemed to be missing, so we were having to piece together information from what could be found in the house, along with incoming mail". In addition to the foregoing problems there was an additional problem to which Mr. Greer referred in his letter to Blackadder McMonagle dated 31<sup>st</sup> January 2005. He stated (see page 24 of the Council's Inventory of Productions paragraph 2, second sentence and following), "...significant complications have arisen because in his latter years, it would appear that Mr.O destroyed a lot of his incoming mail. When Mr Greer went through Mr O's possessions with Mr and Mrs S, we located significant correspondence relating to Mr O's financial dealings in the 1960's, 1970's and 1980's. However there would appear to be very little, if any, information relating to any transactions in the decade or so leading up to his death. Through the course of our investigations, we have determined that much of the historic correspondence related to investments which he no longer held at the date of his death. Essentially, over the past year or so, it has been an exercise in carefully monitoring Mr O's incoming mail and then writing to the various companies involved with a view to identifying assets." See also paragraph 20 of the Joint Minute of Admissions.
- 13) The Respondent was very careful to consider professional ethics when a problem had arisen regarding the sale of the house. (see paragraph 21 of the Joint Minute of Agreement). The Respondent's wife in her evidence and Mr JM, who sent a testimonial which forms part of the Bundle, state that the Respondent is a man of integrity. The Respondent's wife also said in her evidence that the Respondent was honest and hard working.
- 14) The Respondent freely admitted that he had signed the Inventory of the Estate for Mr O's Estate which did not include any moveable items. As he explained he thought that there was or should have been some disclosure or prior communication with the Commissary Clerk but it turns out there is no such communication.

- 15) With regard to the Eik in Mr O's Estate which the Respondent signed it is agreed in the Joint Minute of Admissions (paragraph 29) that the Eik in Mr O's Estate and the Inventory in Mrs O's Estate were prepared by Mrs Alison Greer. The Respondent signed those documents believing they were accurate. No evidence was led by Council to show exactly how the interest on Mrs O should have been included in the Eik to Mr O's Estate other than item 2 on the Eik which shows, "beneficial interest in the unadministered portion of the estate of [Mrs O]." The Respondent in his evidence stated that he had no experience in completing IHT forms. These documents were prepared by Mrs Greer who had such experience and who was in charge of the Executry Department. The Respondent was surely entitled to rely on Mrs Greer's experience in completing these forms.
- 16) With regard to Clause 26 of the Joint Minute of Admissions and Production number 32 referred to therein, the Respondent gave evidence that he was not the author of the note and that it contained the wrong reference. The Respondent's wife said the note "wasn't the way [referring to the Respondent] would have dictated it". She also made reference to the fact that she had no idea who [CR], referred to in the note, was.
- 17) Again with reference to Clause 26 of the Joint Minute of Admissions the Respondent gave evidence that he was not the author of the letter and that the letter clearly had the wrong file reference. The file reference shown on the letter was "DGH/JKH/HOGG3/4 rather than OLIV3/1 which he believed to be the proper file reference. He also pointed out that the word "finalising" on page 2 had been spelt "finalizing" which was an American spelling and Mr Greer had been in America for two years. The Respondent's wife stated in her evidence that the letter was not typed by her even though it contained her reference. She also stated that she would not use a "z" to spell finalising. She confirmed under cross examination that she would have changed it back if the programme had spelt that word with a "z." The Respondent's wife also stated that whoever had typed the letter had, "gone into our own private stuff to get the reference". She confirmed that Mr Greer had access to her computer.
- 18) With regard to Clause 27 and 28 of the Joint Minute of Admissions both the Respondent and his wife stated in evidence that they did not, at the time of the letters, know what a GEDCOM file was. Only Productions 36 and 37 were directly referred to by the Respondent's wife.
- 19) When cross-examined by Mr Lynch the Respondent was asked if he thought he could have done better. He responded that, "He had thought about this a thousand times and that with hindsight he could have done better". He said that it looked different to him at the Tribunal today than it actually felt at the time. He said in evidence that he never at any time felt there was a "red flag" that needed addressed. The Respondent's wife as stated above also said that she wasn't aware of any gaps.
- 20) The First Inventory of Productions for the Respondent (named simply "Inventory of Productions") is a true copy of the minute of the Council's Professional Conduct Sub-Committee meeting of 13<sup>th</sup> March 2014. This minute is also referred to at Clause 36 of The Joint Minute of Admissions and was referred to by the Respondent in his evidence. The Sub-Committee stated that (seven lines down on page 3) "First, the solicitor (defined on the first page of the minute as the Respondent) was not acting as a solicitor in the winding up of the estate. The winding up of the estate was being carried out by Mr Greer, and as a non principal the solicitor [the Respondent] was not ultimately responsible for his supervision." ... and twelve lines down on this page, "on the basis of information provided by the solicitor's representative, for which

there was no contradictory evidence, Mr Greer had deliberately hidden matters from the solicitor" As a result the Sub-Committee decided to take no action against The Respondent.

- 21) Amongst the Bundle are copies of text messages exchanged between the Respondent and his brother, Mr Philip Hogg, one of the former partners of the firm. These were read out by the Respondent in his evidence. The copies with the Bundle were not easy to read and the Respondent produced his own copies which were photographic in style. In order to assist the Tribunal the Respondent narrates again the details of the text exchanges.
- i) The first one was the Respondent stating that Philip had said that nothing could be done on the estates of Mr and Mrs O because they were part of the Law Society's Investigation from October 2011 and that he had said the files had been sent to the Auditor of the Court of Session the following May (2012). The Respondent asked Philip to confirm the files were returned just before the Judicial Factor was appointed. (see page 35 of the Bundle). Philip responded (see page 36) that the LSS came in October 2011, issued their Executive Summary in November 2011 and for three months it went back and forth with comments mainly added by Kenneth (Mr Greer) and Alison (Mrs Greer) because apart from some scanning charges being deemed fees and not outlays it was all about some executry files and obviously mainly O The LSS visited again for an updated inspection in February 2012 and then issued their S39 or S40 letter about appearing before the GFSC (Guarantee Fund Sub-Committee of the Law Society of Scotland) Philip then goes on to narrate, on page 37, that he personally delivered the files by car." .after Kenneth initially dilly dallied and picked the files up sometime in August/September 2012."
  - ii) The second text message exchange was the Respondent asking, " Phil you also told me on Friday that some of the beneficiaries in O's Estates weren't returning the Indemnity forms and that was holding things up in 2011. Is that what Kenneth told you? See page 38 of the Bundle. Philip's response was, "I can't remember if he said that at the time or subsequently". The Respondent then asked, "Did he tell you this before the JF was appointed? ". Philip responded, "I can't say for sure when. P". Production page 49 of Council's Inventory of Productions shows that Mr Philip Hogg had told the Respondent about this problem in July 2011. It also shows that the Respondent referred the matter to his superior.
  - iii) The third text message exchange was as follows:-  
 "Hi Phil! You said you had a letter or something where Kenneth (Mr Greer) admitted he had misled or lied to you. I think it was addressed to your lawyer. Can I have a copy?" The response was, " It was not a letter. My lawyer told me what Kenneth told him on the phone.P" The Respondent asked, " Could you get him to put it in a letter to you? D" The reply was "He closed his file months ago. If he is willing to do so and you are willing to meet any costs of him providing such. P" The Respondent replied that he didn't have any money. See pages 39 and 40 of the Bundle.
- 22) The Respondent's Third Inventory of Productions contains the letter by FMC solicitors to [LY], Complaints Investigator of the Law Society of Scotland dated 14<sup>th</sup> February 2014. On page 5 of the Productions (page 2 of the letter, paragraph [3]) Mr Greer [who was running all these Trusts and Executries within the firm] made a clear statement to the Auditor, before employees of the Law Society of Scotland that the Respondent knew nothing of what was going on.

- 23) Pages 14 and 15 of the Respondent's Third Inventory of Productions is a copy of a text message the Respondent received from his brother, Philip regarding Philip's attendance at the Guarantee Fund Sub-Committee meeting. The Respondent referred to this text message in his evidence; that it was taken from his wife's phone. He had forwarded it to her. This again confirms that "Kenneth" (Mr Greer) had hidden matters from the Respondent and was confessed to in another forum. The other times being in front of The Auditor and to Mr Philip Hogg's lawyer. This was also accepted by the Council's Professional Conduct Sub-Committee as shown above. (see paragraph 20 herein).
- 24) Page 18 of the Respondent's Second Inventory of Productions is a true copy of point 6 Schedule 20 of the Executive Summary and shows the system used by the firm could be backdated. Pages 24, 25 and 26 of the Respondent's Inventory of Productions show that the Respondent took steps to resign as executor and have another firm deal with the winding up of the estates following the collapse of the firm. These items were not directly referred to in evidence. They are referred to at Clause 36 in the Joint Minute of Admissions.
- 25) No direct evidence was led to show that the Respondent failed to communicate with beneficiaries when they contacted him. Indeed the available evidence tends to show that he responded when a beneficiary contacted him direct.
- 26) The proposed Guardianship for Mr O was again a matter taken on and dealt with by Mr Greer under the supervision of Mrs Greer, the sole proprietrix of the firm, at that time. The Respondent did not initiate the procedure. Clearly steps were being taken by Mr Greer towards appointing a Financial Guardian for Mr O. He had taken part in a Case Conference, had corresponded with and had had telephone conversations with the appropriate officer of East Dunbartonshire Council. He had prepared a draft Petition. The last letter from East Dunbartonshire Council was dated 8<sup>th</sup> January 2003 not long before Mr O died on 24<sup>th</sup> February 2003. See page 14 of the Council's Inventory of Productions.
- The appointment of a Guardian under The Adults with Incapacity (Scotland) Act 2000 was the least restrictive option for looking after Mr O's affairs after his wife's death. See Principal 2 stated in the Respondent's Second Inventory of Productions pages 9 and 10 which are referred to in Clause 14 of the Joint Minute of Admissions.
- When Mr. Greer asked him, the Respondent agreed to act as Financial Guardian but Mr O died before he was appointed. Accordingly the Respondent never was the Financial Guardian of Mr O.
- Section 77 of The Adults with Incapacity (Scotland) Act 2000 states also that any appointment terminates on the death of the Adult.
- 27) Although paragraph 2 in the Joint Minute of Admissions states that "the Respondent alone was able to take up the office of executor", the Respondent would submit that this is a statement of fact rather than law. The late Mr O would have in fact been a joint executor until he died along with the Respondent until he was declared incapax, after obtaining the appropriate medical reports, and was then removed by a Petition for his removal on the grounds of his incapacity. The Confirmation in the estate of Mrs O (shown on pages 72 and 73 of Council's Inventory of Productions) clearly narrates that the late Mr O was "also appointed executor" (see paragraph numbered 2 on page 73. Mrs O's Will clearly appoints both executors (see page 1 of the Bundle).
- 28) The Respondent, as an employee and the likelihood that he was being misled by Mr. Greer, was simply not in possession of sufficient facts to make him culpable.

- 29) There must be reasonable doubt that the Respondent is guilty of the charges laid against him in all the circumstances herein narrated.

### CONCLUSIONS

1. The Respondent was not the solicitor acting in the winding up the estates of Mr and Mrs O. That solicitor was Mrs Greer.
2. The Respondent was throughout his period in the firm an Employee.
3. As an employee the Respondent was not in a position to supervise a fellow employee namely Mr Greer. He could not go beyond the actual hierarchy of the firm.
4. The Respondent was not the Financial Guardian of Mr O.
5. That the Respondent had been misled and lied to by Mr Greer regarding his actions on both estates.

### PLEA

**To find the Respondent not guilty of all the charges of Professional Misconduct, numbered 1 to 5, laid against him in the Complaint."**

It was clarified that the Respondent did not accept all the Fiscal's additional proposed findings in fact and he addressed each of these separately. The Tribunal retired to deliberate.

### DECISION

The Tribunal proceeded on the basis of the agreed facts in the Joint Minute along with the evidence of the Respondent and Mrs Hogg. The Tribunal found both witnesses to be credible and reliable, making allowances for the passage of time since the alleged misconduct. Mrs Hogg's evidence was coloured to a degree by her support for her husband but overall, the Tribunal considered that both witnesses were attempting to tell the truth as they saw and remembered it. They had worked in a difficult environment and had been let down by family members and colleagues. The Tribunal also considered the productions agreed by the Joint Minute and took them into account. However, it put aside productions 32-35 and 38 as it was not satisfied that the Respondent produced these letters and notes. The Respondent and his wife gave credible reasons why he was not the author. That evidence cast doubt on the disputed documents and therefore the Tribunal decided not to take them into account.

The Tribunal noted that according to the test 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 facts in

misconduct cases before the Tribunal must be proved beyond reasonable doubt. The Tribunal considered each averment of professional misconduct in turn and applied the Sharp test.

Firstly, the Complainers averred that the Respondent failed to act with appropriate diligence and unconscionably delayed in the administration, winding up and distribution of Mr and Mrs O's estates from the dates of their deaths in February 2003 and July 2001 respectively until the appointment of the Judicial Factor in October 2012. It is the duty of an executor to deal diligently with an estate and to bring it to completion within a reasonable time. There is also a legal obligation to account to the beneficiaries of the estate. The delays of eleven and nine years in dealing with the executries was unacceptable. There was a failure to act diligently in winding up the estates. The Respondent claimed that he was not responsible because he was the client and not the solicitor. However, the Tribunal rejected this argument. The Respondent was both a solicitor and an executor. The responsibility to wind up the estate and account to the beneficiaries rested on the Respondent as executor. The public will often choose solicitors to be their executors due to their knowledge and skills. The Respondent had been appointed as executor in this case due to his professional relationship with Mr and Mrs O. If solicitors accept appointment, they must carry out their duties diligently and without delay. Failure to do so brings the profession into disrepute. A solicitor is required to maintain standards in relation to his/her private or commercial life as well as in his/her professional practice. There will be occasions, as in this case, when an executor who is also a solicitor will engage a firm to act on his/her behalf. This does not mean that the executor's responsibilities are delegated. Failure to reach the proper standards required of an executor was relevant to the question of misconduct.

The executries were not handled efficiently. Even making allowances for the difficulties involved, eleven years was an inordinate time to take to complete them. This alone was a "red flag" which should have prompted the Respondent to make further inquiries. Reassurances from Mr Greer should not have allayed his fears. He should have taken a more proactive role. He was the client and the sole executor. He therefore had control but chose not to exercise it. The Respondent should have attempted to ensure that the estate was being wound up properly. Alternatively, he could have appointed other solicitors, or resigned as executor. The Respondent allowed himself to be duped because of the family environment. He accepted things at face value which might not have done if he had instructed a different firm. It was not appropriate for him to sign the application for confirmation certifying that the inventory constituted a complete record of the deceased's property when he knew that there was significant moveable property not contained in the inventory. These were not the actions of a diligent executor who was also a solicitor. The Respondent's conduct in allowing such a lengthy delay and his failure to diligently wind up the

executry was a serious and reprehensible departure from the standards of competent and reputable solicitors *in cumulo* with the failures in communication in the third averment of misconduct.

Secondly, the Complainers averred that the Respondent unduly delayed and ultimately failed to obtain the appointment of a financial guardian or *curator bonis* to Mr O between 2001 and the date of his death in 2003. Where a solicitor has assumed responsibility for the affairs of an incapacitated adult, there is a duty to obtain the appointment of a *curator bonis* or after April 2012, a financial guardian, within a reasonable time. The Tribunal recognised the importance of obtaining financial guardianship swiftly. For eighteen months before he died, Mr O's financial affairs were in limbo.

However, there was evidence in the file that the matter was being pursued. For example, Mr Greer's file note of 27 June 2002 (Production 12 in the Complainers' First Inventory of Productions) recorded that it was agreed at a meeting on 22 May 2002 that it would be appropriate for the Respondent to be appointed as financial guardian. According to that note it was agreed that the Council's legal department would contact the firm regarding the preparation of the Guardianship application. Mr Greer noted that he spoke to an employee in the Council's legal department and discovered this was the first such application they had considered. It was anticipated that the application for Financial Guardianship would be incorporated into the Council's style for the welfare guardianship application. This is confirmed in Mr Greer's letter to the Bank of Scotland dated 27 June 2002 (Production 9 in the Complainers' First Inventory of Productions). In that letter the firm sought an overdraft facility to cover Mr O's bills during this period. It does not appear to have been clarified until January 2003 that the guardianship was only required in respect of financial matters (Production 14 in the Complainers' First Inventory of Productions). According to the evidence on the file and the Respondent's testimony, the way forward was not clear. The legislation was unfamiliar to the parties and there seems to have been doubt about whether a welfare guardian was required which was not resolved until the month before Mr O's death. In these circumstances, the Respondent's failure to secure the financial guardianship was not sufficient to amount to professional misconduct or unsatisfactory professional conduct.

Thirdly, the Complainers averred that the Respondent failed to keep the beneficiaries of the estates adequately and timeously informed of developments. In an executry where the solicitor is an executor, there is a professional duty to correspond with beneficiaries and keep them reasonably informed. There was evidence that when contacted by the beneficiaries the Respondent did respond to them. However, these communications were reactive and insufficient given the length of time it took to complete the executry. The Respondent had delegated this task to the firm but did not retain proper oversight of this

responsibility as executor. The Respondent became aware of the beneficiaries' complaints during the executry and this should have put him on notice that better communication (and greater diligence) was required. *In cumulo* with the first averment of misconduct, this was a serious and reprehensible departure from the standards of competent and reputable solicitors. By accepting appointment as executor, the Respondent assumed responsibility for communicating with the beneficiaries. The Respondent did not perform this duty properly.

Fourthly, the Complainers averred that the Respondent unduly delayed in the submission of an inheritance tax return to HMRC with the consequence that additional interest of £23,264.79 was charged, and failed to include in the eik to the confirmation in Mr O's estate, the interest of the deceased in the estate of Mrs O. A solicitor acting in an executry has a duty to submit timeous returns for inheritance tax purposes, if necessary making payments to account of the tax. The Tribunal invited the parties to address them specifically on the delay and the figure of £23,264.79 said to be the additional interest charged by HMRC due to the delay with reference to the inheritance tax account (Production 40 in the Complainers' First Inventory of Productions). The interest period ran from 1 September 2003 to June 2007. The Tribunal considered that it was unlikely that the executry could have been completed by 1 September 2003 even if the Respondent had acted properly. There was insufficient evidence before it to quantify the additional interest due to the Respondent's delay. Therefore, the Tribunal could not be satisfied that the conduct constituted professional misconduct or unsatisfactory professional conduct. There was little evidence provided regarding the failure to include in the eik to the confirmation in Mr O's estate the interest of the deceased in the estate of Mrs O. Without more information, the Tribunal was not satisfied that this was a conduct issue, as opposed to a mistake or negligence. Therefore, the Tribunal found the Respondent not guilty of this charge.

Fifthly, the Complainers averred that the Respondent failed to exercise proper and sufficient control and supervision over Mr Greer in relation to the winding up of the estates of Mr and Mrs O. A solicitor appointed to act as executor has a duty adequately to supervise his/her unqualified staff to whom work has been delegated. The Respondent used the services of Mr Greer to discharge his duties as executor. However, Mrs Greer was the solicitor who had a duty to supervise Mr Greer. The Respondent was an employed solicitor in the firm and no supervisory responsibility over Mr Greer. Therefore, the Tribunal found the Respondent not guilty of this charge.

In mitigation, the Respondent apologised to the beneficiaries for the delay they suffered. He said that it should not have happened. He and his wife had suffered badly. He had not worked since 2012. He and



his wife suffered ill health. The Respondent described the community work he has carried out. He gave details of his income.

The Tribunal considered the appropriate sanction with regard to its indicative sanctions guidance. The Respondent did not pose an ongoing risk to the public. He had been found guilty of only two of the five charges of professional misconduct. The conduct related to one case in a lengthy career. The Respondent had not worked as a solicitor since 2012. He had demonstrated some insight and contrition. He had cooperated with the Complainers and the Tribunal. There had been no repetition. The Tribunal had regard to the reference produced on behalf of the Respondent. In all these circumstances a Censure was the appropriate sanction.

Following submissions on expenses and publicity, the Tribunal decided that the appropriate award of expenses was one in favour of the Complainers. However, given the divided success, that award was modified to 75%. The Tribunal ordered that publicity should be given to the decision and that publicity should include the names of the Respondent and the relevant family members in accordance with paragraphs 14 and 14A of Schedule 4 to the Solicitors (Scotland) Act 1980. There was no requirement to identify any other person as publication of their personal data may damage or be likely to damage their interests. The Tribunal allowed the Secondary Complainer 28 days from the date of intimation of these findings to lodge a written claim for compensation.



**Kenneth Paterson**

**Vice Chair**