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

F I N D I N G S

in Complaint

by

THE COUNCIL OF THE LAW SOCIETY of SCOTLAND, formerly at 26 Drumsheugh Gardens, Edinburgh and now at Atria One, 144 Morrison Street, Edinburgh

Complainers

against

SHIRLEY ANNE HOULIHAN, WW & J McClure Limited, 3 Cadogan Street, Glasgow

Respondent

1. A Complaint was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that, Shirley Anne Houlihan, WW & J McClure Limited, 3 Cadogan Street, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was a Secondary Complainer.

3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.

4. In terms of its Rules the Tribunal appointed the Complaint to call for a procedural hearing on 7 March 2017. Of Consent, the Tribunal discharged that procedural hearing and fixed a new procedural hearing for 21 April 2017. Thereafter, on joint motion, the case was sisted on 4 April 2017.

5. The Complainers lodged a motion on 24 July 2017 to recall the sist and the agent for the Respondent confirmed there was no objection to that motion. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 30th and 31st October 2017 with a

procedural hearing on 18 September 2017 and notice thereof was duly served upon the Respondent.

6. At the procedural hearing on 18 September 2017 the Complainers were represented by their Fiscal, Elaine Motion, Solicitor Advocate, Edinburgh. The Respondent was present and was represented by William Macreath, Solicitor, Glasgow. Both parties sought and were granted a period of 14 days to adjust and prepare a Record. Both parties indicated that the hearing was likely to require five days and that each party would be calling at least five witnesses. The case was continued to the hearing previously fixed for 30th and 31st October 2017.

7. At the hearing on 30 October 2017, the Complainers were represented by their Fiscal, Elaine Motion, Solicitor Advocate, Edinburgh. The Respondent was present and was represented by William Macreath, Solicitor, Glasgow. The Complainers lodged an amended Record and asked the Tribunal to allow this to be admitted. The Respondent having consented to this motion, the Tribunal admitted the amended Record. Thereafter, a Joint Minute was lodged which agreed the averments of fact, duties and misconduct. The agent for the Respondent withdrew the Answers. No evidence required to be led. Submissions were made on behalf of both parties.

8. The Tribunal found the following facts established:-

8.1 The Respondent is a solicitor enrolled in the Roll of Solicitors in Scotland on 20 February 1991. She practised as an employee between 9 April 1991 and 7 February 1999, as a salaried partner from 8 February 1999 until 31 May 2015, as a Director from 1 June 2015 to 13 October 2015 and ultimately from 14 October 2015 to date as a solicitor all in the firm of WW & J McClure Ltd, 3 Cadogan Street, Glasgow. At all material times narrated below she was a partner in said firm and as a solicitor supervised Mr CY in relation to the matters narrated.

8.2 At the material time, WW & J MClure-(the Respondent's firm) was a three partner firm that dealt with 400 clients per month and processed around 300 Wills per month across Scotland and England. The majority of the work for said Wills was carried out by unqualified employees who worked, at the material time, on a commission basis.

8.3 Mr Z signed a Will on 20 March 1989. He signed each page. His wife was the main beneficiary. She however predeceased him.

8.4 On 24 November 2010 Mr Z signed a Continuing and Welfare Power of Attorney. The solicitor who certified the Power of Attorney was a solicitor who did not work at the Respondent's firm. The Power of Attorney was registered with the Office of the Public Guardian (Scotland) on 26 January 2011. Subsequent to the death of Mr Z, this solicitor acted with the consent and concurrence of the executors appointed under the will to secure their resignation, the grant of confirmation and his disbursing the estate conform to the provisions of the will. That said the secondary complainer considers and continues to consider the last Will was not properly handled and only determined not to challenge it for practical and pragmatic reasons- not because he considered it valid.

Under the Power of Attorney Mr Z appointed his son, the secondary complainer and his daughters as his Attorneys. He also confirmed that his Attorneys had, amongst other things, the power to;

- act alone to make decisions regarding his estate;
- invest any sum at his or her discretion;
- execute and deliver deeds and documents;
- have access to any information regarding his finances
- make gifts of his property
- have access to confidential information about his will and other testamentary provisions.

8.5 On 31 March 2012 Mr Z's daughter, LZ, sent an email to the Doctor who was primarily responsible for the care of Mr Z. In the email LZ stated that Mr Z's dementia had worsened and that she had noticed a significant change in that her father was adamant that he was wearing trousers when this was not the case. The email also stated that Mr Z was confused about various rooms in the house.

8.6 On 19th July 2012 Mr Z was certified blind by an Ophthalmologist. Certification of Blindness or Defective vision is completed to confirm that Mr Z 'is so blind as to be unable to perform any work for which eyesight is essential'. It is also indicated that Mr Z had a visual handicap which was likely to deteriorate due to dry age related macular degeneration. Following an examination of Mr Z's eyes his sight in both eyes remained the same with and without correcting glasses at 6/60. The Certificate and criteria for certification of blindness is attached to this Report.

8.7 On 25 February 2013 Mr Z was taken into a nursing home for his care. His date of birth was 9 January 1923 and accordingly was 90 years of age at that time.

8.8 On 5 July 2013 the aforementioned Doctor examined Mr Z and issued a Certificate of Incapacity (the certificate). The certificate stated that she was of the opinion that Mr Z was incapable within the meaning of the Adults With Incapacity (Scotland) Act 2000 ('the 2000 Act') in relation to a decision about the following medical treatment; 'All medical and nursing care and administration of medication' because of 'dementia' and that the incapacity was likely to continue indefinitely. The Doctor stated that the Certificate was valid until 5 July 2016 and that she considered that the condition from which Mr Z was suffering was unlikely to improve.

The Respondent's involvement with Mr Z

8.9 In about November 2013 the Respondent's firm was approached to act on behalf of Mr Z through one of his daughters, LZ, who was already a client of the Respondent's firm. By that date Mr Z had been admitted into a nursing home in Greenock. CY, who was employed by the Respondent's firm as an estate planner, was allocated to take and act upon instructions from Mr Z. CY was not a solicitor and prior to May 2011, on joining the Respondent's firm, had no experience in estate planning. At all material times in this matter he was employed on a commission basis. The system in the Respondent's firm was that a solicitor, on this occasion the Respondent, was allocated to be the supervisor to the estate planner. The Respondent's file, as recently provided on her behalf, indicates her involvement commenced on or around 9 December 2013. As such the Respondent provided instructions to/raised queries with and supervised CY to ensure compliance with the legal requirements of the work being carried out by him. CY

would see around about 500 clients a year. About 8 or 9 of those per annum would be in a nursing home.

8.10 At no time did the Respondent meet or ask to meet Mr Z.

8.11 On or about 28 November 2013 CY initially visited Mr Z in the nursing home. The purpose of the visit was to take instructions in relation to a new Will and to discuss his finances, in particular a family protection trust (the trust). Mr Z's daughter LZ was present throughout that meeting. She was a beneficiary under the Will.

8.12 CY was on notice, from LZ, prior to the meeting on 28 November 2013 that Mr Z may not be too well and that he may be confused as he had an infection.

8.13 Despite that a form headed "Estate Planning Fact Find" (the form) was completed by CY on that date having determined that Mr Z did have capacity. There is nothing on the file to indicate the basis of the assessment of Mr Z's capacity. There is no evidence of consideration being given to or input being sought from a treating Doctor, whether a General Practitioner or appropriate Consultant, to confirm the issue of capacity at this or indeed any subsequent meeting to obtain instructions and/or to execute his Will or Trust.

8.14 The form indicated that there was no issue of incapacity. On page 12 it indicated that Mr Z was "fully capax, did give clear instructions". It does not mention that Mr Z had dementia. The form was completed on 28 or 29 November 2013. It was marked as received for input into the Respondent's firm's system on 29 November 2013.

8.15 CY then returned the form to the Respondent's firm and logged it onto the system in the manner described in his Affidavit.

8.16 CY then e-mailed the daughter LZ to seek clarification of Mr Z's medical condition. By e-mail of 29 November 2013 LZ replied under the heading

"*Mr Z- health diagnosis*
Four things...pick as required!

Registered blind (Age related Macular Degeneration) – has residual peripheral sight.
Hard of hearing (age related),
Over active bladder,
Cerebral vascular dementia'.

CY used his personal email for this exchange of correspondence. There is a copy of the email on the Respondent's file, as provided on her behalf to the complainer, in the correct date location. In that email LZ emphasized the need to use large print as he (Mr Z) "is partially sighted".

8.17 The Respondent had no involvement in the file until 9 December 2013. She did not see the emails dated 29th November 2013 until after 14th February 2014. There is no evidence on file of any further instruction from the Respondent to check or review the issue of capacity. There is no evidence on file of any checks/assessments of Mr Z's capacity. CY accordingly proceeded. The Certificate of Incapacity referred to in paragraph 8.8 is not in the Respondent's firm file and there is no record of a previous awareness of it until this complaint was raised by the Secondary Complainer. The Respondent did not supervise CY appropriately to ensure material emails were logged on when received to enable her to take any steps to investigate or review the execution of the documentation in light of this material information.

8.18 On 5 December 2013 LH, a will administrator/trust processor at the Respondent's firm, prepared a letter to Mr Z dated 5 December 2013 enclosing a new Will for his approval. It was reviewed by the Respondent and sent with the Respondent's authority on 9 December 2013. It was sent to a previous address, not to the nursing home. The Respondent did not identify this by way of supervision nor from the file take any steps to remedy the mistake. There is no evidence on file to show Mr Z received the draft Will. The letter stated that Mr Z should read this carefully and contact the Respondent's firm if any amendments required to be made. The letter confirmed that an appointment had been made for CY to meet with Mr Z again on 20 December 2013 to sign the document.

8.19 On 11 December 2013 a Terms of Business letter was also sent to Mr Z stating that the Respondent's firm had been asked to act for him by the British Deaf Association

in connection with both the Will and the trust. The Respondent's reference is on said Terms of Business letter. Again it was sent to a previous address, not to the nursing home. It is not held on file, therefore there is no evidence to indicate that he received this nor signed it.

8.20 Between December 2013 and January 2014 there were various items of correspondence between CY and LZ regarding Mr Z's financial affairs and the secondary complainer was copied in to this. The correspondence related to the need to reduce inheritance tax liabilities and the benefit of setting up a trust. The secondary complainer sent correspondence to CY querying his recommendations. At the same time he also sought advice regarding the proposals put forward by CY from the independent solicitor who had acted for Mr Z when the Power of Attorney was signed by him. On 27 December 2013 the secondary complainer contacted CY with his own suggestions regarding his father's finances and asked to see the relevant paperwork.

8.21 The meeting with Mr Z on 20 December 2013 was postponed due to Mr Z's ill health. He was discharged from hospital on or around 15 January 2014 and the meeting was reorganised for 20 January 2014. By this date Mr Z was 91 years of age.

8.22 The meeting on 20 January 2014 with CY and Mr Z took place again at the nursing home. LZ was again present through the majority of this meeting. Mr Z signed a Will and a Halifax form. At that meeting Mr Z wished to have a further discussion about a change in the division of his estate and gave instructions for an alteration to this Will. There is no evidence on the file to evidence that on or before 20 January 2014 the Respondent took any steps to manage/supervise/check/provide instructions to CY on the issue of capacity and/or the issue of signing of either document by Mr Z. No solicitor was present when the Will was signed.

8.23 The secondary complainer initially raised concerns with the Respondent's firm by email on 20 January 2014. He advised that he was not keen to proceed with CY's suggestions following his latest correspondence and that he wanted the Respondent's firm to cease acting in his father's affairs. He also sought information

regarding the instructions provided by his father to CY. No such information was provided.

8.24 On 21 January 2014 CY emailed LH to state that Mr Z requested that all future correspondence should be sent to his daughter LZ. In a separate email he stated that the Will and trust papers were signed last night and that Mr Z wished to amend the residues in his Will. On the following day CY asked LH when the new documents would be ready for signing. The Respondent did not instruct further investigation in light of this change of position-either in relation to emails being restricted to one sibling or the alteration of Will instructions.

8.25 On 23 January 2014 the Respondent and LH met to discuss the amendments to the Will and how this should be documented. At this meeting the Respondent did not raise the issue of capacity given Mr Z's recent illness; nor the material change of instructions narrated in the preceding paragraph and require investigation as to capacity. The revised Family Protection Trust was sent to Mr Z's previous address. No revised Will appears to have been sent out prior to the meeting where it was executed.

8.26 On 29 January 2014 CY again attended on Mr Z at the nursing home with an amended Will. The daughter, LZ, was again present throughout. The Will was signed at the nursing home. Again there is no evidence on the file to show that on or before 28 January 2014 the Respondent took any steps to manage/supervise/check/provide instructions to CY on the issue of capacity particularly given it was 2 months after the date of the initial meeting and initial instructions. The process in signing the Will was that CY placed a yellow card with a square hole on the signing section, put the pen in Mr Z's hand and helped his hand to bring it to the signature square. Mr Z then signed the document. No solicitor was present when the Will was signed. The Will was read to him. Again there is no evidence that any medical input was considered or sought to check the issue of capacity before proceeding. Nor is there any evidence of instructions on the issue of signing the Will by Mr Z.

8.27 As at 28 January 2014 CY was aware that there was a disagreement between the sisters and the secondary complainer. There was a fundamental disagreement in

relation to the financial management. CY took instructions from the sisters to proceed. In doing so he relied on the Power of Attorney referred to in paragraph 3.7 above.

8.28 The secondary complainer became aware that a fresh Will and Trust had been signed. He instructed an independent psychiatric report of his father which was completed on 10 February 2014, 12 days after the new Will and Trust had been signed.

8.29 In that report the psychiatrist stated that he considered that Mr Z was unable to give informed consent or make informed decisions to matters pertaining to his personal welfare and finances. He stated that he did not think that Mr Z had the capacity to amend a Will because he suffered from significant cognitive impairment as a result of vascular dementia. He also stated he appeared confused and disorientated in time and place and that his short term memory was poor and he was unable to retain any new information. He also stated that Mr Z was a vulnerable individual and that he was unable to understand the purpose of his visit. The psychiatrist also stated that he did not think that Mr Z had the capacity to make or give informed decisions and that he needed 24 hour support and care.

8.30 There is nothing on the file, for which the Respondent was responsible, to:-

(a) evidence the basis of assessment of the capacity of Mr Z or

(b) what tests CY carried out to satisfy him of the capacity of Mr Z on 28 November 2013.

8.31 Furthermore there is nothing on the file to evidence any further assessments of capacity at the further meetings on:

(a) 20 January 2014 when he executed a fresh Will

(b) 20 January when Mr Z provided amended instructions in relation to the Will he had just executed and in relation to communication channels with his children nor

(c) 29 January 2014 when he executed the Will and protected Trust Deed.

8.32 The initial form did not reflect the fact that Mr Z had dementia or was partially sighted. Nor was that form revised or altered to update given the further

information provided to CY on 29 November 2013 and prior to the signing of 2 Wills plus further instructions on 20 and 29 January 2014.

8.33 There was no evidence on the file that any medical practitioners advice was sought on 28 November or after the email of 29 November 2013 alerting CY to Mr Z's diagnosis of dementia and that he was registered blind. There is nothing on file to indicate any discussions with the Manager in the Home in relation to Mr Z's health or capacity at any time.

8.34 There was no evidence on file of any supervision of CY by the Respondent throughout this process. There was evidence of some supervision of LH, however it did not deal with or identify the issue of the documentation going to the old address; issues as to his capacity given his illness or his capacity given his material change of instructions just immediately after signing a fresh Will.

8.35 If adequate supervision had taken place then the issue of capacity and proper process in executing the said Will and protected Trust would have occurred. On the basis of the report obtained on 10 February 2014 Mr Z would not have had capacity and the documentation could not have been appropriately signed.

8.36 Mr Z died on 8 August 2014.

9. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct in respect that, as the responsible solicitor for Mr Z, she failed to adequately supervise CY and LH, and failed herself to act in the best interests of Mr Z throughout the whole period by failing to ensure appropriate steps were taken to establish Mr Z's capacity to give instructions to prepare a will and to execute any will.

10. Having heard further submissions from both parties, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 30 October 2017. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Shirley Anne Houlihan, WW & J McClure Limited, 3 Cadogan Street, Glasgow; Find the Respondent guilty of professional misconduct in respect that she failed to adequately supervise employees

acting on her behalf in relation to the preparation and execution of a will and that she failed to act in the best interests of her client by failing to make or ensure that appropriate steps were taken to establish her client's capacity to give instructions to prepare and thereafter to execute any will; Censure the Respondent; Fine the Respondent in the sum of £2,500 to be forfeit to Her Majesty; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should only include the name of the Respondent and her firm.

(signed)

Alistair Cockburn

Vice Chairman

11. 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 17 JANUARY 2018.

IN THE NAME OF THE TRIBUNAL

[redacted]

Alistair Cockburn

Vice Chairman

NOTE

The Tribunal had before it on 30 October 2017, a Record, Two Inventories of Productions for the Complainers and Six Inventories of Productions for the Respondent. At the hearing the Fiscal lodged an amended Record and asked the Tribunal to allow this to be admitted. The Respondent consenting to this motion, the Tribunal allowed the Record to be admitted. Thereafter, the Fiscal moved to amend the amended Record by deleting the averment of duty referring to Rule B1.14.1 on page 20 of the Record. There being no objection to this motion, the Tribunal allowed this further amendment to be made. Thereafter, a Joint Minute between the parties was lodged agreeing the averments of fact, duty, professional misconduct, Productions 1 – 50 for the Complainers and Productions 1 – 45 for the Respondent. Both parties confirmed to the Tribunal that the Respondent's Answers were to be treated as withdrawn.

The Chairman drew the parties' attention to the reference to an affidavit within the terms of the Record and asked parties to confirm what regard the Tribunal should have to the content of the affidavit where it conflicted with the position of the Respondent as described within the Record as admitted in the Joint Minute. Both parties invited the Tribunal to prefer the admissions where there was any conflict with the content of the affidavit.

Ms Motion moved the Tribunal to anonymise the names of the parties involved, including witnesses who worked for the firm, having regard to the personal and private nature of the matters involved and the effect such publicity might have on the careers of the witnesses involved. Both the Respondent's agent and the Secondary Complainer indicated that they had no objection to this. The Chairman confirmed that due consideration would be given to these matters at the end of proceedings when considering publicity.

SUBMISSIONS FOR THE RESPONDENT

Mr Macreath confirmed that the Respondent accepted her conduct amounted to professional misconduct but recognised that this was a matter for the Tribunal to determine. The Respondent accepted that she had failed to supervise CY and LH and that she failed to ensure appropriate steps were taken to ensure the client had capacity.

Mr Z was 90 years old when he was admitted to a care home. Prior to that he had moved from his family home to live with one of his daughters. Issues arose as to his mobility and there was correspondence

from his daughter to his GP in 2012 disclosing concerns regarding dementia. Mr Z was admitted to the care home on 25 February 2013. By November 2013 Mr Z had been resident at the care home for nine months. The fact find completed by CY made no reference to the time already spent in the care home. Any simple enquiry made of the care home staff would have disclosed how long the individual had been in the home.

Mr Z had two daughters, one of whom is profoundly deaf, the other has partial hearing. The deceased's daughter had been assiduous in caring for her father. The deceased's two daughters met CY at a presentation where numerous people had provided presentations. The two daughters had chosen to instruct the Respondent's firm to have wills and family protection trusts prepared. The fees for that work were paid by the deceased. One of the daughters, LZ, asked CY to meet with her father which he did on 28 November 2013. At that meeting, the fact find was completed which contained a great deal of information regarding the deceased's assets and referred to the deceased's home address. CY should have drawn attention to those concerned that the address for correspondence was the care home and not the previous home address. The fact find was uploaded on to the firm's computer system some days later. CY did not draw any material to the attention of the Respondent which would have disclosed that there were factors indicating a need for a solicitor to attend with the deceased to take instructions. The simple fact that the individual concerned was elderly and in a care home did not inevitably mean he did not have capacity but the fact find completed by CY made no note of the reasons for him forming the conclusion that the individual did have capacity. There is clear authority that, when seeing an individual such as Mr Z, cogent and compelling written notes are needed covering the question of capacity. The exchange of emails between CY and LZ in November 2013 were on CY's private email address and were not transferred onto the firm's electronic file until February 2014. The Respondent did not become aware of these until after that time.

Mr Macreath submitted that in Scotland good practice required, in circumstances such as these where the testator was aged 90 and in a care home, that the solicitor had cogent reasons, properly recorded, for concluding that the testator had capacity and that medical evidence was unnecessary.

It was accepted that CY had knowledge of the testator suffering from dementia, being partially blind, being hard of hearing and aged 90. CY had been trained to ask the appropriate questions and could easily have asked the care home staff who could have provided the necessary information. None of the necessary information was disclosed on the fact find. The email referred to dated 29 November was only flagged up once another firm of solicitors had intimated their involvement and asked the necessary questions in February 2014. The fact find does not highlight the existence of the power of attorney,

which would have been expected as a result of the training given to CY. It did not disclose critical details such as (1) how long the testator had been resident in the care home (2) the reasons why he was there or (3) his care plan.

There was no question here of any lack of integrity on the part of the Respondent. The issue was purely one of the standard of supervision.

These factors that were not disclosed on the fact find did not inevitably mean that the deceased did not have capacity but they were factors that should have been drawn to the attention of the Respondent and this would have resulted in her attending on the deceased herself.

The bulk of the firm's client base is aged between 50 and 65. It was relatively uncommon for the firm to see elderly people in a care home. Since these events, the Respondent's firm had been scrupulous in ensuring that in such circumstances a solicitor goes to see the client. This had been a significant learning curve for the Respondent who has found the experience extremely unpleasant. Appearing before the Tribunal is not an easy matter for any competent experienced solicitor. The Respondent has taken this matter very seriously and has stepped back from the firm by becoming an employed solicitor. She recognises that this should not have happened and has privately resolved the Secondary Complainer's claim for compensation. Mr Macreath invited the Tribunal to accept that these factors indicated that the Tribunal was dealing with an individual who had professionalism in her heart.

Mr Macreath advised that he had been first instructed in 2015 at the stage where the Complaint was with the case investigator. The case investigator made a recommendation to the PCC which the PCC did not accept but rather it concluded the matter should be referred to the Tribunal. In other jurisdictions the duties of supervision in legal practice are clearly defined in some detail. They are not here.

He submitted that at the very least CY was incapable of the work and careless. The Chairman asked if the fact that CY was paid by commission played a factor and Mr Macreath confirmed that the Respondent's firm no longer pays staff commission. He highlighted that the preparation of wills was a free service offered by the firm where clients were asked if they wanted to donate to a charity in return for the service. He indicated that on average 25 wills were instructed per week and that most followed a standard style. He accepted that supervision was vital in these circumstances. The Respondent's firm had a strict training formula. CY had been trained, knew perfectly well the importance of determining capacity and had had this drummed into him. CY had been seeing upwards of 10 clients a week for the preparation of wills, powers of attorney and family protection trusts since 2011. It was objectively

difficult to see how CY reached the conclusion he did with regard to capacity. The correspondence with the daughters of the deceased was not scanned onto the system until 19 February 2014.

The Respondent's firm imposed a standard of excellence upon their employees which was equal to the standard of qualified staff. The firm emphasised that if there were any doubts at all the matter was to be referred back. He asked the Tribunal to accept that this matter would not be repeated.

Mr Macreath referred to the case of Smyth-v-Rafferty and Others [2014] CSOH 150 and also lodged with the Tribunal copies of Sievewright-v-Sievewright and Others [1920] SC(HL) 63 and Banks-v-Goodfellow (1869 – 70) L.R.5 Q.B.549. He submitted that it was not the case that in circumstances such as these a solicitor was compelled to obtain medical evidence regarding capacity. Certainly by Autumn 2014 the other firm of solicitors instructed by the Secondary Complainer were suggesting that the deceased had not had capacity and in so doing they relied upon the psychiatrist's opinion. CY had the same opportunity to ask the same questions as the psychiatrist had done.

The deceased had been admitted to hospital on 15 December. That information was passed on to LH but not picked up by the Respondent. Thereafter the deceased changed his instructions with regard to the provisions for his children pre-deceasing him. This was a material factor available to the Respondent which should have alerted her to ask what steps had been taken to assess the testator's capacity. The fact that the deceased was an elderly man in a care home was not in itself enough to exclude capacity. However it ought to have triggered a suspicion on the part of the Respondent and she now accepts that in such circumstances she would go immediately to see the client personally. She accepts a failure to supervise. The fact that the testator had been admitted to hospital was within the knowledge of the firm and yet no one asked why and whether there had been a change in his capacity. The change of instructions with regard to the residual clause and the request that correspondence be sent to only one daughter were also red flags. The fact that CY had not updated the file was also a failure to supervise. Mr Macreath conceded that the failure to supervise crystallised at the point of the Respondent's knowledge of the fact find in her failure to question how CY could have formed his view regarding capacity. Mr Macreath invited the Tribunal to have regard to the fact that the will itself had not been reduced but was relied upon as a valid will. In essence the question of whether or not the testator had capacity or not was not actually relevant to whether the Respondent had adequately supervised CY or LH.

Mr Macreath acknowledged that the Tribunal would have two issues of concern: (1) potential damage to the reputation of the profession; and (2) any risk of repetition. With regard to the question of damage

to the reputation of the profession, he invited the Tribunal to have regard to the fact that the will had not been reduced and that the Respondent had done her best to reduce the distress of the Secondary Complainer by dealing with the claim for compensation prior to the hearing. He further invited the Tribunal to accept that in the circumstances of this case there was no risk of repetition of such conduct and that the Respondent has very much learned the lesson on this issue.

SUBMISSIONS FOR THE COMPLAINERS

Ms Motion indicated that her starting point was the impact that the Respondent's conduct had had. She submitted that the conduct had had the significant result in there being a continuing family split as a result of these events.

Whilst much had been said to the Tribunal about the training of CY, Ms Motion asked the Tribunal to bear in mind that no training manual had actually been produced.

She referred the Tribunal to the case of The Council of the Law Society of Scotland-v-Graeme Crombie Miller dealt with by the Tribunal on 29 October 2008. In that case the Tribunal had referred to a passage from Smith & Barton:

"As previously indicated, it is always open to a solicitor to employ an unqualified assistant for procedural work within his practice; but it is essential that the solicitor maintains a high level of supervision to ensure that the standard of work is not less than that which is expected of a qualified solicitor."

The Fiscal referred the Tribunal to Production 50 for the Complainers which was guidance produced by the Law Society in relation to B1.5: Vulnerable clients. She submitted that there was a failure of fundamental supervision. Although the pleadings spoke for themselves, she intended to draw the Tribunal's attention to some red flag issues.

The case involved taking instructions from a 90 year old man in a care home. A power of attorney for the man had been prepared in November 2010. In fact CY makes reference to using this power of attorney in order to complete the signing process for the will and trust.

On 31 March 2012 the daughter, who was extremely close to her father, emailed the family GP about her father's deteriorating dementia. This email was produced as Production 8 for the Complainers. This email was sent some 18 months prior to the events involving the Respondent.

In July 2012 a certificate of blindness was completed in relation to Mr Z. This was Production 9 for the Complainers.

Mr Z was introduced to the firm by his daughter, LZ. If the Tribunal looked at the guidance reproduced as Production 50 it would see that solicitors are instructed to take extra care in such circumstances.

The man was admitted to the care home on 25 February 2013. She drew the Tribunal's attention to an entry within the care home notes for 25 February 2013 which referred to Mr Z as being registered blind due to severe macular degeneration, being very hard of hearing, wandering overnight, requiring guidance and reassurance, being unable to read and there being a power of attorney in place for his welfare and financial affairs. Ms Motion referred to further entries within the records which were Production 11 for the Complainers and invited the Tribunal to consider that the daughter, LZ, was abundantly aware of her father's ongoing degenerative condition.

Production 12 for the Complainers were the care plans drawn up for Mr Z and the requirements for care did not materially alter from his admission until May 2014. Videos had been lodged taken by the Secondary Complainer showing that Mr Z had very limited communication.

Then on 28 November 2013 CY attended to take instructions from Mr Z and the daughter LZ was present throughout. Mr Z was living on the dementia level of the care home. LZ was one of the main beneficiaries of the will. This is a factor referred to by the Law Society in their guidance, Production 50, requiring the solicitor to exercise greater care.

The Chairman asked Ms Motion to clarify what information she attributed to the Respondent which was not appropriately acted upon or what information the Respondent ought to have had which one would have expected a competent and reliable solicitor to have had. The Fiscal responded that the starting point for the Respondent was the fact find completed by CY. The content of the fact find made it perfectly clear that the client was a man in a care home, aged 90 and deaf. If the Respondent had read the fact find she should have recognised these red flag issues. The Fiscal drew the Tribunal's attention to Production 44, to an attendance note by the Respondent from 9 December 2013 making it clear that she had seen

the fact find on that date. The Fiscal invited the Tribunal to accept that the Respondent was pinned with knowledge of red flag issues as of that date.

Thereafter Mr Z was hospitalised in December 2013 and from that time his condition deteriorated. Production 18 for the Complainers was an email from the Secondary Complainer to CY making queries with regard to suggested investments. In January, Mr Z was returned to the care home. She referred the Tribunal to page 152 of Complainers' Production 44 and submitted that this raised questions about CY's involvement.

There was no sign on the file of any contact between the Respondent and CY direct. It appeared that all contact was channelled through another member of staff. On 20 January 2014, CY attended at the care home and had the will and trust signed off. There was no indication of any involvement of a GP and no solicitor was present. There was no contact with the care home or accessing of the care notes. The daughter, LZ, was present throughout. Instructions were given to revise the will and to direct all correspondence to the daughter LZ. These were all red flag issues for the Respondent.

It was only a day or so after the signing of the will that the Respondent became heavily involved. The will signed on 20 January was not scanned into the firm's system, which it should have been. The Respondent met with the assistant who had been communicating with CY and therefore would have been aware of the events surrounding the signing on 20 January. The file note in Production 44 relating to this meeting shows that she raised no questions with regard to capacity, change of instructions, correspondence being sent to the wrong address, or correspondence going to only one of the beneficiaries. She said nothing about there being no involvement of a solicitor at the time of the signing of the documents. The Fiscal suggested that if that file note was read by itself, then you would not think that the Respondent knew that Mr Z was in a care home.

Despite all of these factors, CY attended again on 29 January 2014 to have Mr Z sign the will and yet again the daughter, LZ, was present throughout. At that stage CY relied upon the power of attorney to progress to the final stage. The Fiscal submitted that this was an implicit recognition of Mr Z's continuing deterioration.

Ms Motion referred the Tribunal to the psychiatric report which was Production 5 which had been instructed by the Secondary Complainer's solicitors. Putting the issues of lack of supervision to one side, the Fiscal submitted that there were no steps taken by the Respondent to assess the capacity of Mr Z,

even after the medical report was produced. She suggested that the Respondent seemed to concentrate on rebutting this complaint.

The Chairman asked Ms Motion whether the Respondent was in some way instructed by the power of attorney, given the state of health of Mr Z. She conceded that there was not a question of a lack of supervision by that stage but asked the Tribunal to bear in mind that the Respondent had done nothing in an insightful way to deal with the problems raised.

Ms Motion submitted that, whatever training had been put in place, on a number of occasions red flags had been raised and the Respondent had done nothing to ensure by 29 January that these documents were being signed off appropriately.

Ms Motion directed the Tribunal's attention to the case of Smythe-v-Rafftery at paragraph 42 and to Kessler and Grant, Chapter Two.

The Fiscal explained that her basic submission to the Tribunal was that this was a course of conduct amounting to professional misconduct where there was a course of events over months where at various stages, if supervision had taken place, these issues would not have led to this complaint. The course of conduct began with the Respondent not taking issue with CY over the lack of detail in the fact finding showing how he had determined capacity for Mr Z who was 90 years old and in a care home. Thereafter Mr Z was admitted to hospital in December before being released back to the care home in January. Then the change of instructions on the same day as he was signing the first will and the instructions to send correspondence to only one of the children when that person had been present at all meetings, these were all red flag issues that should have alerted the Respondent. If the Respondent had asked the appropriate questions at any of these stages then CY would not have got to the stage of attending to have the will signed on 29 January. Whilst she accepted that the email exchange between CY and LZ of 29 November 2013 was not on the file until February 2014, all of the other information she has referred to was before the Respondent by January 2014.

RESPONSE BY RESPONDENT

Mr Macreath reminded the Tribunal that the Complaint against the Respondent was one of failure to supervise as set out at averment 3.38.

Critical information obtained by CY was not passed onto the Respondent. There was no explanation for the email from LZ of 29 November 2013 not being on the system. However, Mr Macreath accepted that by 23 January the Respondent had knowledge that Mr Z had been in hospital and did not ask why. The Respondent was aware of the change in instructions and made no enquiry. She was also aware of the instruction that correspondence go to only one of the children and made no enquiry.

Once the solicitors for the Secondary Complainer had become involved, there was no longer any locus for the Respondent and her firm. It was only months later that the firm instructed by the Secondary Complainer suggested that the will was invalid. He argued that whether Mr Z has capacity was not the issue and that the Complaint was the inadequate supervision exercise by the Respondent.

Mr Macreath emphasised that there was no suggestion of any lack of integrity on the part of the Respondent and invited the Tribunal to accept that the misconduct was at the lower end of the scale.

In response to a question from Tribunal, Mr Macreath confirmed that there was an error in the fee note which had been produced in relation to the work done for Mr Z and confirmed that the work for preparing the will was done without charge. He confirmed that the firm no longer pay commission.

In response to a further question from the Tribunal, Mr Macreath confirmed that it was the firm's practice that employees were not to use their own personal email address but that all correspondence should go through the firm's email. It appeared that CY was giving advice to clients way beyond his skills and that led to the firm taking disciplinary proceedings against him.

DECISION

Whilst the Respondent had agreed in the Joint Minute that her conduct amounted to professional misconduct, nonetheless, it was for the Tribunal to assess the admitted conduct to determine whether not it met the test for professional misconduct as set out in the case of Sharp.

It is well recognised that a solicitor can employ an unqualified assistant to carry out certain legal work. However, that work requires to be carried out to the same standard expected of a qualified solicitor and subject to the same rules of conduct. Nor does the fact that the work is done without fee in any way detract from the standards expected.

The Respondent accepted that on 9 December 2013 she had before her the fact find prepared by CY. That fact find contained the information that Mr Z was 90 years of age and in a nursing home. Whilst these matters would not in themselves inevitably have led to the conclusion that Mr Z did not have capacity, they should have alerted the Respondent to the issue of capacity. There was nothing at all on the fact find to indicate how CY had reached the conclusion that Mr Z had capacity and this omission should have caused the Respondent some concern.

Thereafter, before CY went back to see Mr Z on 23 January 2014, the Respondent was aware or should have been aware from her file that Mr Z had been admitted to hospital for some weeks in-between the original instructions and the second visit by CY. No questions were raised by the Respondent.

Thereafter, following the signing of documents on 23 January, the Respondent was aware that Mr Z had changed his instructions and that CY had indicated that all correspondence was to go to only one of the children. The Respondent should have been aware that that child, LZ, had been present at both meetings. Again, these are factors that should have alerted the Respondent to have concern regarding Mr Z's capacity.

Mr Z was a vulnerable client. He was the client, not LZ. If the Respondent had exercised reasonable supervision of the conduct of CY she would have been alerted to the issues of capacity. This was an ongoing failure to supervise in relation to work being carried out for a vulnerable individual and which had a potential, which did eventually crystallise, to cause disharmony within a family unit. The Tribunal had no hesitation in holding unanimously that the failures on the part of the Respondent fell well below the standard of conduct to be expected of a competent and reputable solicitor and that the conduct was serious and reprehensible.

MITIGATION

Mr Macreath referred to his earlier submissions with regard to the question of damage to the reputation of the profession.

He submitted that there was no risk of repetition of this conduct. He confirmed to the Tribunal that he himself had seen the training manual for the firm and that it was extremely detailed. All relevant responsibilities were imposed upon staff whether they were solicitors or not.

The Respondent had dealt with the Secondary Complainer's claim for compensation prior to the hearing.

This case had represented a huge burden upon the Respondent.

In answer to a question from the Tribunal, Mr Macreath confirmed that the delay in agreeing a plea was on his conscience given the investigations and enquiry he had had to carry out prior to giving the appropriate advice to the Respondent.

The Tribunal asked Mr Macreath if the Respondent had demonstrated insight into her conduct. Mr Macreath explained that the Respondent had suffered a great deal of anxiety asking herself what more could have been done. The Respondent is 50 years old and been in practice since 1991 without difficulty. She had stepped back from being a partner in the firm. He submitted to the Tribunal that it was not easy for a solicitor in her position to be found guilty of professional misconduct. He asked the Tribunal to consider the terms of the testimonials which had been lodged on her behalf.

The Fiscal asked the Tribunal to have regard to Complainers' Production 45 which was a letter from the Respondent to the Law Society in response to the initial investigations. Ms Motion submitted to the Tribunal that there was no place in that letter for an apology, that the Respondent did not consider that she had done anything wrong and demonstrated that she had no insight into her conduct.

SENTENCE

The Tribunal gave careful consideration to the content of the testimonials produced for the Respondent.

The Tribunal did not accept that this conduct was at the lowest end of the scale for professional misconduct. The public are entitled to expect all work to be carried out to the appropriate standard, whether the individual involved is qualified or not. If a solicitor delegates work to an unqualified individual that solicitor is not excused from responsibility for the standard of work. It is extremely important that unqualified assistants are adequately supervised if the public are to retain confidence in the profession.

This case involved an elderly and vulnerable client and a continuing omission or failure on the part of the Respondent.

Balancing the seriousness of the conduct with the changes adopted by the Respondent since the date of these incidents, the Respondent's previous good conduct and the testimonials, the Tribunal considered that the appropriate disposal was one of a Censure and Fine of £2,500.

Having heard further submissions from the parties, the Tribunal found the Respondent liable for the expenses of the proceedings.

With regard to publicity, the Tribunal were conscious that this case involved extremely sensitive personal issues. Whilst it is essential that the profession and public are made fully aware of the findings of the Tribunal, identifying the people involved had no purpose to serve in this connection and so the Tribunal ordered that there should be publicity in the usual way which only named the Respondent and her firm.

Alistair Cockburn

Vice Chairman