

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

FINDINGS

in Complaint

by

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

Complainers

against

**DAVID JAMES RANKIN, Solicitor, Stewart
& Osborne, 37 Eglinton Street, Beith**

Respondent

1. A Complaint dated 7 July 2017 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that, David James Rankin, Solicitor, Stewart & Osborne, 37 Eglinton Street, Beith (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There were two Secondary Complainers.
3. In terms of its Rules, the Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
4. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 29 August 2017 and notice thereof was duly served on the Respondent.
5. At the hearing on 29 August 2017, the Complainers were represented by their Fiscal, Jim Reid, Solicitor, Glasgow. The Respondent was present and was represented by Johnston Clark, Solicitor, Dundee.
6. A Joint Minute between the parties had already been lodged with the Tribunal Office agreeing the averments of fact, duty and misconduct. It was confirmed that the Respondent

had settled the compensation claims for the two Secondary Complainers. The Tribunal heard submissions from both parties.

7. Having given careful consideration to the terms of the Joint Minute, the documentary Productions for the Complainers and the parties' submissions, the Tribunal found the following facts established:-

- 7.1 In or around 26 September 2014 the Respondent was instructed by Mr X in connection with preparing a Power of Attorney and Will for his mother, the late Mrs A.

Mrs A was diagnosed with a terminal illness and was admitted to hospital in or around late September/early October 2014. She died on 12 November 2014. She is survived by five children, three daughters and two sons. The Secondary Complainers are the son and daughter respectively of Mrs A.

- 7.2 On 26 September 2014 the Respondent wrote to Mr X referring to a telephone conversation between them regarding a proposed Power of Attorney to be granted by Mr X's mother in favour of Mr X and his sister.

The letter set out the details of the proposed Power of Attorney and explained inter alia:

"As I advised the Power of Attorney requires to be signed by your mother in the presence of a witness and details of the execution noted on a Schedule of Particulars. In addition your sister and yourself would require to sign the appropriate forms confirming you are willing to act as an Attorney and finally I require to sign a Certificate confirming that I am satisfied that your mother has full capacity in relation to the Power of Attorney and that she understands the nature and effect of same. As I advised, to avoid any delay if you were to obtain a note or letter from her Consultant confirming that they are satisfied that your mother has full capacity then I will be able to sign the Certificate without meeting her personally."

The letter went on to explain that the Power of Attorney would only be effective during Mrs A's lifetime and that if she wished to give instructions regarding the division of her estate then she ought to consider preparing a Will.

Enclosed with the Respondent's letter were two separate letters addressed to Mrs A. The letter to Mr X concluded:

"I appreciate in a matter such as this your mother is in fact the client and I have therefore enclosed a letter to your mother detailing the procedure and requirements in relation to the Power of Attorney. I have also enclosed my firm's standard Terms of Engagement together with an estimate of the costs of the preparation of the Power of Attorney and its registration with the Office of Public Guardian."

- 7.3 Drafts of a Power of Attorney and Will were thereafter prepared by the Respondent on behalf of Mrs A. The Power of Attorney was to be granted in favour of Mr X and his sister Mrs B and in accordance with the Will said Mr X was to be appointed Executor.

A filenote of 1 October 2014 notes Mr X had requested a fresh Will and Power of Attorney be sent to him and that the "Documents were sent to Mr X today first-class post".

Although Mrs A was the client, the file does not show any reference to, or checks and documentation relating to, due diligence and or monitoring in terms of The Money Laundering Regulations 2007 Regulation 14.

- 7.4 A handwritten filenote of 2 October 2014 states *inter alia*:

"Re call you are noting Consultant will sign as witness - but unwilling to give note confirming capacity. She is satisfied that you have full capacity ... we can proceed on that basis. Will forward fresh docs."

- 7.5 Mrs A signed the Will and Power of Attorney on 5 October 2014. The testing clause

of the Power of Attorney records the place of signing as the New Victoria Hospital, Glasgow. Both documents were witnessed by a General Practitioner, believed to be a family friend. Mrs A's Consultant did not sign as a witness.

- 7.6 On 7 October 2014 the Respondent sent letters to the home addresses of both Mr X and Mrs A. Said letters enclosed copies of the Power of Attorney and Will and confirmed arrangements were being made for the Power of Attorney to be registered with the Office of the Public Guardian.

The Respondent signed a Certificate on 7 October 2014 which was subsequently submitted to the Office of the Public Guardian on registration of the Power of Attorney.

The Respondent certified that he had interviewed the granter [i.e. Mrs A] immediately before she subscribed the Power of Attorney, that he was satisfied the granter understood the nature and extent of the Power of Attorney on the basis of the Respondent's own knowledge of the granter, and that he had no reason to believe the granter was acting under undue influence or that any other factor vitiates the granting of the Power of Attorney.

The Respondent submitted the Power of Attorney electronically to the Office of the Public Guardian and received a confirmation email on 10 October 2014 that payment had been received successfully.

- 7.7 The Respondent's file contained a photograph and utility bill in the name of Mrs A. There was however no evidence to suggest the Respondent had met with Mrs A at any point throughout the duration of the transaction. There was no evidence to suggest Mrs A was an established client of the Respondent.

The Respondent took instructions direct from Mr X. He did not meet with Mrs A to satisfy himself regarding her capacity in granting the Power of Attorney or Will.

- 7.8 By letter dated 13 October 2014 the Respondent wrote to Mr X enclosing a fee note in connection with the preparation of the Power of Attorney. The fee note was

addressed to Mrs A and the letter stated "I look forward to receiving your mother's remittance in settlement, in due course."

- 7.9 The Secondary Complainers made a complaint to the Scottish Legal Complaints Commission (SLCC), By letter dated 31 March 2016 the SLCC referred the matter to the Complainers.

The summary of the complaint was:-

1. Mr Rankin failed to act diligently in our late mother's best interests and failed to communicate in any way with our late mother, in that he prepared a Will for her favouring our brother (Mr "X") (signed by our late mother on 5 October 2014) by taking direct instructions from Mr X, without taking the necessary steps to ensure that our late mother had the legal capacity required to instruct the preparation and execution of such a document.
2. Mr Rankin failed to act diligently in our late mother's best interests and failed to communicate in any way with our late mother, in that he prepared a Power of Attorney document on her behalf (which our late mother signed on 5 October 2014) by taking instructions from our brother, without taking the necessary steps to ensure that our late mother had the legal capacity required to instruct the preparation and execution of such a document.

- 7.10 By letter dated 14 April 2016, the Complainers wrote to the Respondent enclosing a Summary of Complaint and confirming a Report would be required to be prepared in respect of the complaint.

A Report was thereafter prepared and sent to the Respondent by letter dated 19 July 2016. Said letter informed the Respondent that the matter would go to the Complainers' Professional Conduct Sub Committee for consideration.

- 7.11 The complaint was considered by the Complainers' Professional Conduct Sub Committee on 25 August 2016.

The Sub Committee determined that the Respondent's conduct in respect of both matters referred to in the summary of the complaint [as noted at Para 7.9 above] appeared to amount to a serious and reprehensible departure from the standard of conduct to be expected of a competent and reputable solicitor; that it appeared capable of being proved beyond reasonable doubt and could, therefore, amount to professional misconduct.

The Sub Committee determined that the complaint should be prosecuted in terms of Section 51 of the Solicitors (Scotland) Act 1980.

By letter dated 14 September 2016 the Complainers sent the Respondent a copy of the Professional Conduct Sub Committee Determination.

8. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct in respect of his breaches of Rules B1.2, B1.5.1, B1.9.1 and B6.23.1 of the Law Society of Scotland Practice Rules 2011 in relation to his failure to communicate with his client at any time, to satisfy himself that his client had capacity and his signing of a certificate to the Office of the Public Guardian despite having no basis to do so.

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

Edinburgh 29 August 2017. The Tribunal having considered the Complaint dated 7 July 2017 at the instance of the Council of the Law Society of Scotland against David James Rankin, Solicitor, Stewart & Osborne, 37 Eglinton Street, Beith; Find the Respondent guilty of professional misconduct in respect of his breaches of Rules B1.2, B1.5.1, B1.9.1 and B6.23.1 of the Law Society of Scotland Practice Rules 2011; Censure the Respondent; Fine him in the sum of £3,000 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.

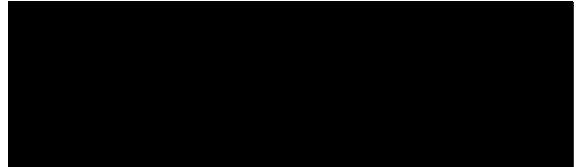
(signed)

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 **5 OCTOBER 2017** .

IN THE NAME OF THE TRIBUNAL



Alan McDonald
Vice Chairman

NOTE

At the hearing on 29 August 2017 the Tribunal had before it the Complaint, Inventory of Productions for the Complainers, Answers for the Respondent and Joint Minute between the parties. Prior to the hearing, the solicitor for the Respondent had lodged with the Tribunal written confirmation from both Secondary Complainers that they had received settlement of their claims for compensation. The Fiscal for the Complainers confirmed that the claims for compensation had been settled.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal submitted that the admitted facts, when taken along with the averments of duty amounted to actings which met the Sharp test and therefore amounted to professional misconduct. He accepted that the question of misconduct was a matter for the Tribunal but submitted such a finding was appropriate in this case.

Mr Reid explained that the matter arose as a result of one of the sons of the deceased requesting that the Respondent prepare a power of attorney and will for his mother. The mother at the time was in hospital with a terminal illness.

Mr Reid took the Tribunal through the averments of fact. He drew the Tribunal's attention in particular to the following:

1. The letters to the deceased in averment 5.2 of the Complaint were sent to her home address when the Respondent was aware that she was in hospital;
2. The Respondent acknowledged in his correspondence that it was the deceased who was his client and yet he effectively had no instructions from her;
3. The consultant in charge of the deceased was reluctant to sign a certificate of capacity because she did not think the deceased had capacity;
4. The will and power of attorney were witnessed not by the consultant but by a GP who was a family friend;
5. The Respondent signed a certificate stating that he had interviewed the grantor when he had not met her and all of the information that he had was second hand.

The Respondent made no attempt to take instructions from his actual client. The Respondent made no attempt to check first hand that the deceased had had capacity to sign the will and power of attorney. The will could have had significant detrimental consequences to the family of the deceased. The fact that it did not have such consequences in this case was, in Mr Reid's submission, sheer chance. Mr Reid submitted that it was difficult to understand how the Respondent could have completed the certificate in the terms that it was stated.

Mr Reid clarified that the breaches of duty as set out within paragraph 6 of the Complaint were all agreed and that the averments of misconduct set out in paragraph 7.1 and 7.2 were also agreed.

In answer to a question from the Chairman with regard to the Anti-Money Laundering Regulations, Mr Reid accepted that these were not a significant factor here but were part of the general position. The Respondent had acknowledged that the deceased was his client but had no instructions from her.

He invited the Tribunal to hold that the averments of fact amounted to professional misconduct.

SUBMISSIONS FOR THE RESPONDENT

Mr Clark stated that the Respondent accepted that he made several mistakes and accepted the inevitable conclusion. The Respondent allowed his instinctive desire to help to take over and he had taken the word of the deceased's son, for whom he had acted for some time.

From the outset the Respondent identified who the client was but he then failed to follow through properly. The Respondent should have known better. The Respondent had not thought there was anything untoward involved and was not suspicious because all of the children of the deceased were beneficiaries in the terms of the will. If there had been no power of attorney, then a guardianship would have been required, which is obviously more complicated.

He accepted that the Respondent did not know whether or not the deceased was capable of signing the two documents. The poor certification by the Respondent was done on the back of the GP witnessing the signing of the two documents. The Respondent might have accepted that the GP acting as witness was enough to establish capacity, and once upon a time that would have been sufficient although it was not now.

Mr Clark invited the Tribunal to look at this incident as similar to a case of careless driving, where there was no consequence. He submitted there was no criminality. The will left the family in exactly the same position as if the deceased had died intestate. There had been no attempt made to reduce the will. There was no competing guardianship.

With regard to the Secondary Complainers' claims for compensation, he submitted that the Respondent had actively sought to avoid inconvenience. The Respondent had quickly agreed compensation with the Secondary Complainers and receipts had been submitted to the Tribunal Clerk.

The Respondent is 61 and is a partner in the firm of Stewart & Osborne. The firm has one office. This has been the Respondent's only appearance before the Tribunal. The Respondent is the senior partner of the firm and is a chamber practitioner engaged in executry and private client work. He submitted that any restriction on the Respondent's practising certificate would have a serious consequence for the firm. The Respondent has a plan to retire at the age of 65.

Mr Clark submitted that something like this would never happen again and that this was a one-off situation. The Respondent had taken advice early in relation to the Complaint and had been cooperating fully from the outset. This matter had been hanging over him for more than a year. Given the private nature of his work it had been difficult to obtain references for him. The Respondent was embarrassed that his integrity had been called into question.

In relation to penalty, Mr Clark asked the Tribunal to consider the seriousness of the misconduct in this case in comparison to the case of Durkan [2012] where a fine of £2,000 and a Censure were imposed and the case of Paterson [2015] where only a Censure was imposed although he accepted that there was no issue of a false certificate being signed in these cases.

DECISION

Whilst the Respondent had admitted professional misconduct, it remained for the Tribunal to consider whether or not the admitted conduct met the test set out within the case of Sharp.

The Respondent had recognised from the outset that the deceased was his client and not her son and yet at no stage had he met with the deceased. He had no personal understanding as to the capacity of the deceased. Albeit the family GP had witnessed the deceased's signatures, the Respondent was aware that

the deceased's consultant had declined to sign a certificate of capacity. The Respondent had no idea whether or not his client, the deceased, had understood the effects of the documents she had signed. The certificate the Respondent had signed was clearly inaccurate in a number of areas – he had not interviewed the grantor, could not be satisfied that she understood the nature and extent of the power of attorney and had no personal knowledge of the grantor.

The Respondent's conduct clearly fell well below the standard of conduct to be expected of a competent and reputable solicitor to a degree which could only be regarded as serious and reprehensible.

The Tribunal unanimously found the Respondent guilty of professional misconduct.

The Tribunal invited the parties to make further submissions in relation to sanction, expenses and publicity. Neither party had any further submission to make in relation to sanction. The Fiscal moved for expenses and for publicity in the usual way. The solicitor for the Respondent indicated that the Respondent accepted as inevitable an award of expenses against him and made his submissions regarding publicity.

PENALTY

The Tribunal considered the Respondent's misconduct here to be serious. The consequences of his misconduct could have been disastrous and the Respondent should consider himself fortunate that the consequences in this case had not been so.

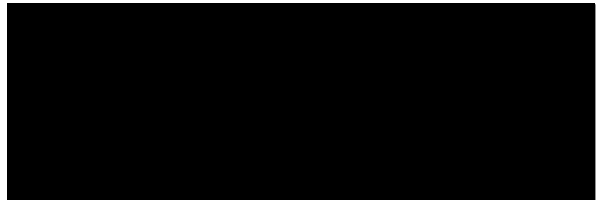
The Tribunal was conscious of a large number of mitigating factors. The will had included all of the children of the deceased. The son of the deceased had been a long standing and trusted client. The Respondent has been a solicitor for 36 years without any other issues arising. He was clearly remorseful and had cooperated with proceedings from the outset. The Tribunal accepted that there was unlikely to be any repeat of such conduct and considered that, given the Respondent's insight into his conduct, there was no ongoing risk to the public requiring any kind of restriction.

Nonetheless, the Tribunal required to mark the seriousness of the Respondent's conduct and concluded that this would be done appropriately by imposing a Censure and a Fine of £3,000.

The Respondent's agent had referred to other cases that had been before the Tribunal. These cases could clearly be distinguished from the current circumstances, not least because of the signing of the inaccurate certificate. Each case requires to be considered within its own facts and circumstances.

Given the Tribunal's findings, the appropriate award of expenses was one in favour of the Complainers.

With regard to publicity, the Tribunal concluded that given the sensitive nature of the circumstances, it would be inappropriate to name the individuals involved. In normal circumstances, Secondary Complainers would be named in Tribunal Findings but in this case to do so would identify the other parties involved. In all of these circumstances, the Tribunal consider it appropriate to order publicity including only the name of the Respondent.



Alan McDonald
Vice Chairman