

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

INTERLOCUTOR

in Complaint

by

THE COUNCIL OF THE LAW SOCIETY OF
SCOTLAND, Atria One, 44 Morrison Street,
Edinburgh

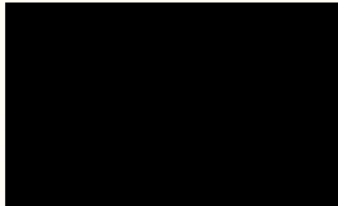
Complainers

against

BRUCE GREGOR DE WERT, Georgesons, 22
Bridge Street, Wick

Respondent

Edinburgh, 24 May 2019. The Tribunal having heard submissions in relation to the Complaint at the instance of the Council of the Law Society of Scotland against Bruce Gregor De Wert, Georgesons, 22 Bridge Street, Wick; Repels the plea to the competency based on the nature and extent of the complaint referred to the Scottish Legal Complaints Commission; Sustains the plea to the relevancy of the averments of fact relating to the will only and excludes from probation the Complainers' averments in paragraph 3.2 of the Complaint from the words "The Respondent received" in line 2 to "organise the signing" in line 9 inclusive and all of paragraph 3.3 of the Complaint; Continues consideration of the plea to the relevancy regarding allegations of deception, fraud, or lack of integrity until after evidence has been led; Allows both parties a Proof of their respective averments; Reserves the question of expenses to the conclusion of the case; and Fixes a hearing for 29 August 2019 at 10am.



**Kenneth Paterson
Vice Chairman**

NOTE

The agent for the Respondent requested a preliminary hearing for parties to address the issues of competency and relevancy raised within the Answers lodged on behalf of the Respondent. The Tribunal fixed a preliminary hearing in terms of Rule 42 of the Scottish Solicitors Discipline Tribunal Rules 2008 for 24 May 2019 at 10am to hear parties' submissions. At that preliminary hearing, the Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. The Respondent was present and represented by David Burnside, Solicitor, Aberdeen.

SUBMISSIONS FOR THE RESPONDENT

Mr Burnside noted this was a third party complaint proceeding on the basis that AJ was not capable of instructing either a will or a power of attorney. There was criticism that the Respondent accepted instructions from JC. Mr Burnside said it was conceded that JC did set up the meetings; he was to be the "whom failing" executor; and he was to be the attorney. Documents were sent to JC as requested. He reported that he had spoken to AG and she was happy with the drafts. The Respondent did not know that the welfare guardianship existed until he registered the power of attorney. In Mr Burnside's submission, the Fiscal must prove beyond reasonable doubt firstly, that AJ was not capable of giving instructions or granting documents; and secondly that he accepted instructions from JC.

Competency

According to Mr Burnside, issues relating to the will were rehearsed in the case investigator's report and the Professional Conduct Sub Committee's minute but no complaint about the will was ever made to the Scottish Legal Complaints Commission (SLCC). The Sharp test requires consideration of the whole circumstances of the case. However, this is limited to the circumstances as described in the complaint which has been considered as part of the investigation process. It was not open to the Fiscal to add matters to the Complaint.

Mr Burnside quoted from paragraph 46 of Lord Reed's judgement in Law Society of Scotland v-The Scottish Legal Complaints Commission 2011 SC 94. Lord Reed said:-

“The focus is thus on the nature of the grievance expressed by the complainer, rather than on the nature of potential grievances which have never been expressed.”

In that same paragraph, Lord Reed also says that:-

“What has to be dealt with, therefore, is the complaint which the Respondents actually received not some other potential complaint which the Respondents consider might have been made.”

Mr Burnside explained that the Law Society of Scotland-v-The Scottish Legal Complaints Commission was a challenge to the SLCC’s sifting jurisdiction. While the present case has a different context, Lord Reed’s reasoning must also apply to a complaint. The structure of the statutory scheme is such that the investigation stage only takes place after the SLCC gatekeeping function has been exercised and the case passed to the Law Society. It is only that complaint which was first intimated which might be investigated and determined. The meetings with the client regarding the will are relevant to the state of mind of the Respondent when he was considering capacity but should be limited only to that issue. The meetings regarding the will took place long before the power of attorney was dealt with. The Sub Committee instructed the prosecution relative to the power of the attorney only.

Relevancy

Mr Burnside submitted that even if the averments of paragraph 3 of the Complaint are competent in consideration of professional misconduct, there are no relevant averments of professional misconduct relating to the Respondent’s conduct when dealing with the will.

Mr Burnside noted that there is reference in the Complaint to the Law Society Practice Rules 2011. Rule B1.2 relates to trust and personal integrity. Rule B1.5.1 refers to having proper instructions from the client. The Fiscal also lodged the Law Society Guidance on Vulnerable Clients (Production 3 in the Complainers’ First Inventory of Productions). Mr Burnside conceded that the pro-forma used by the Respondent is perhaps not as detailed as the guidance recommends, but the Tribunal ought to remember that guidance does not have the status of a rule.

Mr Burnside said there was nothing in the power of attorney document which suggests either an absence of authority or undue influence. The Respondent has 40 years of chamber practice experience. He executes hundreds of documents a year. The only evidence that JC was present was in the Respondent's email to the Office of the Public Guardian dated 8 December 2015.

Mr Burnside submitted that much is made in the Complaint of the lack of attendance notes. Mr Burnside recognised that these are important and can be helpful but are not always practical or necessary. This issue does not detract from a reasonable will. It does not prove that the Respondent took instructions from JC. It was accepted that the client was in hospital and unable to write. The Respondent was aware that AJ had alcohol related tremors which affected her ability to write. He made four visits to her including one where he executed the will as a relevant person witnessed by a member of hospital staff. There are no averments in the Complaint to support the suggestion that JC influenced AJ. Mr Burnside noted that the Fiscal had lodged the Tribunal decision in Law Society of Scotland-v-Shirley Houlihan. In that case the solicitor concerned never met with the client and relied upon her unqualified assistant. The lack of files was a very important factor in that case. The major difference in the present case is that the Respondent knew the client. Mr Burnside referred to a letter from Dr Bather dated 10 December 2018 (Production 5 in the Complainers' First Inventory of Productions). It relates to an examination of AJ on 31 October 2014. AJ was discharged home after that examination (but later readmitted).

Mr Burnside referred to a letter from Dr Nicoll dated 29 November 2018 (Production 9 in the Complainers' First Inventory of Productions). It referred to a mini-mental state examination on 24 August 2015 in terms of which AJ was found to be on the cusp of severe cognitive failure. However, Mr Burnside submitted that the Tribunal must consider what the Respondent was certifying. The Respondent was of the opinion that on that particular day, based on his meetings, AJ understood the nature and extent of what she was signing. When a solicitor signs a power of attorney he certifies capacity and confirms that the grantor knew the nature and extent of the deed. Capacity is a legal not a medical matter. It can vary day-to-day and vary according to the complexity of the issues concerned. A solicitor is in a privileged position to judge capacity. It is not open to the Tribunal to say that it prefers the doctor's position. The letter notes that AJ did

not want a power of attorney because she thought her son might put her in a care home. This demonstrates an understanding of the nature of the power of attorney.

Mr Burnside argued that before finding professional misconduct on the basis of lack of integrity, the Tribunal must be satisfied that there is no other satisfactory alternative explanation. AJ might have decided not to tell the Respondent, or fooled him, or did not want to involve him in the guardianship. There was no relevant averment of lack of integrity or of JC giving instructions. Therefore, there was no fair notice to the Respondent. There is no public record of guardianship orders. The Respondent was under no duty to satisfy himself regarding this. For a prosecution to succeed, it would have to be the case that no competent and reputable solicitor would have acted like the Respondent. There was no reason for the Respondent to have acted without integrity. There was no question of personal gain but there was a risk to his reputation.

Mr Burnside noted that the second averment of professional misconduct relates to the registration of the power of attorney. The Respondent had a duty to register it and follow the client's instructions unless they were withdrawn or the client died. The guardianship order did not affect the decision he made several weeks before regarding capacity. At the time of registration, his task was *functus*. For a case of professional misconduct to succeed on grounds of lack of integrity, the solicitor would be obliged to review his own decision in the light of subsequent events. For the case to succeed on absence of proper instruction, the Complainers must prove AJ was incapable and someone else gave the instruction.

In summary, Mr Burnside submitted that averments 3.2 and 3.3 in the Complaint were incompetent for want of complaint to the SLCC. In addition, there were no relevant averments of professional misconduct to enable the Tribunal to consider the matter. Therefore, the Complaint should be dismissed and expenses awarded to the Respondent.

SUBMISSIONS FOR THE COMPLAINERS

Mr Reid questioned the relevance of the Law Society of Scotland-v-the Scottish Legal Complaints Commission. He submitted that the SLCC is a separate statutory "animal" to the Law Society Fiscal. Different duties and obligations apply. However, the issue might be

academic. He invited the Tribunal to consider the terms of paragraph 3.8 of the Complaint. He submitted that in that paragraph he summarised the basis of the allegation of professional misconduct. The terms of paragraph 3.8 show that the basis of the Complaint relates to the Respondent's conduct regarding the power of attorney. The Fiscal said that he was "not interested in the will". The conduct relating to the will is of relevance because the Complaint encapsulates the commercial relationship between the client and the Respondent. It demonstrates the "red flags" regarding capacity which were apparent. Therefore, the Tribunal ought to hear evidence regarding this. The Fiscal referred to the Tribunal's decision in Law Society of Scotland-v-Shirley Houlihan which concerned a solicitor's failure to supervise staff. The behaviour of the assistant in that case is almost identical to the Respondent's conduct in the present case. If the Fiscal establishes the facts in the Complaint, a case of professional misconduct can be made. The Fiscal suggested that the Tribunal proceed by way of a Proof Before Answer.

DECISION

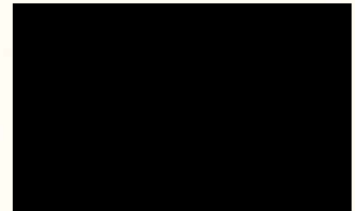
The Tribunal gave careful consideration to the parties' submissions, and the Productions and Authorities to which they were referred. The Respondent's agent raised questions of competency and relevancy. The Fiscal indicated that the Complainers made no complaint regarding the Respondent's conduct in relation to the will but that he was entitled to lead evidence of the background to the conduct.

Firstly, the Tribunal considered the Respondent's submission that averments 3.2 and 3.3 of the Complaint were incompetent for want of complaint to the SLCC. The Tribunal considered that the averments in paragraphs 3.2 and 3.3 contained factual background to the conduct Complaint. However, there are no corresponding averments of professional misconduct. It is not the case that the Complainers included an additional head of complaint which had not been referred to the SLCC in terms of the statutory process. Therefore, the Tribunal repelled the plea to the competency.

Secondly, the Respondent's agent submitted that there were no relevant averments of professional misconduct to enable the Tribunal to consider professional misconduct. The

Tribunal considered that the terms of paragraph 3.8 of the Complaint were not clear and could equally apply to the will and the power of attorney. However, given the Fiscal's concession, much of Articles 3.2 and 3.3 were irrelevant as they had no bearing on what the Fiscal submitted was the Complainers' case. Therefore, the Tribunal sustained the plea to the relevancy and excluded from probation the Complainers' averments in paragraph 3.2 of the Complaint from the words "The Respondent received" in line 2 to "organise the signing" in line 9 inclusive and all of paragraph 3.3 of the Complaint. These deleted sections might be prejudicial to the Respondent and were not relevant to the case against him. The deletions do not preclude or inhibit the case the Complainers say they intend to make against the Respondent. The averments relating to capacity have not been deleted as this may be relevant to determining professional misconduct. The Tribunal continued consideration of the plea to the relevancy regarding the allegation of deception, fraud, or lack of integrity until after evidence has been led.

The Tribunal fixed a hearing for 29 August 2019 at 10am. The Tribunal reserved all questions of expenses until the conclusion of the case.



Kenneth Paterson
Vice Chairman