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, Atria One, 144 Morrison Street, Edinburgh

Complainers

against

PAUL ANTHONY GALLAGHER, Solicitor, formerly of Raeside Chisolm Solicitors Limited, Tontine House, 8 Gordon Street, Glasgow and Curle Stewart Limited, 2nd Floor, 16 Gordon Street, Glasgow, and now of Appleby, 33-37 Athol Street, Douglas, Isle of Man

Respondent

1. A Complaint dated 2 November 2016 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") averring that Paul Anthony Gallagher, Solicitor, formerly of Raeside Chisolm Solicitors Limited, Tontine House, 8 Gordon Street, Glasgow and Curle Stewart Limited, 2nd Floor, 16 Gordon Street, Glasgow, and now of Appleby, 33-37 Athol Street, Douglas, Isle of Man (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. The Secondary Complainer is Mr A.

3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent on 7 November 2016. Answers were lodged by the Respondent on 16 December 2016. Of consent and on the Complainer's motion, the case was sisted on 22 December 2016. Of consent, and on the Complainers' motion, the sist was recalled on 3 August 2017.

4. In terms of its Rules the Tribunal appointed the Complaint to be heard on 16 November 2017 and notice thereof was duly sent out for service on the Respondent by recorded

delivery letter of 17 August 2017. On 22 August 2017, the Complainers advised the Tribunal Office that an essential witness could not attend on 16 November 2017. Accordingly, in terms of its Rules the Tribunal discharged the hearing of 16 November 2017 and appointed the Complaint to be heard on 8 December 2017. Notice thereof was duly sent out for service on the Respondent by recorded delivery letter of 28 August 2017. Both notices of hearing were returned to the Tribunal Office marked "not called for". On 12 September 2017 the Tribunal Office contacted the Respondent by email. The Respondent indicated that he was willing to accept service of the Notice of Hearing of 8 December 2017 by email. On 14 September 2017 the Tribunal Office served the Notice of Hearing by email.

5. On 5 December 2017 the Respondent lodged a motion seeking to adjourn the hearing of 8 December 2017. The Chairman considered the motion under Rule 56 of the Tribunal Rules and refused the motion to adjourn.

6. At the hearing on 8 December 2017, the Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. The Respondent was neither present nor represented but provided written submissions. The Fiscal made a motion in terms of Rule 14(4) of the 2008 Tribunal Rules for the Tribunal to proceed to hear and determine the Complaint in the absence of the Respondent. The Tribunal heard evidence from the Clerk with regard to service of the Notice of hearing and considered whether it was fair to proceed in the Respondent's absence. Thereafter it granted the Fiscal's motion. The Tribunal heard evidence from two witnesses. The Fiscal made submissions.

7. The Tribunal found the following facts established:-

7.1 The Respondent is Paul Anthony Gallagher. He was born 5 March 1983. He was admitted and enrolled in the Register of Solicitors practising in Scotland on 5 August 2011. Following admission to the profession the Respondent was employed as a trainee and latterly as an employee with the firm Miller Samuel Solicitors, Glasgow from 11 June 2010 until 7 December 2012. Between 10 December 2012 and 31 December 2013 he was employed with a firm Raeside Chisolm Solicitors Limited, Glasgow. From 2 January 2014 onwards the Complainers believe the Respondent was employed as an assistant with the firm Curle Stewart Limited, Glasgow. He is currently working for Appleby, 33-37 Athol Street, Douglas, Isle of Man.

7.2 Mr A resides at Property 1. He separated from his wife. He was represented by TLT Solicitors. An action was raised at Glasgow Sheriff Court being an action for divorce and ancillary craves. The Respondent acted on behalf of Mrs A. On the eve of a Diet of Proof a financial agreement was reached between the parties. In terms of that agreement, amongst other proposals, an agreement was reached that Mrs A would dispone to Mr A a 25% pro indiviso share of a property which she jointly owned along with her sister. It was recorded in the Minute of Agreement drafted between the solicitors that Mrs A would deliver along with the Disposition a Form 12A Report from the Land Register of Scotland which showed no entries prejudicial to the Disposition being granted to Mr A. In particular, the third clause of the Minute of Agreement provided "on the date which is 21 days after the last date of execution of these presents, the wife shall deliver to the husband a one-quarter pro indiviso share in the title to the property at Property 2. On said date, the wife shall deliver to the husband (a) a valid executed Disposition of said interest in the title to the said subjects; (b) a sworn declaration of the solvency of the wife as at the date of delivery of said Disposition; (c) a Form 12A Report brought down to a date as near as practical to the date of delivery of said Disposition showing no entries prejudicial to the grant of said Disposition by the wife in favour of the husband; (d) a letter of obligation in classic form issued by the wife's solicitors to the husband's solicitors".

7.3 On 7 August 2013, the agent on behalf of Mr A wrote to the Respondent proposing a change to the terms of settlement. It was suggested that instead of obtaining a quarter share in the property at Property 2, the preference of Mr A was to receive a capital sum of £15,000 in lieu of that sum £10,000 would be paid at completion and the balance of £5,000 by monthly instalments of £1,000 per month over a period of five months. The Respondent advised on 12 August 2013 that the proposed alteration to the agreement was unacceptable to his client. Accordingly, the parties proceeded on the basis that Mr A receive a Disposition of a share of the subjects at Property 2. On 2 September the Respondent wrote to the agent for Mr A suggesting proposed revisals to the Minute of Agreement which would prevent Mr A from raising an action of division and sale. These proposed revisals were rejected by Mr A. His agent made it clear to the Respondent on 2 September 2013 that it was the intention of Mr A upon receipt of the Disposition to raise an action for division and sale immediately. Having obtained this information, the Respondent advised the agent that he would obtain his client's instructions. Later on 2

September 2013 he left a voicemail with the agent for Mr A advising that his client would agree to sign the Minute of Agreement in its original form without any proposed changes. The Minute of Agreement between the parties was signed by Mrs A on 9th September 2013 and by Mr A on 10th September 2013. This agreement contained the clause referred to in Article 7.2.

7.4 On 15 September 2013 the Respondent attended at Gartnavel Hospital and met with his client, her sister and the mother of his client. At this meeting the Respondent presented to the individuals a liferent deed by Mrs A and her sister in terms of which a liferent was granted to and in favour of Mrs B being the mother of Mrs A in and to the heritable subjects at Property 2. The deed was signed by Mrs A, her sister and her mother at Glasgow on 15 September 2013. The deed was witnessed by the Respondent. Thereafter the deed was presented to the Land Register. The liferent is entered on the title sheet affecting Property 2 with a date of registration of 20th September 2013. The presentation and registration of the deed of liferent impacted considerably upon the value of the share of the property being disponed to Mr A. Whilst an action of division and sale remained an option available to Mr A, the value he could expect to realise in respect of his interest would decrease dramatically given the existence of the liferent. The Respondent was aware of the intention of Mr A to raise an action of division and sale immediately upon receipt of the Disposition. The effect of the Respondent's conduct was to make a sale less likely and diminish the value of his interest in the heritable subjects.

8. Having given careful consideration to the above facts, the Complainers' submissions in relation to the question of professional misconduct, and the Respondent's written submissions, the Tribunal found the Respondent guilty of Professional Misconduct in respect that:-

He acted in breach of the Law Society of Scotland Practice Rules 2011, namely

(a) Rule B1.1.2 to the extent that his personal integrity was called into question; and

(b) Rule B1.1.14 to the extent that he acted with other regulated persons in a manner which was not consistent with persons having mutual trust and confidence in each other and he misled other regulated persons.

9. Having heard further submissions from the Complainers and taken the Respondent's written submissions into account, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 8 December 2017. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland dated 2 November 2016 against Paul Anthony Gallagher, formerly of Raeside Chisholm Solicitors Limited, Tontine House, 8 Gordon Street, Glasgow and now of Appleby, 33-37 Athol Street, Douglas, Isle of Man; Find the Respondent guilty of professional misconduct in respect that he acted in breach of the Law Society of Scotland Practice Rules 2011 namely (a) Rule B1.1.2 to the extent that his personal integrity was called into question and Rule B1.1.14 to the extent that he acted with other regulated persons in a manner which was not consistent with persons having mutual trust and confidence in each other and he misled other regulated persons; Censure the Respondent; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not name any other person; and allow the Secondary Complainers 28 days from the date of intimation of these findings to lodge a written claim for compensation with the office of the Tribunal.

(signed)

Alan McDonald

Vice Chairman

10. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on 12 JANUARY 2018.

IN THE NAME OF THE TRIBUNAL

[redacted]

Alan McDonald

Vice Chairman

NOTE

The Complaint was served by recorded delivery letter on the Respondent at the address of the firm he was working for on 7 November 2016. Answers were lodged by the Respondent on 16 December 2016. Of consent and on the Complainer's motion, the case was sisted on 22 December 2016. Of consent, and on the Complainers' motion, the sist was recalled on 3 August 2017.

In terms of its Rules the Tribunal appointed the Complaint to be heard on 16 November 2017 and notice thereof was sent out for service on the Respondent by recorded delivery letter of 17 August 2017. On 22 August 2017, the Complainers advised the Tribunal Office that an essential witness could not attend on 16 November 2017. Accordingly, in terms of its Rules the Tribunal discharged the hearing of 16 November 2017 and appointed the Complaint to be heard on 8 December 2017. Notice thereof was duly sent out for service on the Respondent by recorded delivery letter of 28 August 2017. Both notices of hearing were returned to the Tribunal Office marked "not called for". On 12 September 2017 the Tribunal Office contacted the Respondent by email to enquire whether the Respondent was willing to accept service of the notice of hearing of 8 December 2017 by email. The Respondent indicated by email that he was willing to accept service of the Notice of Hearing by this method. On 14 September 2017 the Tribunal Office served the Notice of Hearing of 8 December 2017 by email.

On 5 December 2017 the Respondent lodged a motion seeking to adjourn the hearing of 8 December 2017 based on his limited annual leave availability. The Chairman carefully considered the motion, exercising the function of the Tribunal under Rule 56 of the Tribunal Rules. The motion to adjourn was refused. Ample notice was provided to the parties of the hearing date. The Respondent's motion to adjourn did not provide sufficient justification regarding the necessity for adjournment nor why the Respondent was unable to anticipate or cater for the issue which prevented his attendance. An adjournment at that late stage was likely to have a significant effect on the parties and the operation of the Tribunal. A venue was booked, travel arrangements made by Tribunal members and witnesses cited. The Respondent had the opportunity to attend or arrange representation. The Tribunal's decision was intimated to the Respondent by email on 5 December 2017. He provided written submissions by email on 7 December 2017 for the Tribunal to consider at the hearing.

At the hearing on 8 December 2017, the Fiscal made a motion in terms of Rule 14(4) of the Tribunal Rules for the Tribunal to proceed to hear and determine the Complaint in the absence of the Respondent. He noted that the Respondent was aware that his motion to adjourn had been refused and had provided written submissions to be considered in his absence.

The Tribunal heard evidence on oath from the Clerk with regard to service of the Notice of Hearing and considered whether it was fair to proceed in the Respondent's absence. The Tribunal noted that the Respondent had accepted service of the Notice of Hearing by email, service by recorded delivery to the address provided by the Respondent having failed. The Respondent was aware of the date of the hearing as shown by his motion of 5 December 2017 to have the hearing of 8 December 2017 adjourned. The Tribunal had regard to R v Jones [2002] UKHL 5 and the need to exercise its discretion in this matter *"with great caution and with close regard to the overall fairness of the proceedings."* The Tribunal considered that if it heard the case in his absence, there would be a disadvantage to the Respondent in being unable to give his account of events. However, he had been given ample notice of the date and had not made sufficient arrangements to attend. His reason for failing to attend was not sufficiently compelling to adjourn the case at this stage of the proceedings. There was no reason to be confident that he would attend on another occasion if the hearing was adjourned. The disadvantage to him of proceeding in his absence was mitigated to some extent by the provision of written submissions. It is in the public interest that regulatory proceedings take place within a reasonable time. Respondents cannot be allowed to frustrate the process. The fair, economical, expeditious and efficient disposal of allegations against solicitors was an important consideration. It was relevant that the Complainers' witnesses were present. It was noted that the Respondent continued to practice as a solicitor. It was therefore in the public interest that the matter was adjudicated upon without delay. In these circumstances the balance lay in favour of proceeding in the Respondent's absence. Therefore, the Tribunal granted the Fiscal's motion to proceed in the Respondent's absence.

The Fiscal invited the Tribunal to consider the status of the Respondent's written submissions. He noted that in those submissions the Respondent admitted paragraphs 3.1, 3.2 and 3.3 of the Complaint. Paragraph 3.4 was agreed in part. The Fiscal conceded that the Respondent was not responsible for presenting the liferent to the Land Register for registration and that another solicitor had done this. The Fiscal also noted that the Respondent disagreed with the Fiscal's suggestion that the Secondary Complainer's interest in the property was rendered virtually worthless. The Fiscal noted that this was not an averment of fact, but was the Complainers' submission and ultimately was for the Tribunal to determine once it had heard evidence on the matter. The Fiscal also noted that the Respondent denied that he had been informed during negotiations of the intention of Mr A to raise an action for division and sale. The Fiscal noted that this was contradicted by the email the Respondent had sent to the Complainers on 18 November 2015. Said email was production number 28 of the Complainers' productions and the relevant section was contained on page 40 where the Respondent notes *"The potential for a division and sale action was discussed and we decided that it would be prudent to attempt to insert an additional*

clause into the agreement to prevent any such action...When I attempted to obtain agreement to such a clause, Mr Caplan confirmed that these were indeed Mr A's intentions and that he would not agree to the insertion of any clause...". The Fiscal noted therefore that the Complainers did not accept that the Respondent was not informed of Mr A's intention to raise and action for division and sale. The Tribunal decided that it would be appropriate to consider the weight to be given to the Respondent's submissions once it had heard the evidence in the case.

NOTE OF EVIDENCE

Witness One: Mr A

The witness gave evidence on oath that he instructed Mr Caplan to act on his behalf in divorce proceedings. A court action was raised. Mr A's wife was represented by the Respondent. A proof was fixed at Glasgow Sheriff Court. The witness did not know whether a pre-proof hearing was also fixed. There was dialogue regarding resolution and a settlement was agreed.

The witness was referred to Production 1 of the Complainers' productions. He indicated that this was the Minute of Agreement reflecting the negotiated financial settlement. The Minute of Agreement stated that the witness' wife would pay him £7,000, £5,500 by instalments and a quarter share in Property 2 in addition to a pension-sharing agreement. The witness said that Property 2 had been valued by Shepherd and Company at £70,000. His quarter share would therefore be worth £17,500.

Before the Minute of Agreement was completed the witness was aware of correspondence between the solicitors. The witness would have preferred to receive a sum of money rather than a share in the house as he had debts to settle. Therefore, he asked his solicitor to suggest a payment of £15,000 cash as a compromise. This was less than the share of the house, but he offered a discount for the convenience of receiving cash. This was not acceptable to his wife. His wife then proposed through her solicitor that a clause was inserted into the Minute of Agreement which would prevent him raising an action for division and sale of the property at Property 2. The witness did not accept this proposal. He said that he needed to have the opportunity if necessary to sell the property. That was made clear to the parties before the Minute was signed. Although the witness had initially told his solicitor not to mention a potential division and sale, he knew that his solicitor had in fact informed the Respondent of this possibility before his wife signed the Minute of Agreement. The witness said that he never intended to raise an action for division and sale. He thought that his wife would make cash available to him rather than face that possibility. He indicated that the Minute of Agreement was signed by his wife on 9 September 2013 and that he signed it on 10 September 2013.

The witness indicated that all items in the Minute of Agreement were executed, except for the quarter share of Property 2. Shortly after the Minute of Agreement was signed, he asked Mr Caplan to request the disposition from the Respondent. Mr Caplan was provided with a draft disposition with the liferent. Mr A indicated that this disposition has never been recorded as he did not accept that it reflected the agreement after the liferent was recorded.

The witness was referred to production 2 in the Complainers' Productions. This was an extract from the Land Register for Property 2. He was asked to look at Section B "Proprietorship Section". He agreed that the property was recorded as being owned by his wife and her sister. A liferent in favour of their mother had been registered on 20 September 2013. The witness agreed after reference to Production 5 in the Complainers' Productions that the liferent had been created on 15 September 2013, five days after he had signed the Minute of Agreement.

The witness explained that the effect of the liferent was to devalue his interest in the property. He had agreed to receive a quarter share of the property. He had assessed that to be £17,500 based on the independent valuation which was based on vacant possession. It was his view that the liferent devalued the property because he would not be able to sell the property so someone else, perhaps for many years.

The Chairman noted that the Tribunal had not yet heard evidence as to the value of the property with and without a liferent. The Minute of Agreement did not attach a value to the quarter share. The witness pointed out that there was reference in the correspondence between the solicitors to the value of the property. According to him, his wife signed the agreement knowing that he wanted to be in a position to sell it. He had specifically refused her amendment to the Minute of Agreement to the effect that he should not be able to raise an action for division and sale. His solicitor had clearly explained to the Respondent that he would be able to raise an action for division and sale as the Minute of Agreement stood. From his perspective, it was not necessary to have a value in the agreement. Either they would settle or he would make the sale happen.

The Fiscal referred the witness to Production 22 of the Complainers' productions which was an email from the witness to his solicitor dated 30 August 2013. The witness agreed that the email noted that the witness did not want his solicitor to tell the other side about his intentions regarding division and sale. He was referred to Production 7 which was an email dated 2 September 2013 from the Respondent to Mr Caplan attempting to create a protection for his client with regard to division and sale. The witness noted within the same production the email from Mr Caplan to himself which said *"I subsequently received a*

call from him and explained to him that I did not think under any circumstances you would agree to either of the two changes made. I made it clear that your intention was to raise an action for division and sale immediately." It was therefore his understanding that as of 2 September 2013, the Respondent was aware that he might pursue his right to raise an action for division and sale.

Witness Two: Anthony Caplan

The witness gave evidence on oath that he had been a solicitor for forty years. He acted for Mr A in a divorce action. Mr A's wife was represented by the Respondent who was working for Raeburn Christie at that time. In advance of the pre-proof hearing, settlement was reached and terms agreed. The inclusion of the quarter share in Property 2 was suggested by the Respondent. There was no mention in his initial letter of a liferent.

The witness was referred to Production 1, the Minute of Agreement. The witness noted that he had signed this agreement as a witness. The husband was to get £7,000, then £5,500 by instalments, a share of the pension and a quarter share of the house. He agreed that the property had been valued at £70,000 and that a quarter share would amount to £17,500. The witness indicated that the total sum to be paid to Mr A was £66,500 including the cost of implementing the pension-sharing arrangement. The Minute of Agreement identified how that split was to be achieved. However, the Respondent sought to negotiate on the pension charges and division and sale of the property after they had reached agreement.

The witness was referred to Production 7 of the Complainers' productions at p15. This contained an email from the Respondent to the witness proposing two changes to the Minute of Agreement. The first was to prevent an action for division and sale. The second was an alteration to the clause relating to the pension sharing charges. The witness indicated that his client rejected the proposed amendments.

The Fiscal asked the witness whether he thought Mr A intended to pursue an action for division and sale. The witness said that was his understanding. Mr A had put forward an alternative proposition because he wanted cash. The witness was asked whether Mr A told him not to tell the Respondent of his intentions. After reference to Productions 22 and 7 the witness agreed that this was the case but that other discussions took place with Mr A and on 2 September 2013 the witness revealed Mr A's intentions to the Respondent.

The witness later learned that a liferent had been created over the property at Property 2. He considered this to be a breach of the terms of the agreement where it said the wife should deliver a Form 12A Report brought down to a date as near as practical to the date of delivery of the disposition showing no entries

prejudicial to the grant of the disposition. The witness considered that the liferent was an entry prejudicial to the grant of the disposition. He noted that the Minute of Agreement used a standard form of words which would be used in the sale and purchase of a home. It would not be usual to exclude liferents. When the Respondent's firm sent him the draft disposition there was no liferent in the warrandice clause. The witness said that he had sight of the Land Certificate before the liferent was registered and it was clear of adverse entries. He was therefore expecting a clear title. If the liferent had already been created Mr A would never have signed the Minute of Agreement because Mr A needed cash. In the witness's view, the liferent affected the marketability of the property. It was not like a lease as no income was being paid. There was no guarantee as to how long the liferenter would live. It effectively prevented a sale. The asset therefore decreased in value. He did not know by how much, and he was not a conveyancer but would estimate it would have a substantial impact, perhaps about 50%.

The witness said he was "taken aback" by the creation of the liferent. In his view you should not enter into an agreement and breach it within a week. It was not the right thing to do. If the client had wanted to do that, the firm should have withdrawn from acting. The witness went back to the Respondent's firm and asked them to discharge the liferent. The client refused. Mr A's remedy was therefore to sue for damages due to breach of contract.

The Chairman noted that the obligation in the Minute of Agreement was to produce a Form 12A report but that this was never produced. The witness indicated that it was never produced because the transaction never completed. He would have expected to receive it a couple of days before completion.

In answer to a question from a Tribunal member the witness indicated that he did recall vaguely there being a discussion about liferent and he had indicated that it was not allowed by the Minute of Agreement. He thought this discussion took place on the telephone.

The witness noted that it was another solicitor in the Respondent's firm who dealt with the disposition. It was his understanding that the Respondent dealt with the case up to the Minute of Agreement and a colleague dealt with the conveyancing.

COMPLAINERS' SUBMISSIONS

The Fiscal accepted that the Tribunal will have regard to the Respondent's submissions. However, he submitted that the Tribunal could not use them to make findings in fact. He noted again the contradiction in the Respondent's correspondence regarding when he was made aware of Mr A's intention to raise and

action for division and sale. The Fiscal accepted that the administration of the liferent was carried out by another solicitor in the Respondent's firm. He noted that the Respondent described his conduct as occurring within the context of group decision making. However, he submitted that this did not exonerate the Respondent. He was responsible for the Minute of Agreement and exposing the client to the action for division and sale. He attended at the hospital, explained the nature of the draft liferent and presented the deed for signature by the client and her sister.

The Fiscal noted that the Respondent agreed the factual circumstances contained in paragraphs 3.1-3.3 of the Complaint. The Fiscal submitted that the settlement terms had been breached. There were attempts on both sides to revise the Minute of Agreement. Mr Caplan told the Respondent about Mr A's intentions regarding division and sale. Despite this, the Respondent left him a voicemail telling him that the client would sign the Minute. The Respondent had realised that his client was exposed. He should have indicated that the deal was off or withdrawn from acting. Instead, he operated in a deceitful way by creating the liferent which frustrated and impeded the Minute of Agreement. It had an impact on the value of the asset while the liferent existed. His conduct was wholly at odds with the Minute of Agreement. Therefore, he invited the Tribunal to find that the Respondent was guilty of professional misconduct.

The Fiscal referred to the list of authorities lodged with the Tribunal. He drew the Tribunal's attention to p655 of Volume 13 of the Stair Memorial Encyclopaedia. A written deed is always necessary for the constitution of a liferent. He submitted that although an informal arrangement may have been ongoing, it had no legal effect.

The Fiscal also referred to the Tribunal case referred to in Smith and Barton's "Procedures and Decisions of the Scottish Solicitors' Discipline Tribunal" at p102. In that case (726/88) the solicitor entered into missives with another firm regarding purchase of heritable subjects. The sellers did not own part of the property which they occupied and a title to the area had to be obtained from a third party. The Respondent indicated that the third party required a consideration of £X for the outstanding area and the solicitors for the sellers agreed that £X could be deducted from the price. The Respondent then negotiated a lesser sum with the solicitors for the third party but did not communicate this reduction of price to the solicitors for the sellers. The Tribunal found the Respondent guilty of professional misconduct. It said that it was an essential feature of negotiations between solicitors that they are conducted in an atmosphere of mutual trust and a solicitor has a professional duty to respect that element of trust in all his dealings. The solicitor had a professional duty to inform the other side in the event of any material change of circumstances which significantly affected the basis on which the arrangement had been made. The outcome was of

significant financial advantage to his clients but that was not the only consideration. It is essential that at all times a solicitor has regard for his professional relationship with his fellow solicitors. The Fiscal submitted that in the present case, the Respondent had acted contrary to the expectation of mutual trust between solicitors.

The Fiscal also referred to paragraph 1.17 of Paterson and Ritchie's "Law, Practice and Conduct for Solicitors" which states that the Tribunal and the Inner House decisions reveal that inexperience or junior status only goes to mitigation and not to culpability. The Fiscal indicated that he did not dispute that the Respondent had discussed the case with the partners of the firm.

A Tribunal member asked the Fiscal to explain why creating a liferent was improper. The Fiscal submitted that it was a breach of clause three of the Minute of Agreement which required a Form 12A report showing no entries prejudicial to the grant of a valid disposition. The member asked the Fiscal whether he relied entirely on breach of that clause. The Fiscal explained that he also relied upon the conversations which had passed between the solicitors. The Respondent recognised the client's exposure, sought to revise the Minute, was told of Mr A's intention regarding division and sale, then left a voicemail saying that the client would sign the minute which she in fact did. Working behind the Minute of Agreement to create a liferent was wrong in the circumstances.

A Tribunal member asked the Fiscal whether it was conceivable that the Respondent and his colleagues reached a considered view to which they were entitled. The Fiscal submitted that was not a reasonable interpretation. Creation of the liferent was prejudicial to the grant of the disposition. The liferent meant that realistically no one would buy the property and rendered the share in it worthless.

A Tribunal member asked whether if the Tribunal agreed that the grant of a liferent was wrong in the circumstances, how much blame should be attributed to the Respondent. The Fiscal noted that the Respondent was responsible for the file up to the Minute of Agreement. There was then a gap between the Minute and the conveyancing. However, up until 10 September the responsibility was with him. According to the Respondent's own correspondence and submissions, he was then involved in discussions about the situation. He knew of the problem. He went to the hospital and got the liferent signed. He should have taken a stand and refused to do so.

The Chairman noted that the third clause does not refer to £17,500 or a quarter share of the value of the property but only a quarter share of the title. He also noted that the wording of the Minute of Agreement refers to entries prejudicial to the grant of the disposition. He queried whether the Complainers would

concede that a liferent does not prejudice the grant of a disposition. The Fiscal said that the Tribunal should have regard to the purpose of the Minute of Agreement. Mr A was entitled to £66,500. This was to be paid in different ways. As part of this, Mrs A had to give Mr A a quarter share of the house. The solicitor allowed this agreement to be formulated but worked to frustrate it. The Tribunal must consider the public perception of the misconduct. The Fiscal submitted that although the conduct was serious enough to constitute professional misconduct, it was not at the most serious end of the scale.

The Fiscal indicated that the Respondent was now working for Appleby, Douglas, Isle of Man.

RESPONDENT'S SUBMISSIONS

The Respondent provided written submissions. These admitted paragraphs 3.1, 3.2 and 3.3 of the Complaint but took issue with parts of paragraph 3.4. Firstly, the Respondent denied that he presented the deed to the Land Register. He also denied that in acting in the way he did, he sought to circumvent the intention of Mr A, thereby rendering his interest in the property virtually worthless. The Respondent noted that it was likely that the property will have held its value. He denied that his conduct was contrary to the Practice Rules. He noted that there was an "informal" liferent in existence which Mr A as aware of. The Respondent denied that he had been informed during negotiations of Mr A's intention to raise an action for division and sale.

In the event that the Tribunal was to make findings against the Respondent, he provided mitigation to the effect that all actions were taken with the clear instructions of his client and the instructions and support of his supervising partners and senior colleagues at Raeside Chisholm. The Respondent was just over one year qualified at the time of the conduct.

DECISION

The Tribunal considered carefully the evidence of the witnesses, the productions, the Fiscal's submissions and the Respondent's written submissions. It found Mr A and Mr Caplan to be credible and reliable witnesses and accepted their evidence.

The Tribunal had regard to Rule 14(5) of the Tribunal Rules which states that in any case where the Respondent fails to appear or to be represented at the hearing and the Tribunal decides to proceed to hear and determine the complaint in the absence of that person it shall take into account all the documents lodged with the Clerk, whether by the principal or secondary complainer or by the Respondent. However,

the Tribunal also recognised that where the Respondent had made submissions regarding facts rather than simply mitigation, it could not place as great a weight on that evidence since the Tribunal had not had the opportunity to see it tested by cross examination and had not been able to ask any questions in clarification. The Tribunal noted the discrepancy which the Fiscal had highlighted between the Respondent's email to the Complainers and his written submissions on the question of whether he had been told explicitly that Mr A intended to raise an action for division and sale. On this point it preferred the direct evidence of Mr Caplan who spoke to emails to that effect which were productions before the Tribunal. This was also consistent with the Respondent's earlier position to the Complainers' Sub Committee. The Tribunal accepted that the Respondent did not draft the liferent or present it for registration. This was consistent with Mr Caplan's evidence and the Fiscal's concession on this point. The Tribunal rejected the Respondent's suggestion that his firm had merely "formalised" an existing liferent. A liferent must always be in writing. The Tribunal noted that there was no direct evidence from a surveyor regarding the impact of the liferent on the value of the property. However, it did hear evidence from Mr Caplan that the liferent affected the marketability of the property. He said that the liferent effectively prevented a sale and the asset therefore decreased in value. The Tribunal was of the view that at the time the liferent was signed, the Respondent should have been aware of the likely impact on the value of Mr A's share of the property. The Tribunal concluded therefore that the facts contained in paragraph 7.1-7.4 above were proved beyond reasonable doubt.

The Tribunal considered the test for professional misconduct contained within Sharp v Council of the Law Society of Scotland 1984 SLT 313, namely that:

"There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of rules or some other actings or omissions the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is made."

The Tribunal was satisfied that the Respondent's actions met the test for professional misconduct. However, it considered the behaviour to be at the lower end of the scale of misconduct. In coming to its conclusion, the Tribunal noted the Respondent's junior status within the firm. At the time of his conduct he had been qualified for about a year and claimed to have discussed his conduct with more senior

colleagues who had approved his course of action. This was not disputed by the Fiscal. However, the Tribunal noted in case 809/90 referred to at paragraph 6.06 of Smith and Barton's "Procedures and Decisions of the Scottish Solicitors' Discipline Tribunal", that it is to expected that a newly qualified assistant will refer any unusual work matter to the partner of the firm to whom he is responsible. However, the qualified assistant also has the professional responsibility of a solicitor and this Tribunal cannot accept that by blindly following the directions of the principal solicitor, the assistant can disregard the ethical consequences of any of his actings. Therefore, although in the present case the Respondent's course of action may have been supported by his superiors, he is still responsible for his conduct.

In the knowledge that Mr A was considering an action for division and sale, having attempted unsuccessfully to negotiate a prohibition on such an action, and having advised his client to sign the minute of agreement regardless, the Respondent contributed to a decision to present a liferent for signature to his client and sister. The creation of the liferent was designed to allow his client's mother to stay in her home. This had the effect of preventing Mr A from gaining the financial benefit the Respondent was aware he intended to realise. The Respondent was aware that Mr A's circumstances would materially change as a result of the recording of the liferent. This was contrary to the spirit of the Minute of Agreement which he had negotiated on behalf of his client. His actions called into question his integrity and breached the relationship of trust between the solicitors.

As is was noted in case 726/88 which is described at paragraph 10.01 of Smith and Barton's "Procedures and Decisions of the Scottish Solicitors' Discipline Tribunal", it is an essential feature of negotiations between solicitors that they are conducted in an atmosphere of mutual trust and a solicitor has a professional duty to respect that element of trust in all his dealings. Solicitors have a professional duty to to inform the other side in the event of any material change of circumstances which significantly affected the basis upon which the arrangement had been made. Acting in the best interest of his client should not have been the Respondent's only consideration. It is essential that at all times a solicitor has regard for his professional relationship with his fellow solicitors. There is a special relationship of trust between solicitors, and solicitors are entitled to expect and rely on a course of action whereby this relationship of trust is not breached.

The Tribunal considered that the Respondent's actions brought into question his integrity and called the profession into disrepute. His conduct was not becoming of a solicitor. His serious and reprehensible departure from the standards of competent and reputable solicitors could only be categorised as professional misconduct. However, the Tribunal did not consider that the Respondent's conduct had

been dishonest. Dishonesty was not averred and no evidence of dishonest intent was placed before the Tribunal.

In considering the appropriate sanction, the Tribunal had regard to various factors. The Respondent's conduct was likely to damage the reputation of the profession. His conduct represented a significant and serious error of judgement but was not malicious or dishonest. The Tribunal considered the behaviour to be at the lower end of the scale of professional misconduct. In addition, at the time of the conduct, the Respondent was relatively inexperienced. He had attempted to consult with others more experienced than him. The conduct was a one-off event and was not part of a course of conduct. No previous findings were placed before the Tribunal. The Respondent engaged with the Tribunal to the extent of providing Answers and written submissions. The appropriate sanction in the circumstances was censure.

The Fiscal moved for expenses to be awarded against the Respondent. The Tribunal found the Respondent liable in the expenses of the Complainers and of the Tribunal. It directed that publicity would be given to the decision and that publicity should include the name of the Respondent but should not identify any third parties as publication of their personal data is likely to damage their interests. The Secondary Complainer has 28 days from intimation of these findings to lodge a claim for compensation.

Alan McDonald

Vice Chairman