

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

DECISION

**in Appeal under Section 42ZA(10) of the
Solicitors (Scotland) Act 1980 as amended**

by

**WESLEY MITCHELL, Glenwarren,
Shanmullagh, Ballinamallard**

Appellant

against

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

First Respondents

and

**HUGH COLIN SOMERVILLE, 39 Bridge
Street, Musselburgh**

Second Respondent

1. An Appeal was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42ZA(10) of the Solicitors (Scotland) Act 1980 by Wesley Mitchell, Glenwarren, Shanmullagh, Ballinamallard (hereinafter referred to as "the Appellant") against the Determination made by the Council of the Law Society, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the First Respondents") dated 10 September 2020 not to uphold, or award compensation in respect of, various heads of complaint of unsatisfactory professional conduct against Hugh Colin Somerville, 39 Bridge Street, Musselburgh (hereinafter referred to as "the Second Respondent").

2. In accordance with the Rules of the Tribunal, the Appeal was formally intimated on the First Respondents and the Second Respondent. Answers were lodged for the First Respondent. The Second Respondent did not lodge Answers or enter the process.

3. Having considered the Appeal and Answers, the Tribunal set the matter down for a virtual procedural hearing on 22 April 2021 and notice thereof was duly served on the parties.
4. At the virtual procedural hearing on 22 April 2021, the Appellant was present and represented himself. The First Respondents were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. Another procedural hearing was fixed for 22 June 2021. Notice thereof was duly served on the parties.
5. At the virtual procedural hearing on 22 June 2021, the Appellant was present and represented himself. The First Respondents were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. A preliminary hearing was fixed for 29 September 2021. Notice thereof was duly served on the parties.
6. The Appellant lodged a motion under Rule 28. The Tribunal fixed a procedural hearing on 14 September 2021 to deal with that motion. Notice thereof was duly served on the parties.
7. At the virtual procedural hearing on 14 September 2021, the Appellant was present and represented himself. The First Respondents were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The virtual procedural hearing was continued to 23 September 2021.
8. At the continued virtual procedural hearing on 23 September 2021, the Appellant was present and represented himself. The First Respondents were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Tribunal's decision in relation to the Appellant's motion is contained within its Interlocutor and Note of 23 September 2021. The case was continued to 29 September 2021 for the preliminary hearing already fixed. Notice of the preliminary hearing was served on the parties.
9. On the morning of 29 September 2021, the Tribunal adjourned the preliminary hearing due to take place on that date to 9 November 2021 due to the Appellant's ill health. Notice of the preliminary hearing was served on the parties.
10. At the virtual preliminary hearing on 9 November 2021, the Appellant was present and represented himself. The First Respondents were represented by their Fiscal, Grant

Knight, Solicitor, Edinburgh. The Tribunal's decision on the preliminary issues is contained within its Interlocutor and Note of 9 November 2021. The Tribunal fixed a procedural hearing for 26 January 2022. Notice of the procedural hearing was served on the parties.

11. At the virtual procedural hearing on 26 January 2022, the Appellant was present and represented himself. The First Respondents were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Tribunal fixed a hearing for 15 March 2022. Notice of the procedural hearing was served on the parties.
12. At the virtual hearing on 15 March 2022, the Appellant was not present or represented. The First Respondents were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Appellant had by email to the Tribunal Office on 14 March 2022 requested an adjournment of the hearing. The Tribunal's decision on the motion to adjourn is contained within its Interlocutor and Note of 15 March 2022. The Tribunal continued the hearing to 25 April 2022. Notice of the continued hearing was served on the parties.
13. At the continued virtual hearing on 25 April 2022, the Appellant was present and represented himself. The First Respondents were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Second Respondent did not lodge Answers or enter the process. He had waived his right to appear or be represented and the Tribunal concluded accordingly that it was appropriate to proceed in his absence. Parties made submissions. The Tribunal began its deliberations which were continued to 16 May 2022. A continued hearing was set for 17 June 2022.
14. At the continued virtual hearing on 17 June 2022, the Appellant was present and represented himself. The First Respondents were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Second Respondent had not entered the process. The Chair outlined the Tribunal's decision to parties.
15. Having given careful consideration to all the documents lodged and the oral submissions from both parties, the Tribunal:-
 - (a) Quashed the Determination of the First Respondents to take no action in relation to Issue 3 and upheld this head of complaint; and

- (b) Confirmed the Determination of the First Respondents to take no action in relation to Issue 5 and refused to uphold this head of complaint.

16. The Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference 17 June 2022. The Tribunal, in respect of the Appeal under Section 42ZA(10) of the Solicitors (Scotland) Act 1980 by Wesley Mitchell, Glenwarren, Shanmullagh, Ballinamallard (“the Appellant”) against the Determination made by the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh (“the First Respondent”) dated 10 September 2020 and intimated to the Appellant on 5 October 2020 to take no action in respect of complaints made by the Appellant against Hugh Colin Somerville, 39 Bridge Street, Musselburgh (“the Second Respondent”); (a) in relation to Issue 3, Quashes the Determination to take no action and Upholds the complaint; and (b) in relation to Issue 5, Confirms the Determination to take no action; Invites parties to make written submissions on compensation, publicity and expenses by 22 July 2022; and continues the virtual hearing to 1 September 2022 at 12pm.

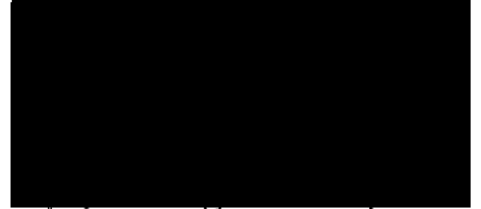
(signed)

Ben Kemp

Vice Chair

17. 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 Appellant by recorded delivery service on

IN THE NAME OF THE TRIBUNAL



Ben Kemp
Vice Chair

NOTE

The Appellant made several complaints against the Second Respondent. These related to the Second Respondent's involvement in the affairs of two elderly sisters, both clients, Ms A and Ms B. The Appellant was a friend of these ladies and a beneficiary of their wills. The Appellant was not himself a client of the Second Respondent. This was a "third party complaint".

For the purposes of this decision, there were two relevant and remaining heads of complaint, Issue 3 and Issue 5. These were as follows:-

"3. Mr Somerville acted inappropriately on 16 May 2012, the day of [Ms A's] death, when, he arrived hours after her passing at the home of the surviving [Ms B] with Mr X and Mr X's family members and told her the Will was "all wrong and needed to be changed", thereafter notarising, on her behalf, a Will prepared by Mr X, with Mr X's sister as witness.

5. Mr Somerville inappropriately witnessed a further Will prepared by Mr X for [Ms B] on 2 July 2012, despite the fact [Ms B] indicated she did not want to sign the document. Mr Somerville arrived at the home of the surviving [Ms B] with Mr X and persuaded her to sign it, advising that he would not leave until she did."

These heads of complaint were investigated by the Law Society Reporter. A report was produced recommending that the complaint in Issue 3 was partially upheld. The Professional Conduct Sub Committee of the First Respondents ("the PCSC") made no findings of unsatisfactory professional conduct against the Second Respondent.

Unsatisfactory professional conduct is defined in Section 46 of the Legal Profession and Legal Aid (Scotland) Act 2007 as:

"Professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor."

Unsatisfactory professional conduct lies on a spectrum between inadequate professional services and professional misconduct.

The Appellant appealed against the PCSC's decision under Section 42ZA(10) of the Solicitors (Scotland) Act 1980 in accordance with the Tribunal's Procedure Rules 2008. The matter called for various hearings as has been set out at the beginning of this decision. Some procedural and preliminary issues were determined in advance of the continued hearing on 25 April 2022. More detail about these decisions can be found in the Tribunal's interlocutors and notes of 23 September 2021, 9 November 2021, 26 January 2022 and 15 March 2022.

On 15 March 2022, the Tribunal directed the Respondent to provide a medical certificate on soul and conscience addressing his ill health and failure to appear at the Tribunal hearing on that date. He did not provide a soul and conscience certificate. In an email to the Tribunal Office, he gave more detailed information about his health and attached a prescription from his GP dated 15 March 2022.

At the continued hearing on 25 April 2022, the Tribunal had before it the Appeal as initially lodged and a "Note of Appeal" subsequently lodged by the Appellant, various documents lodged by the Appellant with his Appeal, Answers for the First Respondents, written submissions from the Fiscal, and the Interlocutors and Notes produced by the Tribunal at earlier stages of this case. It also had the email correspondence from the Appellant about his health as well as a copy prescription dated 15 April 2022.

The Fiscal invited the Tribunal to dismiss the appeal on the ground that the Appellant had not complied with the Tribunal's direction of 15 March 2022. The Tribunal had warned the Appellant that in the absence of satisfactory medical evidence, the appeal might be dismissed. In addition, the Fiscal noted that the Appellant had submitted on 9 November 2021 that he had settled the judicial expenses for a related court case from the legacy of the estate. The Fiscal had received information from the Second Respondent that the Appellant had been "economic" with that information. The solicitors were said to hold no record of the Appellant telling them they can abate his share to settle the judicial expenses and, in any case, the value of the expenses is greater than the Appellant's legacy. The Fiscal said the Appellant had therefore displayed a lack of candour in his submissions to the Tribunal.

The Appellant provided further information with regard to his health in the week that included 15 March 2022. He had tested positive for COVID. He had initially been unable to get an appointment with his GP but managed to obtain one on 15 March 2022. He was given a prescription for a chest infection. He had not been able to participate at the hearing. He was given no assurance that a soul and conscience report would be available within the timescale the Tribunal had given. However, he

had provided his prescription to the Tribunal. Regarding the matter of the judicial expenses, it was his belief that the expenses will be abated from his legacy. He disputed the value of the legacy given by the Fiscal and noted that he was due to receive a share of a property which had not yet been sold. He said that he was able to proceed with the Appeal hearing on 25 April 2022.

The Tribunal retired to consider this preliminary issue. It had no reason to doubt that the Respondent had COVID on 15 March 2022 and had experienced difficulties seeing his GP. The Tribunal was prepared to accept the information provided by the Appellant about his health at face value. It was content to give him the benefit of the doubt, even in the absence of a medical report which it had directed him to provide. The Tribunal was not convinced the information regarding the judicial expenses was relevant to this particular issue. It considered on balance that the pragmatic and fair approach was to proceed to hear the appeal, allowing parties to present their submissions that day.

SUBMISSIONS FOR THE APPELLANT

The Appellant submitted that the PCSC had made a decision based upon no evidence. He said that the decision was also contradictory of the evidence and unreasonable.

The Appellant referred the Tribunal to the report which had recommended that the PCSC made a finding of unsatisfactory professional conduct in relation to Issue 3. The PCSC had not followed that recommendation. The Appellant wished the Tribunal to take account of the Reporter's finding that on 16 May 2012 the Second Respondent's client had been,

“distraught and inconsolable with grief visibly presenting in a distressed state of mind, at times irrational and delusional in her conversation and falling into periods of hysteria, she said she wanted to die and be with [her deceased sister]”.

The Appellant submitted that Ms B had clearly stated to friends and colleagues that she did not know the reason why the Second Respondent attended at her house on 16 May 2012. She thought he was there to console her. Those others present assumed he was there to deal with the funeral and estate of Ms B's sister. No one had any belief he would present a will to her on that date. The Appellant referred to his own statement quoted at p27-28 of the report. He said the reason the will had been notarially executed was because Ms B had been unhappy to sign it. She was in a state of grief and confusion. The provisions of the will are not consistent with her stated wishes and the way she had lived. He said that she would have left clear instructions regarding the properties. The will does not

include sections present in other wills. Witnesses say she did not wish to sign the document and refused to do so. She maintained to others after this incident that she had not wanted to sign it. This was all done within hours of the death of her sister.

The Appellant highlighted the information in the report that the Second Respondent had been working on the basis that changes were to be made to both wills while both ladies were still alive. He noted that Ms B's sister had been in hospital for weeks before her death. Instruction could have been obtained if necessary. However, he did not think the changes were desired or offered. He submitted there had been a massive attempt to change the arrangements. The Appellant therefore had serious reservations about the will.

The Appellant noted that the Reporter at page 41 of the report highlighted in relation to the burden of proof that in a situation where the only available evidence is the opposing positions of the solicitor and complainer, there requires to be some additional independent evidence which weighs the balance in favour of one or the other to allow either position to be proved. He invited the Tribunal to accept the statement of NI as independent evidence supportive of the Appellant's position. NI had been a friend of the elderly sisters since the early 1960s and visited Ms B towards the end of her life when she was resident in a care home.

The Appellant highlighted that the PCSC decision included reference to "*the view of the medical staff as recorded*" and also made its decision having regard to "*the foregoing*" which included the reference to medical information. He noted that there was no medical evidence from 16 May 2012. The views of medical staff were expressed later when Ms B was in hospital. This was a major contradiction to the facts as found by the Reporter. The PCSC had given no reasons as to why it disregarded the Reporter's recommendation. Their decision was contradictory and unreasonable. The Appellant also disagreed with the Reporter's recommended sanction, saying that the maximum penalty should have been applied.

The Appellant submitted that there was a connection between Issue 3 and Issue 5. Issue 5 related to events on 2 July 2012, the date of execution of the final will. Ms B was having delusional moments, speaking as though her sister was present. She was distressed, afraid and anxious following a visit from the Second Respondent and Mr X who were in charge of her affairs. According to the Appellant, it was inconceivable that Ms B would have instructed those changes. Both wills were prepared in the most challenging circumstances. Ms B never deviated from what she had told her friends. She felt abused, deceived and bullied and asked her friends to seek justice on her behalf.

SUBMISSIONS FOR THE FIRST RESPONDENTS

The Fiscal referred to his outline written submissions. He suggested that the Tribunal's decision to work from the redacted version of the report would pose certain difficulties. The unredacted report gives more support to the PCSC decision because it contains full information. The Fiscal invited the Tribunal to ask itself where the PCSC had gone wrong.

The Fiscal noted that the Appellant's criticisms of the PCSC decision were that it disregarded the Appellant's evidence, it disregarded the absence of file notes, and it relied upon medical evidence from 2013 with regard to events in 2012. The Fiscal said that the answers to these issues were found at pages 6-12 of the report which contained redacted material. It is clear from the PCSC decision that it took into account the information in these redacted paragraphs.

The Fiscal referred to pages 18 and 19 of the report at paragraphs 43(r) and (s) which referred to witness statements. Page 14 of the report contains the information provided by the Appellant which includes quotations from his own statements. All of the information and documents supplied by the Appellant to the Reporter were summarised in unredacted form. His views were part of the report and the information considered by the PCSC. The PCSC had all the information it needed. It considered the Appellant's comments. He produced a follow-up statement which was included as the "Tabled Paper" before the PCSC.

The Fiscal argued that the PCSC did not use medical evidence from 2013 to substantiate events in 2012, rather it used the views of the medical professionals to assess the complainers' credibility. The Appellant had claimed to have had lengthy meetings with Ms B. The PCSC considered that this raised a question mark over his assertion that Ms B was incapax. The PCSC was satisfied that the factual basis of Issue 3 could not be made out. For the Appellant to succeed, he must show that the PCSC erred. The Appellant and the Tribunal do not have all of the information and the redacted pages of the report are "illuminating".

The Fiscal noted that the only evidence in the Appeal comes from the Appellant. He gives hearsay evidence of what he was told by the deceased. There is nothing in the Appellant's note of argument regarding Issue 5 providing sufficient detail for the Tribunal to say what evidence was present and what was misinterpreted. There is no competent ground upon which to believe the Appellant rather than the Second Respondent. The Appellant has his grievances and disputes events. Those are not questions for today. To be successful, the Appellant must show that the PCSC made an error of law.

The Fiscal reiterated that he and the Second Respondent were content for the Tribunal (but not the Appellant) to have the unredacted report. He also noted that in the Section 42ZA Appeal by Peter Stewart, the Tribunal made its decision with reference only to a redacted report.

DECISION

Unredacted Report

The Tribunal considered the Fiscal's invitation to read the unredacted report but decided it ought to be guided by the Tribunal's decision of 9 November 2021. The members of that Tribunal had examined the unredacted report. That Tribunal noted that although the redactions were extensive, the Appellant was aware of much of what was contained therein either from his own personal knowledge or from the unredacted material contained elsewhere in the report. That Tribunal was aware that its decision might make it more difficult for the Appellant to present his case and make the Tribunal's decision-making at any substantive hearing more difficult. However, those considerations or difficulties were not sufficient reason to override concerns about legal professional privilege. This was therefore an issue the previous Tribunal bore in mind when they decided that this Tribunal ought not to have the unredacted report. The Appellant was opposed to the Tribunal reading the report if he did not have access to it. The Tribunal concluded in any event that it could properly and fairly deal with this matter having regard to the redacted report and the accompanying evidence, as available to all parties, and that this would be the appropriate approach having regard to the previous decision of this Tribunal on this point.

Reporter's Report

In relation to Issue 3, the Reporter recommended that the PCSC made a finding of unsatisfactory professional conduct. The Reporter noted a considerable body of direct evidence regarding Ms B's presentation on 16 May 2012. That evidence came from the Appellant, DM, NI and GDS (also referred to in the report as the second complainer). The Reporter noted that Ms W was 93 years old and only hours before, had lost her twin sister, with whom she had lived her entire life. She was so physically stricken that she could not sign her name. There were obvious emotional manifestations of grief.

The Reporter noted that,

“a decision by a solicitor to take any instructions, on any matter, from any individual, only hours after suffering a close personal bereavement should be proceeded with cautiously in terms of being attuned to their obvious vulnerability at such a time” (Para 11, page 44 of report).

It was the Reporter’s conclusion that on any objective view there ought to have been at least a doubt in the mind of the Second Respondent as to Ms B’s capacity and he ought to have sought advice from a medical practitioner in accordance with the Law Society’s relevant guidance. In those circumstances, it could not be said that the Second Respondent had his client’s authority for his actions in relation to her new will or its notarial execution. However, the Reporter could find no evidence to support the allegation that the Second Respondent had told Ms B that the existing will was all wrong and needed to be changed.

In relation to Issue 5, the Reporter noted that there was conflicting evidence from the Appellant and the Second Respondent. The Second Respondent’s contemporaneous file note supported his position. The Reporter could find no evidence to contradict the Second Respondent’s position. The factual basis of the complaint could not therefore be made out.

PCSC Determination

In relation to Issue 3, the PCSC noted that the Reporter had recommended a finding of unsatisfactory professional conduct on the basis that the solicitor ought to have had doubt in his mind as to whether his client had capacity.

Referring to Law Society-v-Bruce de Wert (2019), the PCSC stated that the absence of a file note outlining the client’s condition and capacity was not an adminicle of evidence against the solicitor. Given the length of time the solicitor had been acting for the client, he was in as good a position as anyone to assess her capacity. Given the view of the medical staff as recorded, and the evidence of the lengthy meetings between the Appellant and the client, there had to be, at the very least, a “question mark” over the evidence of the complainers that the client had been incapax on the night. It could see no basis for coming to a different conclusion from the Reporter that there was insufficient evidence to prove the allegation relating to the existing will being “all wrong”. The PCSC was satisfied that there was insufficient evidence, even on the balance of probabilities to establish any of the factual basis of Issue 3.

In relation to Issue 5, the PCSC noted that the only evidence supportive of the allegation was what the complainer alleged he had been told by Ms B. The Second Respondent, on the other hand, had given direct evidence as to what had happened, and his version of events was supported by a contemporaneous file note. In addition, it said that given the evidence regarding the concerns raised by the medical staff, it could see no basis for preferring the evidence of the complainers over the Second Respondent.

Tribunal's approach to the Appeal

In an appeal under section 42A(10) of the Solicitors (Scotland) Act 1980, a complainer may before the expiry of 21 days beginning on the day on which a determination under subsection (1) or (2) not upholding the conduct complaint is intimated to him, appeal to the Tribunal against the determination. The Tribunal's powers in relation to appeals under section 42ZA(10) are contained in section 53ZB(2) which provides that on an appeal the Tribunal may quash the determination being appealed against and make a decision upholding the complaint and if it does so, where it considers that the complainer has been directly affected by the conduct, direct the solicitor to pay compensation of such amount, not exceeding £5,000, as it may specify to the complainer for loss, inconvenience or distress resulting from the conduct. Alternatively, it may confirm the decision.

In Hood, Petitioner [2017] CSIH 21, it was said that the Court should be slow to interfere with the PCSC's decision on an evaluative question and should only do so in three main situations. The first is where the Sub Committee's reasoning discloses an error of law, which may be an error of general law or an error in the application of the law to the facts. The second is where the Sub Committee has made a finding for which there is no evidence or which is contradictory of the evidence. The third is where the PCSC has made a fundamental error in its approach to the case by asking the wrong question, or taking account of manifestly irrelevant considerations or arriving at a decision that no reasonable PCSC could properly reach. The Tribunal has applied this same framework to appeals from the PCSC. The Tribunal noted that the PCSC is comprised both legal and lay members and its views on professional conduct matter should be afforded appropriate respect.

The Tribunal considered that it should analyse the PCSC's decision-making in terms of the tests in Hood. If there were grounds to disturb the PCSC's decision, the Tribunal would consider whether the Second Respondent was guilty of unsatisfactory professional conduct, by evaluating what a competent and reputable solicitor would have done in the circumstances. The Tribunal should only disturb the decision of the PCSC if one or more of the Hood grounds was met. It should not interfere with the decision just because it might have come to a different one on the evidence.

Unsatisfactory professional conduct was conduct which was not of the standard which could reasonably be expected of a competent and reputable solicitor (Section 46 of the Legal Profession and Legal Aid (Scotland) Act 2007). Unsatisfactory professional conduct lies on a spectrum between inadequate professional services and professional misconduct. The standard of proof to be applied to the evidence was the civil standard of balance of probabilities.

Tribunal's Decision – Issue 3

The Tribunal was persuaded that there were shortcomings in the PCSC's reasoning in relation to Issue 3 and that it had made a decision which was contradictory of the evidence. The evidence supported a finding that the Second Respondent's conduct was a departure from the standards of competent and reputable solicitors and therefore constituted unsatisfactory professional conduct. The Tribunal also considered that the PCSC had fundamentally erred in its approach to the case by taking into account manifestly irrelevant considerations. In so doing, the PCSC arrived at a decision no reasonable Sub Committee could reach.

The PCSC in making its determination on Issue 3 relied on Law Society-v-Bruce de Wert (2019). It said that this case supported its decision not to take into account the absence of a file note regarding the Second Respondent's views of Ms B's capacity. The Tribunal in that case said that it was a counsel of perfection to expect full file notes in every case. However, that case involved quite different circumstances from the present Appeal. In de Wert, although the medical professionals were agreed that the client was incapax, the psychiatrist called to give evidence on behalf of the Complainers conceded that the client could appear well. Superficially she could give the impression that she had capacity because her impairment was subtle. She could fool a lay person. In that case there was an instruction sheet on the file along with the signed certificate. The crucial element of the case was whether there were sufficient warning signs whereby the Respondent ought to have made further enquiries about capacity and whether failure to do so constituted misconduct. The Tribunal concluded that there were insufficient warning signs to render the Respondent's decision to draft and register the Power of Attorney, professional misconduct. It was of the view that competent and reputable solicitors could have acted as the Respondent did. The Tribunal in the present case considered that the PCSC's interpretation of Law Society-v-Bruce de Wert (2019) was superficial. The PCSC ought not to have disregarded entirely the absence of a file note. Although not determinative, it was an adminicle of evidence that ought to have been taken into account.

The PCSC was of the view that given the length of time the Second Respondent had acted on behalf of the client, he was in as good a position as anyone to assess her ability to understand what she was doing on the night in question. The Tribunal considered that this statement was contrary to the evidence available to the PCSC. The Second Respondent reportedly had no concerns about capacity. He had acted for the client for many years. However, as the Reporter noted, there was a considerable body of evidence giving an alternative account of the client's presentation on 16 May 2012. The evidence of the Appellant, DM, NI and GDS suggested that the client was vulnerable and obviously so to any observer. These individuals were friends of Ms B and had contact with her during the relevant period. The Fiscal said that the Note of Appeal was limited to the evidence of DM and the Appellant, and the Tribunal therefore could not have regard to other evidence. However, the Tribunal was of the view that the essence of the appeal was that the PCSC had made a finding in relation to Issue 3 that was contrary to the evidence before it. It therefore had regard to all the information which was before the PCSC on this issue.

The PCSC did not justify why they were departing from the Reporter's conclusion. The PCSC has delegated powers from the Council of the Law Society of Scotland. The decision on unsatisfactory professional conduct is for the PCSC, not the Reporter. However, the Reporter provided clear and cogent reasoning for his recommendation. The PCSC did not in the Tribunal's view explain why it had reached its contrary decision, against the body of evidence to which the Reporter referred and apparently purely upon the basis of an asserted assumption that the Second Respondent ought to have been in a position to assess the state of mind of his client. The PCSC appeared to have closed its mind to the alternative possibility, supported by the direct evidence of a number of witnesses, that Ms B was in fact in a state of considerable distress occasioned by the death of her sister such as at least to call into question the appropriateness of proceeding immediately with the execution of the will.

Ms B was very elderly. She had lived her entire life with her twin sister. She was very distressed on the day of her sister's death. DM was at Ms B's house on 16 May 2012, although not present in the room when the will was signed. She said she was "*alarmed*" by the Second Respondent's actions. She described Ms B as being "*absolutely distraught*". She noted that the demise of one sister was always going to be "*catastrophic*" for the other (page 1 of DM's statement of 1 February 2016 which is also summarised at paragraph 43(r) on page 18 of the report). GDS noted that Ms B had been in a "*terrible state*" after her sister died and had wanted to die (Paragraph 43(s) on page 19 of the report). When NI visited Ms B after her sister's death, she had been "*inconsolable with grief and lost without her dear sister and remained in that state through to her admission into hospital*" (page 1 of NI's statement which is also summarised at paragraph 43(t) on page 19 of the report). The Appellant had

reported that Ms B was in “*a terrible and distressing state of mind, inconsolable, falling into periods of hysteria, her conversation was irrational and delusional, she wanted to die...Throughout the day [Ms B’s] mental and physical condition deteriorated...*” (the Appellant’s letter of 4 March 2019 as quoted at para 46 on page 26 of the report). The Tribunal considered that these views were properly summed up by the Reporter in the findings in fact as:

“[Ms B] was distraught and inconsolable with grief visibly presenting in a distressed state of mind, at times irrational and delusional in her conversation and falling into periods of hysteria, she said she wanted to die and be with [her sister]” (paragraph 9(d) on page 38 of the report). All this evidence was available to the PCSC.

The notarial execution was undertaken due to Ms B’s frailty and her grief. Through his representative the Second Respondent noted that “*Given her somewhat weak physical condition and her grief following the death of her sister, it was agreed that she will be notarially executed.*” (paragraph 44 on page 23 of the report). Ms B was subsequently able to sign another will on 2 July 2012.

The Tribunal is of the view that the combination of the extreme and obvious manifestations of grief displayed by Ms B and the decision to execute the will notarially due (at least in part) to Ms B’s grief, were warning signs that Ms B may have been a vulnerable client. The client was so physically stricken by grief that she could not even sign her name. There was clear evidence before the PCSC that she was obviously in significant distress, well beyond what might be considered the usual stages of early grief.

The Tribunal found it difficult to make sense of the following sentence in the PCSC determination:

“Further, given the view of medical staff as recorded and the evidence of the lengthy meetings between the first complainer and the client there had to be, at the very least, a question mark over the evidence of the complainers that the client had been incapax on the night.”

The Appellant says that the PCSC wrongly used those ‘medical views’ recorded in 2013 by applying them to circumstances on 16 May 2012. However, the Fiscal says that the PCSC was only using this evidence as a check on the Appellant’s credibility. The PCSC gave less weight to what the Appellant had to say because of his later behaviour and his admission that he had subsequently spent ten to twelve hours daily discussing the matter with Ms B. Even if the Fiscal is correct, the PCSC appears to have relied upon the views of medical staff in relation to a separate issue (his subsequent behaviour)

as a reason to discount the evidence of the Appellant and the other complainers and witnesses in this case in relation to events on 16 May 2012, without further reasoning or explanation. Moreover, the pertinent question was not, in the Tribunal's view, whether or not Ms B was in fact incapax, but whether or not the evidence at the time was such that the Second Respondent ought to have been put on notice that she might be, and to have acted accordingly, following the relevant Law Society guidance (See "Vulnerable Clients Guidance" on Rule B1.5). This in the Tribunal's view was clearly the case.

The Tribunal considers that the Reporter was correct to note that *"a decision by a solicitor to take any instructions, on any matter, from any individual, only hours after suffering a close personal bereavement should be proceeded with cautiously in terms of being attuned to their obvious vulnerability at such a time."*

A solicitor must act on his or her client's instructions and act in their best interests. A solicitor should be satisfied when taking instructions that his/ her client has capacity to give them. If there is any doubt as to the client's capacity to instruct, advice should be sought from a medical practitioner. The Tribunal was satisfied on the evidence available to the PCSC on the balance of probabilities that there were sufficient warning signs that the Second Respondent ought to have had a doubt about Ms B's capacity. If he had properly considered the capacity issue and decided to proceed, that ought to have been properly recorded and justified. There is no note on the file expressing a view on her condition as would be expected given the presentation of Ms B as described by the complainers and DM. While the Law Society's guidance relating to vulnerable clients is not a rule, the Tribunal considers that the issue is of fundamental importance and failure either to pause or to seek a medical report in these circumstances was a departure from the standards of competent and reputable solicitors. Protection of vulnerable clients is essential. Following the guidance protects solicitors and upholds the reputation of the profession in the eyes of the public. If the guidance is to be departed from, the decision should be carefully justified and recorded. There was no evidence in this case that the issue of client vulnerability, in the context of an immediate and sudden bereavement, was even considered. The weight of the evidence clearly points to the fact that it should have been.

In conclusion, the Tribunal was satisfied that there was sufficient evidence, on the balance of probabilities, to establish the factual basis of Issue 3 to the extent that the Second Respondent had acted inappropriately on 16 May 2012 when he attended at Ms B's house and signed a new will for her by way of notarial execution. The Tribunal was not satisfied that the appeal in relation to the remaining elements of the complaint were made out, namely that the Second Respondent told the

client that the will was all wrong and needed to be changed, or that the will had been prepared by Mr X with Mr X's sister as witness. While upholding this part of the complaint in relation to Issue 3, the Tribunal expresses no view on Ms B's actual capacity on 16 May 2012. The Tribunal merely notes that the presence of the clear warning signs present in this case should have caused a competent and reputable solicitor to pause, analyse capacity, consider getting a medical opinion, and carefully record and justify all decisions made.

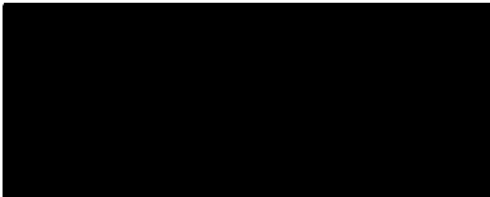
Tribunal's Decision – Issue 5

The Tribunal considered Issue 5, and the parties' submissions on the PCSC's determination to take no action in relation to this issue. Although the Tribunal did not consider that the concerns of the medical staff were relevant to the issue at hand, it was not persuaded that it should disturb the PCSC decision overall. It agreed with the PCSC that the only evidence supporting this allegation was hearsay evidence of what Ms B had reportedly said to the Appellant. The PCSC was entitled to prefer the evidence of the Second Respondent which was in this case supported by a contemporaneous file note. This incident took place some time after the death of Ms B's sister. There is no suggestion by this point that capacity was an issue. There were insufficient grounds to disturb the PCSC decision.

Tribunal's Decision – Conclusion

The Tribunal upheld the Appeal in relation to Issue 3. To the extent outlined above, it quashed the determination being appealed against and made a determination upholding that complaint of unsatisfactory professional conduct. It refused the appeal in relation to Issue 5 and confirmed the PCSC's determination on this issue.

A summary of the Tribunal's decision was delivered orally to parties by the Chair on 17 June 2022. Parties indicated that it would be helpful to see the Tribunal's written decision before making further submissions. The Tribunal indicated that in the circumstances it would intimate its written decision containing full reasons on this part of the appeal to parties. Any written submissions on compensation, publicity and expenses should be lodged with the Tribunal by 22 July 2022. The Tribunal continued the virtual hearing to 1 September 2022 at 12pm.



Ben Kemp
Vice Chair