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

CRAIG ROBERT HARVIE, Eden Legal Limited, Unit E3, Inveralmond Business Centre, 6 Auld Bond Road, Perth

Respondent

1. A Complaint dated 16 December 2022 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 Craig Robert Harvie, Eden Legal Limited, Unit E3, Inveralmond Business Centre, 6 Auld Bond Road, Perth (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There were two Secondary Complainers, Mrs Laura Johnston-Brand, 15 Glebe Crescent, Alva and Mrs Karen Lee, 47 Woodside Crescent, Mintlaw, Peterhead.

3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged for the Respondent.

4. In terms of its Rules, the Tribunal set the matter down for a hearing on 11 May 2023 and notice thereof was duly served upon the parties.

5. At the hearing on 11 May 2023, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by William Macreath, Solicitor, Glasgow. The Fiscal made a motion for the Tribunal to receive an amended Complaint. This being consented to by the Respondent, the Tribunal

granted the motion. A Joint Minute of Admissions was lodged, admitting all of the averments of fact and misconduct within the amended Complaint. Therefore, no evidence required to be led. The Tribunal heard submissions from both parties.

6. Having given careful consideration to the submissions and documents before it, the Tribunal found the following facts established:-

6.1 The Respondent is Mr Craig Robert Harvie, Eden Legal Limited, Unit E3, Inveralmond Business Centre, 6 Auld Bond Road, Perth. His date of birth is 29 April 1972. He was admitted to the roll of solicitors on the 3 October 1995. He was an employee of McCash & Hunter Perth between October 1995 and December 1997; McGrigors, Glasgow between January 1998 and July 2002; Scottish Government, Edinburgh between July 2002 and October 2003; he returned to McCash & Hunter as employee between November 2002 and December 2004. He became partner in McCash & Hunter in January 2007 remaining as such until March 2014. He became director of Eden Legal Limited in April 2014. He became director in McKean & Gardner Limited on the 14 December 2017. He continues to practise as a director in both limited companies.

6.2 The Respondent is the sole shareholder and director of Eden Legal Ltd and McKean Gardner. Eden focuses on agricultural and rural land matters, McKean Gardner on private client work.

6.3 Eden was engaged by the farming partnership of Messrs C & D Johnston. Accordingly, the Respondent had acted for the partnership for a number of years. The partners were Bill Johnston, Andrew Johnston, Douglas Johnston and Hazel Johnston. The partnership was the Respondent's client. The land upon which the partnership operated was not a partnership asset. It was owned in pro indiviso shares – Bill 50%, Andrew 40% and Douglas & Hazel 5% each. The partnership interest was split on similar proportions.

6.4 The partnership was aware of the difficulty that the surviving partners may have in continuing the partnership should Bill or Andrew die. The land had a greater value than the individual's interest in the partnership.

6.5 The Respondent acted in 2016 in preparing a co-ownership agreement. There was at that time in place a life assurance policy covering Bill and Andrew's lives, the sum insured was £750,000. In 2016 it was noted the benefactor of the life insurance policy was the partnership, not the surviving partners as individuals. The intent of the policy had been to allow the other partners to buy the deceased's share of the farmland and allow the farm to continue as a going concern. As the partnership was the benefactor – the life insurance policy was noted not to benefit the surviving partners but the partnership- it accordingly would not be effective for this purpose.

6.6 The co-partnership agreement entered into in 2016 allowed the surviving partner to buy out the deceased estate's interest in (1) the farmland and (2) the partnership over a period of six years.

6.7 The partners were made aware of the deficiency in the insurance policy in 2016.

6.8 The secondary complainers are daughters of Bill Johnston. Bill became ill in 2019. Prior to the illness becoming serious and requiring his hospitalisation he consulted with the Respondent's firm McKean Gardner in relation to his will and a power of attorney. The farmland ownership position was raised again with Bill.

6.9 Bill was admitted to hospital in December 2019. Bill died on the 19 January 2020.

6.10 Andrew advised the Respondent about Bill's serious ill health by email on the 19 December 2019. He raised the difficulties explained above (the value of the land and partnership) and thought they needed to be addressed now.

6.11 The Respondent spoke at length with Andrew by telephone on the 20 December 2019. He noted Andrew advised that Bill was very ill with doctors saying he only had days left. Andrew said he'd had discussions with Bill over the years about the co-ownership problem but that they had never really reached a concluded position about what would ultimately happen. The Respondent noted:-

6.11.1. Andrew sensed that Bill understood the predicament that he was in and that he might do something to give him an opportunity to carry on the farm.

6.11.2. There was no way Andrew could afford to buy out the land at £1.5 million, plus the partnership money on top of that.

6.11.3. The Respondent recapped the terms of the current Partnership Agreement and the terms of the Co-owners' Agreement for the land. Both gave Andrew six months to decide if he wanted to buy out Bill's share in both the partnership and the land and if he did, he had six years to pay the value.

6.11.4. The current Partnership Agreement called for all assets to be valued to market value which due to depreciation would likely be less than Bill's capital account of about £200,000. The land would then need to be valued separately.

6.11.5. According to Andrew the problem was the life insurance policy was supposed to pay out £750k to the survivor to buy out the other's share but looked like it would pay out to the partnership instead. Andrew thought/ noted this had been an error made by the financial advisors at the time but the effect of which would be to swell the value of the partnership capital with half going to Bill's capital account.

6.11.6. The Respondent advised that it might be possible with Bill's agreement to vary the Partnership Agreement to state that Bill was relinquishing any interest he had in the policy proceeds so excluding them from his capital account.

6.11.7. The Respondent advised that Bill would need to agree to that following a chat with Andrew and thereafter give the Respondent clear instructions that those were his wishes. The Respondent could then quickly draft something up and visit Bill to go over that with him and have it signed if those were his wishes.

6.11.8. The Respondent noted that there may be issues about capacity and concerns about undue influence. Basically, that anything that was being changed at this very, very late stage would create suspicion and potentially lead to disputes unless there was very clear communication among everyone.

6.11.9. Andrew asked about the possibility of Bill agreeing to cap the value of his share to say £1 million. The Respondent pointed out that whilst this would be possible through variation of the Co-ownership Agreement, the downside for Bill was that he would be reducing the money otherwise going to his children's benefit. Andrew and Bill would need to be very, very clear that that was what he wanted to do and be fully aware of the consequences. In the Respondent's view this type of arrangement so late in the day was exactly what people end up fighting about post death.

6.11.10. The Respondent noted if Bill was interested, then they would need to be extremely careful and make sure that the doctors had signed off that he had capacity to do it and that there was absolutely no question that he had been put under any pressure of any sort to make this arrangement. It would also be better if Bill could explain to his children his reasons for making the change, but Andrew thought it unlikely he would do that.

6.11.11. Matters were left with Andrew to speak to Bill over the weekend and then get back to the solicitor if any further action was agreed.

6.12 Andrew emailed the Respondent on the 21 December indicating he had had a discussion with Bill in hospital about the possible alterations. In particular he advised the insurance had been previously discussed and the decision not to change it was made jointly (by Bill and Andrew) in 2014. The Respondent indicated he was willing to visit Bill. He re-iterated that care would be needed regarding Bill's ill health, specifically, consideration of undue influence and pressure to change the contract. The Respondent prepared a contract altering the use of the insurance proceeds so that they would vest in the surviving partner, in

effect Andrew in the imminent circumstances, and not the partnership.

6.13 The Respondent emailed Andrew on the 22 December 2019 with a draft of the partnership variation. In the email he explained the effect of the changes.

6.14 The Respondent also emailed Ian Craig of Campbell Dallas Accountants on the 22 December. Ian Craig was the partnership Accountant. In his email the Respondent set out various scenarios regarding the potential transfer by Bill of certain heritable property and raising the issue re the intention behind the insurance policy. The Respondent had not spoken to Bill at this time.

6.15 On the 23 December the Respondent met with Bill in hospital. The Respondent prepared a short file note, this was prepared in advance as an aide-memoire. It listed the matter the Respondent intended to raise at the meeting. It reads:

"Meeting with Bill

1. *Capacity*
2. *Influence*
3. *Partnership variation – Policy and net book value issue*
4. *Farm Value and houses*
   Prepared to take some farm value away from children and transfer to Andrew to assist him in keeping the farm going?
5. *Any further instructions and next steps."*

6.16 The entry at number 4 has a question mark. That suggests it is a question to be posed to Bill. The entry at number 5 also suggests that it is a reminder. On the whole the file note is an aide-memoire, it is not a record of what was discussed at the meeting.

6.17 The Respondent wrote to Bill (personally) at Hilton Farm on the 23 December. Bill was in hospital. Bill lived in at Hilton Farm Cottage not the Farmhouse – Andrew lived in the Farmhouse. The letter begins "*I refer to our call yesterday*…". The Respondent did not call Bill on the 22 December. It goes on "*I understand the partners wish to make a change to the partnership agreement deal with the way the life insurance has been written*." The letter gives advice on the effect of the 5 clauses in the variation of partnership agreement. It concludes

"*[p]lease let me know if you are satisfied with the changes or whether you would wish to discuss the matters in more detail*."

6.18 The Respondent sent a formal letter of engagement (LoE) to the partnership on the 23 December 2019 to Hilton Farm. It was emailed to Andrew only. The LoE was addressed to "The Partners". It noted that Andrew would be the principal point of contact and the Respondent would take instructions from him. The LoE had details for signature by Andrew and Bill. It noted the Respondent would communicate by email and the communication would only be sent to Andrew's email address.

6.19 The LoE noted the work would be:

6.19.1. Reviewing the Partnership Agreement

6.19.2. Identifying changes required to be made to reflect agreement about treatment of life insurance policy proceeds

6.19.3. Identifying any other updates and changes required to update the agreement

6.19.4. Preparing variation Agreement

6.19.5. Attendance with you, discussing Variation Agreement, taking instructions, finalising Agreement for signature, arranging for deed to be signed and all other work in connection therewith.

6.20 The Respondent wrote to Andrew on the 24 December 2019 setting out his discussion with Bill. He reported-

6.20.1. Bill wanted more time to think about things. The Respondent thought Bill was to discuss the matter with his family and Andrew.

6.20.2. The Respondent left the variation agreement with Bill.

6.20.3. He apologised for not "*having anything more concrete to report*"

6.21. The variation of the partnership agreement provided:

6.21.1 Firstly, an amendment to the profit sharing.

6.21.2 Secondly, adding a new clause 11 which

6.21.2.1 clarified/formalised the relationship between the farming partnership and the individual owners of the farm land.

6.21.2.2 that with regard to the life insurance policy "*it is agreed that a deceased partner shall have no interest in, or be entitled to receive any share of, the proceeds of the said policy*."

6.21.2.3 the balance sheet of the partnership on death would exclude (a) goodwill and (b) the proceeds of the life assurance policy.

6.21.3 Thirdly – the balance sheet prepared on the death of a partner would be without a revaluation of any partnership asset – relying on the previous figure given in the most recent partnership accounts.

6.22. The Respondent received an email from Andrew on the 30 December 2019. That email is not on the Respondent's file. The Respondent made a file note which narrated inter alia:-

6.22.1 Bill was deteriorating and Andrew was concerned that they could run out of time for him to make any decisions about what he wanted to do with his half-share of the farm.

6.22.2 Bill had now said that he would discuss Andrew's scenario and decide whether there was anything else that he needed to do. Andrew felt he had to at least try to explain to Bill the problems he would face if something was not changed.

6.22.3 Andrew had spoken to Bill's children and they had mooted the possibility of renting the farm back to him for a period because if it was at simple market value then there was no way he could afford to buy out Bill's half.

6.22.4 Andrew emphasised that Bill was clear that he wanted to achieve what the policy was meant to.

6.22.5 Andrew was to speak with Bill again to ensure he was up for meeting with the Respondent later that day.

6.23 The Respondent advised he was free to meet with Bill that day. Bill's son was made aware of the meeting between Bill, Andrew and the Respondent. He emailed asking if his presence was needed. The Respondent replied, no.

6.24 The Respondent met with Bill and Andrew in the High Dependency Unit of Perth Royal Infirmary on the 30 December 2019. The Respondent's file note records (paraphrased) inter alia:-

6.24.1 Bill was now taking his oxygen through a face mask rather than through a nasal pipe. He confirmed that he was ready and happy to discuss the farm although said that he did tire easily and found talking tired him out.

6.24.2 The Respondent was satisfied following the initial discussion Bill had capacity. Bill advised he was on steroids and occasional morphine but felt fine at present and there was no interference with his mental faculties. Breathing was laboured. The Respondent was satisfied Bill understood what was being discussed. Bill was alert.

6.24.3 Bill and Andrew had discussed the life insurance policy. The parties discussed the presumption the life insurance was going to be paid to the partnership. Bill confirmed that he agreed that the whole purpose of the policy was to ensure that Andrew or he would have funds to buy out the other's share post death. Bill said he was willing to try and help Andrew

buy out his share of the farm. He wanted to be fair to his children. Bill said he had not come to any firm conclusions yet.

6.24.4 The Respondent then spoke to Bill alone. He asked if Bill was comfortable having the conversation with Andrew present. Bill said yes but did not wish details of his will discussed. He proposed that he could make it a condition that the lease back of his interest in the farmland to the partnership was a strict condition of the legacy of the farm.

6.24.5 Andrew returned and Bill suggested the surviving partners buy out his £220,000 capital account in the business by transferring their one-half share of his cottage to his estate which said half-share might be worth £90,000 - £100,000 if it was upgraded. The solicitor recorded that Bill was content with this in principle and that he had understood that this was much less than in his capital account. The solicitor clarified that whilst he would draft this as a further variation to the partnership agreement, it was not a direct instruction at this stage but something Bill would consider further in discussion with his family before giving clear instructions.

6.24.6 The Respondent went over the Partnership Variation Agreement and Bill and Andrew then signed the Partnership Variation Agreement. This set out the changes as noted in the previous letter [see para 6.21]. It made clear that the insurance policy proceeds would not form part of a deceased partner's capital account and would be left available to the remaining partners. It made clear that the deceased or outgoing partner's share would not be valued at market value. This was in line with Bill's wishes to do something to reduce the value of his capital account. He did not want to have it increased beyond the net book value that was currently showing in the Accounts at around £220,000.

6.24.7 The Respondent highlighted that there was a notice written in bold at the top and bottom of the Partnership Variation Agreement, which Bill signed, stating that it was a legally binding contract and that each

partner of the firm should take independent legal advice prior to signing.

6.24.8 The three then discussed the land, Andrew stated a rent back wouldn't help him. He wanted to agree a price for Bill's half share of the land. He stated if Bill insisted on market value then the farm would have to be sold. Bill indicated he would be willing to consider options that might alleviate things for Andrew but wanted to ensure that his children were fairly treated.

6.24.9 Andrew suggested he buy out Bill's land by using the insurance policy proceeds, the money in the partnership account and the half share in the cottage. Bill set out he owned half of the land and the four residential properties. Further discussion took place and it was proposed Andrew would buy Bill's half share of the farm with a cash payment of £950,00 (the insurance policy plus credit in the partnership bank account) and the transfer of his one half share in South bank Cottage.

6.24.10 Bill said he would consider the proposal.

6.24.11 The Respondent set out that Bill would be reducing his half share in the farm. The Respondent left a written note for Bill.

6.24.12 The meeting concluded and the Respondent remained alone with Bill to check he was not being pressured. Bill indicated it was a lot to take on and that he was tired.

6.25 Andrew went back to see Bill after the Respondent left. He called the Respondent. He said Bill was on borrowed time and could die at any time. Andrew had met Bill's son. Bill's son was surprised about how long the meeting lasted on the basis Bill had told him (the son) he didn't want to change anything.

6.26 Bill became confused in the days after the meeting. Bill's daughter told the Respondent on the 3 January 2020 that Bill could not recall his grand children's names and that she had been advised memory loss was a side effect of the

medication. The family did not want any pressure or ongoing conversations being put on him at this stage.

6.27 The Respondent sent a copy of the signed partnership variation document to Bill. His daughter called the Respondent on the 9 January 2020 and advised Bill had said the variation was not what he thought he had signed. There was a discussion re capacity, the daughter reported the ward nurse's position that Bill should not be signing anything but said she thought he was lucid when he was talking to her that morning regarding the variations.

6.28 The Respondent advised Andrew that he considered it very important to get to the bottom of Bill's confusion. If Bill felt disadvantaged or that he now felt that he did not fully understand the effect of what he was signing, it may be that they needed to check with the medical team what their professional opinion was about Bill's ability to make decisions both on 30 December 2019 and now.

6.29 On 11 January 2020, the Respondent met Bill at the hospital. Bill's children and wife (from whom Bill was separated) were present. The Respondent's file note records that Bill was weak, frail and became very tired when talking but had confirmed that he was able to have a discussion. Bill said that he was upset by the partnership agreement and genuinely had no recollection of the meeting on 30 December 2019. He said that he would not have agreed to change the insurance policy, nor did he agree to freeze the level of his capital account or make any other changes or proposals. His wish was that the variation to the agreement was not followed through with, or any changes made, at which point he made a cutting gesture with his hands leaving the Respondent satisfied that he had a clear view on the matter. On being asked by the Respondent about the insurance policy, Bill asked rhetorically "*Why would I give up £350,000*?". The Respondent then explained he had a conflict of interest and could not continue to advise Bill as a partner and could only act if all partners were aligned.

6.30 The file note records that on his way out the Respondent spoke to two nurses and asked them if Bill was "okay" from a capacity perspective. One replied that she was not aware of any capacity issues and that he had no "AWI" [Adults with Incapacity] in place.

6.31 BiIl died eight days later on the 19 January 2020.

6.32 The ward staff of Perth Royal Infirmary present on the 30 December 2019 provided a letter dated 22 April 2021 in reply to one of the secondary complainers. They advised they recalled the meeting of the 30 December 2019. They had been concerned about Bill, they spoke to Bill twice. Bill on the first occasion said he was fine but on the second he was tired. The staff advised the Respondent was abrupt on the second occasion.

6.33 A report was obtained from Mr Peter Williamson Consultant in Respiratory and General (internal) Medicine. He was the primary named consultant responsible for Bill's care. Mr Williamson said he had reviewed the notes with his colleague. He set out Bill's illness and symptoms following admission in December 2019. He stated:

Over the final days of December, he remained critically ill. He had been treated for several days with systemic blood thinners for his bilateral pulmonary embolus and right heart failure and he had been treated with broad spectrum intravenous antibiotics

On the 26/12 he is recorded as reporting low mood and possible depression. On 27/12 his blood markers showed ongoing significant systemic inflammation. His CRP (C-reactive protein), a marker of systemic infection remained extremely high. We had not grown a specific bacteria or found evidence of other systemic auto-immune conditions (such as vasculitis) and so added very high dose corticosteroids to cover inflammatory (in addition to infective) causes of his deterioration. He was prescribed 60mg Prednisolone daily from 27th December. The record of the ward round on 29/12 shows that he was tired and fatigued.

On 30/12 he remained critically unwell. Medication included Prednisolone 60mg. This medication is often associated with psychological disturbance and confusion, particularly in the elderly. He was also on Codeine Phosphate 30mg four times daily. This medication may be associated with confusion, particularly in the

elderly. He required assistance from nursing staff for his personal care due to his poor physical state. He declined his evening meal…

Overall [Bill] was clearly a critically unwell individual with needs of intensive nursing, constant supervision and adjustment of ventilatory support, proven ongoing severe systemic inflammation, derangement of multi-organ systems (including lungs, heart and liver), self-reported low mood and very high doses of systemic corticosteroids which may be associated with confusion and altered mental state in some.

"It is my opinion that Bill] was so physically debilitated that it would be clear, even to a lay individual that he was critically ill.

On the 30/12 I assessed him medically but did not formally assess his mental state or capacity as this was not requested. There is no documentation in the medical or nursing notes of any request for information or discussion with the clinical teams from the nephew or solicitor of the deceased…

…The medical team received no request or enquiry from [Bill's] solicitor or nephew to assess capacity…

7. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct *in cumulo* in respect that he acted in breach of:

7.1 Rule B1.2 of the Law Society of Scotland Practice Rules 2011 (the 2011 Rules). His actions lack integrity in that he took instructions from Andrew to significantly reduce Bill's interests in the partnership; drafted a variation of the partnership agreement without taking instructions from Bill and met with Bill on 30 December 2019 when it was plain he was a vulnerable client (in light of his terminal illness and hospitalisation), without a family member present. The Respondent failed to properly consider (a) the vulnerable witness guidance and (b) that the effect of the alteration to the partnership agreement, reducing Bill's interest by in excess of £425,000, including altering the basis of the valuation of the partnership on the death of Bill, was all to the benefit of Andrew from whom he took instructions.

7.2 Rule B1.4.1of the 2011 Rules. In taking instructions from Andrew without consulting Bill and drafting the variation of the partnership agreement, which could act to Bill's detriment, the Respondent failed to act in Bill's best interests.

7.3 Rule B1.7.1 of the 2011 Rules. The Respondent acted in a conflict of interest. He took instructions from Andrew and acted upon those instructions. In doing so, he acted to the detriment of Bill, when a competent and reputable solicitor would have given Bill and Andrew different advice.

7.4 Rule B1.5.1 of the 2011 Rules. He did not have proper instructions at the time he drafted the variation of the partnership agreement. The Respondent had only consulted with one partner who had a minority interest in the partnership. He had not taken instructions from Bill and did not have Bill's instructions to draft the variation.

7.5 B1.9.1 of the 2011 Rules. The Respondent was on notice, due to Bill's terminal illness requiring hospitalisation, that the past methods of communication would require to be re-assessed and enhanced given Bill's limited ability to concentrate while terminally ill, in end-of-life care within Perth Royal Infirmary. This required the Respondent's advice to be provided in writing to allow Bill to make an informed decision. The implications of signing the deed of variation discussed in the meeting of the 30 December 2019 should have been given in writing.

8. Having heard submissions from both parties in relation to mitigation, expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh, 15 May 2023. The Tribunal having considered the amended Complaint dated 16 December 2022 at the instance of the Council of the Law Society of Scotland against Craig Robert Harvie, Eden Legal Limited, Unit E3, Inveralmond Business Centre, 6 Auld Bond Road, Perth; Find the Respondent guilty of professional misconduct *in cumulo* in respect of his contraventions of Rules B1.2, B1.4.1, B1.7.1, B1.5.1 and B1.9.1 of the Law Society of Scotland Practice Rules 2011; Censure the Respondent; Fine him in the sum of £5,000 to be Forfeit to His 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; Direct that publicity will be given to this decision; and Allow the two Secondary Complainers 28 days from the date of intimation of these findings to lodge a claim for compensation if so advised.

(signed)

Ben Kemp

Vice Chair

9. 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

IN THE NAME OF THE TRIBUNAL

Ben Kemp
Vice Chair

NOTE

At the hearing on 15 May 2023, the Tribunal had before it the amended Complaint, Joint Minute and two Inventories of Productions for the Respondent. Given the extensive nature of the Joint Minute, no evidence required to be led. Both parties confirmed they would proceed by way of submissions only. The Tribunal sought clarification of one of the dates within the averment describing the Respondent's history. Both parties confirmed this was a typographical error and the Tribunal allowed a motion to amend.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal explained that the two Secondary Complainers in the Complaint were the daughters of Bill and that they were present for the hearing.

The Fiscal advised that the Respondent's two firms, set out within the Complaint, both operated from the same premises. Whilst the Respondent was instructed by the partnership, he also acted for Bill in a personal capacity. He had drafted a will and power of attorney for Bill.

The Fiscal explained that the partnership concerned in this case was a farming business that operated from an area of land that was not a partnership asset but was owned by the partners as individuals. The farmland had a value in excess of £2,000,000, which far exceeded the value of the partnership. In 2016, the Respondent acted in the drawing up of a co-ownership agreement which had formalised the percentage ownership of each individual partner in the farmland. The partnership had previously been aware that the value of the land might present a problem in the farming business being able to continue should one of the partners die. Accordingly, a life insurance policy had been arranged, covering both principal partners. The intention was that any pay-out under the policy would go to the survivor in order to enable the survivor to buy out the land and allow the business to continue. Unfortunately, the policy provided that any pay-out would be to the partnership and not to any individual. All parties were aware of this difficulty in 2016.

In response to a question from the Tribunal, it was clarified that the Respondent himself had given advice at the time of the drafting of the co-ownership agreement in 2016. It was further confirmed that Bill was a direct client of the Respondent through the firm of McKean Gardner, having prepared a will and power of attorney for Bill in November 2019. The issue of the farmland had been raised again with Bill at that time. Bill was admitted to hospital in December 2019 and the Respondent was aware he was terminally

ill. When Andrew spoke to the Respondent on 20 December 2019, he told the Respondent that Bill only had days left and this should have been in the forefront of the Respondent's mind. The issues of the valuation of the partnership's assets and the problem with the life insurance policy were not new. In particular, the issue of the life policy was known about at the latest by 2016.

In this discussion with Andrew, the Respondent had made it plain that there needed to be "very clear communication with everyone". The Fiscal submitted that "everyone" included all of the parties and the family of Bill. The Fiscal emphasised that from the very first discussion with Andrew, there was a clear conflict between Andrew and Bill. Andrew was seeking to reduce the value of Bill's interest in the partnership assets. The Respondent immediately identified other risk factors including Bill's capacity and the need for Bill to discuss matters with his children. The Respondent chose to leave Andrew to discuss matters with Bill in the hospital when it would have been more appropriate for the Respondent to have these discussions with him.

Andrew reported the content of this discussion with Bill to the Respondent in an email of 21 December 2019. In that email, it was recognised that the issue with the life policy had been discussed between Bill and Andrew as early as 2014 and that they had decided not to change it then. Even when Bill had been fit and healthy, he had chosen not to change the insurance policy. The Respondent was aware of Bill's ill-health and himself raised the question of Bill's capacity to provide instructions.

The Fiscal submitted that it was important to note that the email from Andrew did not say that Bill had agreed to any changes and yet the Respondent proceeded to draft a variation agreement. The Fiscal emphasised that Andrew only held a 40% interest in the partnership and the Respondent had not taken any instructions from Bill, who held a 50% share.

The Respondent met with Bill on 23 December 2019. There is no file note of that meeting prepared after the meeting took place. The only file note is an aide-memoire prepared by the Respondent before the meeting took place. The Respondent wrote to Bill following the meeting, addressing it to the farm. The Respondent wrote to Andrew on 24 December 2019 explaining the discussions he had had with Bill. From that it is apparent that there was no clear instruction from Bill to change the partnership agreement. The content of the letter suggested that the Respondent wanted to assist Andrew and had Andrew's interests at heart. In particular, the variation being proposed involved Bill waiving his estate's claim to £375,000 of insurance money. The variation of the partnership agreement was left with Bill in hospital.

The Fiscal explained that the gaps in communications were reasonably explained by the time of year this was all happening. It was the Christmas period and the Respondent's office closed on 23 December 2019.

Andrew contacted the Respondent by email on 30 December 2019. A copy of the email is not on the Respondent's file but there is a file note explaining its content. The Respondent was made aware that Bill was desperately ill. The note states that Bill wanted the insurance payment to achieve what was originally intended. The Respondent only had Andrew's word for that. On at least two previous occasions Bill had declined to change the policy.

The Respondent agreed to meet Bill on 30 December 2019 in hospital. The Respondent was aware Bill was desperately ill and that on at least two occasions, when he was fit and healthy, Bill had chosen not to change anything. Despite this, the Respondent told Bill's son that he did not need to be present at this proposed meeting.

The Fiscal stated that by the time of the meeting, Bill was in the high dependency unit and was breathing oxygen from a mask. The Respondent noted that Bill had not yet come to any firm conclusions. New matters were raised with Bill at this meeting. The Respondent was attending to provide advice. Although the Respondent highlighted to Bill that the variation agreement contained notices saying that he should take independent legal advice, there had been no opportunity for him to do so. Given the Respondent's previous involvement with Bill, he should have been aware of his position as a trusted adviser. There was a clear conflict of interest.

The Fiscal emphasised that, whilst there is no medical evidence that Bill lacked capacity, the deterioration in his health was clear. The disagreements identified by the Respondent as risks at the outset then arose. Information regarding the capacity of Bill would have been available if the Respondent had asked.

The Fiscal drew the Tribunal's attention to the averments of duty in the Complaint. These set out Rules B1.2, B1.4.1, B1.5.1, B1.7 and B1.9 of the Practice Rules 2011. Although the Complaint contained reference to Rule B2.1.7, the Fiscal was not relying on that rule in this case as it was his position that Bill was the Respondent's client. The Fiscal took the Tribunal through the Law Society guidance to Rule B1.5 with regard to vulnerable clients.

The Fiscal directed the Tribunal's attention to the averments of misconduct and invited the Tribunal to find the Respondent guilty of misconduct in relation to each averment individually.

Beginning with the breach of Rule B1.2, he stated that the Respondent's actions lacked integrity. He submitted that it was strange that the letter to Bill had been addressed to the farm when the Respondent knew Bill was in hospital. By 30 December 2019, it was clear that Bill was a vulnerable client in the high dependency unit. It was clear that the Respondent's instructions involved two competing interests and yet the Respondent had a meeting with Bill with only one side present. He told Bill's son that he did not need to be at that meeting. The Respondent did not consider the competing interests or the vulnerable client guidance. This was all to the benefit of Andrew.

The Fiscal submitted that "integrity" was shorthand for the higher standards to be expected of members of the profession. The breaches of the Respondent's duties and obligations in this case amounted to a breach of integrity. He submitted that you would not expect a solicitor to attend hospital to see a terminally ill client to take instructions resulting in a huge reduction in the client's estate. He stated that it was important to emphasise that the client had on at least one previous occasion, in 2016, when the client was fit and healthy, taken the decision not to change the insurance policy. The Respondent had given the interests of Andrew priority over the interests of Bill. The Fiscal submitted that the key consideration was the Respondent's lack of regard to Bill's interests. The Respondent did not approach medical staff to check what medication Bill was being given. In particular, by 30 December 2019, when the Respondent was clearly aware of Bill's worsening condition, he should have made enquiries.

The Fiscal submitted that the Respondent had breached Rule B1.4. He explained that it was not in Bill's interest to agree to such a reduction of his estate. The Respondent drafted an agreement to the detriment of Bill's interests without his instructions. It was the Respondent's duty to protect Bill.

The Respondent had breached Rule B1.7 and had acted in a conflict of interest. A competent and reputable solicitor representing the interests of each of these clients would have given Bill and Andrew different advice.

The Fiscal submitted that the Respondent had breached B1.5. At the time that he drafted the variation agreement, he only had instructions from the minority interest in the partnership. At the time that he drafted this document, the Respondent had no idea what Bill's position was.

The Fiscal submitted that the Respondent had breached Rule B1.9. By 30 December 2019, Bill was in the high dependency unit. The Respondent should have ensured that Bill had a full understanding of the whole meeting and that he was not just having lucid moments. There was a greater obligation on the Respondent because of Bill's obvious vulnerability to ensure that Bill understood the consequences of his actions.

In answer to a question from the Tribunal, the Fiscal submitted that the conflict here was so great that both Andrew and Bill should have had separate representation. A competent and reputable solicitor would not have represented both.

The Tribunal invited the Fiscal to clarify his position on what in particular tipped the Respondent's conduct into a lack of integrity. The Fiscal explained that the conduct amounted to a lack of integrity because of the higher standards expected of members of the profession. The Respondent had allowed his desire to help this partnership keep running to blind him to the interests of Bill. Over a period of seven days, he had prepared a variation agreement, and had the document signed by Bill, when Bill's health was deteriorating, and the consequences were that Bill was giving up more than £400,000. The Fiscal emphasised that there was no suggestion of dishonesty, deceit or even recklessness on the part of the Respondent. The Fiscal made reference to the Tribunal's decision of The Law Society-v-Gordon William Tulloch Murphy, 19 January 2023.

In answer to a question from the Tribunal regarding the Respondent's duties to the other two partners of the firm, the Fiscal indicated that they were the parents of Andrew and were "silent" partners and had no input into the discussions at all.

SUBMISSIONS FOR THE RESPONDENT

Mr Macreath explained that the Respondent had acted for this partnership since 2006. This was a family partnership, the history of which dates back to 1931. The farmland and buildings had never been partnership assets. Andrew had been gifted his 40% share by his parents who continue to be partners. Bill was Andrew's uncle. All of the partners live in their own homes on the farmland. The land and buildings are all owned by them in the same proportion as their shares in the partnership.

The co-ownership agreement of 2016 regulated the ownership of the land for the first time, setting out that the shares in the land and buildings reflected the partners' shares in the business.

Mr Macreath explained that the insurance policy on the lives of Bill and Andrew was in the nature of a "key-man" policy. The idea was that, if one died, the survivor would be in a position to continue the long-established business. Unfortunately, the beneficiary of the policy, which was arranged by independent financial advisors, was the partnership. It was accepted that Bill and Andrew had previously discussed this change. However, the proposal at that time was to take out a new policy which would have doubled their premiums and the view was taken that this was too expensive.

Mr Macreath submitted that acting for a partnership was a complex area involving the possibility of conflict of interest. Solicitors have to be cautious but usually have time to reflect. He submitted that the timing of events in this case was of particular significance. Andrew first contacted the Respondent on or around midnight on 19 December 2019. He then telephoned the Respondent on 20 December 2019 explaining Bill was in hospital. The will and power of attorney for Bill were in fact drafted by a colleague of the Respondent's and were signed by Bill on 16 December 2019. The colleague dealing with that matter had been satisfied as to Bill's capacity.

Mr Macreath referred the Tribunal to the case of Smythe-v-Rafferty and Others [2014] CSOH 150. He submitted that what is called the "Golden Rule" in England, where a testator who was old and infirm should have his signature witnessed and approved by a medical practitioner who satisfies himself as to the testator's capacity and understanding, does not apply in Scotland.

Mr Macreath referred the Tribunal to a copy of the partnership agreement from 1997 which was his Production 2 of Inventory 2. It was clear from that that the land and buildings were not a partnership asset. The co-owners agreement of 2016 set out that the ownership of the land and buildings would reflect the partnership share. It provided for an option for the surviving partners to purchase the farmland based on its market value.

Mr Macreath emphasised that this was always a family partnership. The land was never a partnership asset and was always to be valued at market value.

Andrew recognised that, without the policy proceeds, the farm would have to be sold. A farm which had been in the family for 90 years would no longer be farmed by them. The Respondent was a partnership solicitor who had known the family for a long time. He knew everyone involved and wanted to help. To have to say to Andrew on 20 December 2019 that he could not act and that he and Bill should take independent advice would have been very difficult. Mr Macreath invited the Tribunal to consider the time of year and the pressing nature of the issues involved. The Respondent was aware that Bill had

given instructions to a colleague for a will and power of attorney in November 2019 and that he had brought into the office with him a proposal for a new life policy. Bill had indicated that the premium was too high. The Respondent was aware that this had been a concern for a number of years. With the benefit of hindsight, the Respondent recognises that there was a conflict of interest from the outset and that Bill's interests were different to Andrew's. However, the time of year was a significant factor. The Respondent's office closed at lunchtime on 23 December 2019 and did not reopen until 27 December 2019. The Respondent went to the hospital on 23 December 2019. Bill's children were there. The Respondent left the variation document with Bill for him to consider.

On 30 December 2019, the Respondent had a lengthy conversation with Bill on his own. Bill was able to speak and understand that the changes being proposed were to allow the farm to continue.

Within 48 hours of that meeting, it was clear that Bill's condition had deteriorated further. On 11 January 2020, the Respondent withdrew from acting and other agents took over the representations of Andrew and Bill's family. It is important to note there is no medical information to the effect that Bill lacked capacity. As far as Mr Macreath is aware, no action has been raised to reduce the partnership variation document.

Mr Macreath submitted that this type of situation happens relatively often, where a solicitor is trying to do the right thing for everyone and it results in him acting in a conflict of interest. There was no element of deceit or "nefarious" purpose on the part of the Respondent. However, the conflict of interest was stark and the Respondent had failed to recognise it when he should have done. As soon as Bill said on 23 December 2019 that he needed to think about things, the Respondent should have stepped away and directed both Andrew and Bill to independent agents. However, the Respondent was faced with a dilemma and time was of the essence. The Respondent was reluctant to abandon them.

All correspondence, at all times, was sent to the partnership address. Whilst the Respondent accepts that his letter of 23 December 2019 should have been delivered to Bill, Mr Macreath invited the Tribunal to consider the time of year and the fact that his office was closing on 23 December 2019.

Mr Macreath referred the Tribunal to Wingate and Evans-v-SRA [2018] EWCA Civ 363.

He directed the Tribunal's attention to the two references lodged for the Respondent and submitted that the Respondent was a well-respected practitioner. This has been an anxious case and the Respondent's life has been on hold pending the resolution of the disciplinary proceedings.

Mr Macreath recognised that it was for the Tribunal to be satisfied that the facts admitted amounted to professional misconduct but he wanted to make it plain that the Respondent accepted that the test was met. The Respondent has referred the matter to his professional indemnity insurer.

The Tribunal invited Mr Macreath to clarify his position with regard to the issue of lack of integrity. He submitted that integrity connotes the importance of ethical standards. The conflict of interest rules rely on a solicitor's integrity. He referred the Tribunal to The Law Society-v-Michael Gerard Kilkerr, 6 December 2022. The Respondent had allowed Andrew's interests to become paramount. However, Mr Macreath invited the Tribunal to consider that this conduct did not impinge on the Respondent's honesty. His desire had been to fix everything. The issue of the life insurance policy was one that had been understood for some years. Matters were now pressing and the Respondent had not wanted to abandon the partnership. The Respondent had focussed on Andrew's desire to continue to farm. To be able to do that, Andrew needed the insurance money. This was a family partnership. The variation did not affect the ownership of the land.

The Tribunal asked Mr Macreath if the Respondent had failed to have appropriate regard to the vulnerable circumstances of Bill because his focus had been on the interests of Andrew in continuing to farm. Mr Macreath conceded that was the case and explained the Respondent had lost sight of the conflict of interest in his desire to help.

In response to a question from the Tribunal, Mr Macreath submitted that the question of capacity was always one for the solicitor and the solicitor should take detailed notes of how he reached his conclusions. When someone is vulnerable, there is a higher responsibility to check. Here, the Respondent should have seen that Bill was in a deteriorating condition and should have spoken to a doctor. There were a number of red flags here that the Respondent failed to recognise as circumstances had clouded his mind. Whilst there is no "Golden Rule" in Scotland that a solicitor must get a medical report, the law makes a distinction between testamentary and commercial issues and here the conflict of interest was stark.

DECISION ON PROFESSIONAL MISCONDUCT

All of the averments of fact were agreed within the Joint Minute; accordingly, the Tribunal held these to be established.

Whilst the Respondent was admitting professional misconduct, in terms of Section 53(1)(a) of the Solicitors (Scotland) Act 1980, the Tribunal itself required to be satisfied that the Respondent is guilty of professional misconduct.

The test for professional misconduct contained in Sharp-v-Council of the Law Society of Scotland 1984 SLT 313. According to that case,

"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 to be made."

Before the Tribunal could assess whether the admitted facts met the Sharp test, it required to look at the averments of misconduct and satisfy itself that the conduct established within the facts breached the Rules referred to there. The averred breaches of Rules B1.4.1, B1.7.1, B1.5.1 and B1.9.1 were straightforward and the Tribunal was satisfied that the conduct described was in breach of these duties. The conflict of interest between Andrew and Bill was, or should have been, obvious from the beginning. The Respondent admitted that he had not acted in the best interests of Bill, having the interests of Andrew and the partnership at the forefront of his mind.

Where the issues were not quite so clear was in relation to the averment of breach of Rule B1.2. The Tribunal considers a breach of that Rule to be a serious matter and it gave this averment careful consideration. Rule B1.2 states:-

"You must be trustworthy and act honestly at all times so that your personal integrity is beyond question."

In this case, there is no question of any lack of honesty or deceit. The averment of misconduct within the Complaint was that the Respondent's "actions lack integrity". There is no concise definition of "integrity" in relation to Rule B1.2 but guidance can be found in the case of Wingate referred to in the submissions before the Tribunal.

The Tribunal accepted that the Respondent's motivation in this case was to try to help a family partnership, for which he had acted for many years, in difficult circumstances. The Tribunal accepted that there was no 'nefarious purpose', as referred to by Mr Macreath, or any personal gain to the Respondent. However, the Tribunal considered that the cumulative effect of the Respondent taking instructions from Andrew to significantly reduce Bill's interests in the partnership; drafting a partnership variation without having Bill's instructions; meeting with Bill on the 30 December 2019 when it was plain that he was a vulnerable client, without a family member present; failing to properly consider the vulnerable client guidance and failing to properly consider that the effects of the alteration to the partnership agreement significantly reduced Bill's interest, had the effect of calling into question his personal integrity. In these circumstances, and to the extent that his personal integrity was not beyond question, the Tribunal was satisfied that the Respondent's actions lacked integrity and a breach of Rule B1.2 was established.

The averment of misconduct included reference to the Respondent sending the draft variation document to Bill's home address when Bill was in fact in hospital. The Tribunal accepted the explanation put forward on behalf of the Respondent in this regard and, consequently, did not include it in the finding of misconduct.

The Fiscal invited the Tribunal to find the Respondent guilty of professional misconduct in relation to all of the averments of misconduct singly. However, given that this was a single course of conduct over a period of some seven days, the Tribunal considered it more appropriate to look at the conduct on an *in cumulo* basis. The Tribunal was satisfied that the Respondent's conduct fell below that to be expected of a competent and reputable solicitor to the degree that could only be described as serious and reprehensible.

It should be emphasised that the Tribunal's approach of looking at the conduct cumulatively should not be taken as any indication of the Tribunal viewing the individual elements of the misconduct less seriously. The Tribunal considered the Respondent's acting in a conflict of interest situation and his failure to give proper consideration to the vulnerable client guidance, in particular, to be serious matters in their own right.

DECISION ON SANCTION, PUBLICITY AND EXPENSES

The Tribunal invited further submissions in relation to sanction, publicity and expenses.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal confirmed that the Respondent had no previous disciplinary matters on his record. He moved for expenses to be awarded to the Complainers and confirmed that the two Secondary Complainers had no objection to being named in the Findings.

SUBMISSIONS FOR THE RESPONDENT

Mr Macreath invited the Tribunal to have regard to his earlier submissions explaining the background circumstances to the Respondent's conduct.

He emphasised that the Respondent has been a solicitor since 1996 with no previous conduct issues on his record. The references lodged on his behalf confirmed that he is a well-respected solicitor. Mr Macreath outlined the structure of the Respondent's two firms and explained that the Respondent was the mainstay for both.

Mr Macreath submitted that this has been a salutary lesson for the Respondent. The Respondent has cooperated with the disciplinary process and been candid and transparent. This has been a very anxious case for the Respondent who has demonstrated insight and cooperation and is unlikely to repeat this type of conduct.

Mr Macreath conceded that expenses follow success and that there would be publicity.

DECISION

The Tribunal had at the forefront of its mind the protection of the public and the reputation of the profession. The Respondent had acted in a conflict of interest, not in the interests of his client, Bill, who was terminally ill and, whilst there is no medical evidence that Bill lacked capacity, he was clearly vulnerable. However, there was no question of dishonesty or any gain to the Respondent. The Tribunal accepted that the Respondent had acted with the intentions of trying to help a long-standing client in difficult circumstances.

The Tribunal noted the Respondent's cooperation with the disciplinary process and accepted that he had demonstrated insight. The Tribunal accepted that this, taken along with the Respondent's previous good character, supported the submission that he is unlikely to repeat such conduct. In all of the circumstances, the Tribunal concluded that it did not require to consider strike off, suspension or restriction. However,

the seriousness of the conduct required to be marked and the Tribunal considered it appropriate to censure the Respondent and fine him in the sum of £5,000.

The Tribunal determined that it was appropriate to award expenses to the Complainers.

In relation to publicity, the Tribunal had regard to its duties under paragraphs 14 and 14A of Schedule 4 to the Solicitors (Scotland) Act 1980 balanced with its duties in relation to issues of data protection and privacy. The Fiscal confirmed that both Secondary Complainers had no objection to being named in the Findings. There was no information before the Tribunal to suggest that the interests of any other individual would be likely to be damaged by publicity and, accordingly, it directed that publicity be given to this Decision.

The Tribunal allowed the two Secondary Complainers 28 days from the intimation of these Findings to lodge written claims for compensation.

Ben Kemp
Vice Chair