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

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

Respondent

1. A Complaint dated 3 January 2019 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 Bruce Gregor De Wert, Georgesons, 22 Bridge Street, Wick (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was no Secondary Complainer.

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

4. The Respondent's agent 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.

5. At the preliminary hearing on 24 May 2019, the Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. The Respondent was present and represented by David Burnside, Solicitor, Aberdeen. The parties made submissions. The

Tribunal produced an interlocutor and note following the preliminary hearing which should be read alongside this decision.

6. The Tribunal fixed a hearing for 29 August 2019. Parties produced a Record. On 26 August 2019, the Complainers moved to adjourn the hearing. This was opposed by the Respondent. The Chair, exercising the functions of the Tribunal under Rules 44 and 56 granted the motion to adjourn but indicated that the Complainers would be liable for the expenses of the cancelled hearing, including those of the Respondent and the Tribunal. The Tribunal fixed a hearing for 27 November 2019.

7. At the hearing on 27 November 2019, the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented by David Burnside, Solicitor, Aberdeen and Johnston Clark, Solicitor, Dundee. Parties confirmed that they were content for Answer 3.3 to remain in the Record although there was no corresponding averment of fact in the Complaint, and for it to be treated as foundation for examination-in-chief or cross-examination. The Respondent having no objection, the Tribunal granted the Fiscal's motion to amend the Record by deleting "14th August 2015" where it appeared in line 2 of averment 3.4 and substituting of "14 October 2015"; deleting the word "accommodated" where it appeared in line 10 of averment 3.6 and substituting "accompanied"; deleting the word "fit" where it appeared in line 17 of averment 3.6 and substituting "thin"; and deleting the word "remissions" where it appeared in line 2 of averment 4.0 of the Record and substituting "omissions".

8. Two witnesses gave evidence for the Complainers. No evidence was led on behalf of the Respondent. Parties lodged a Joint Minute of Admissions and made submissions on professional misconduct.

9. The Tribunal found the following facts established:-

9.1 The Respondent was born 24 July 1954. He was enrolled and admitted as a solicitor on 27th May 1982. From on or about 11 November 1986 until June 2015, the Respondent was an Assistant and thereafter Partner with the firm Georgesons Solicitors, 22 Bridge Street, Wick. From 19 June 2015 until 1 July 2016 he was a Partner in Smith Grant Solicitors.

9.2 The Respondent's client, AJ, met Dr Caroline Bather, Associate Specialist in Psychiatry for the Elderly on 31 October 2014. Dr Bather assessed AJ and was of the view that she had no significant understanding of her physical health needs. AJ suffered from dementia with the aetiology being cerebrovascular disease and alcohol related brain damage. There was also an element of chronic delirium. The doctor did not consider that AJ was capable of granting a Power of Attorney nor able to make broader decisions regarding her care needs. AJ was discharged from Lawson Memorial Hospital, Golspie on 12 January 2015 but was re-admitted on 19 January 2015. At that stage there was a broad agreement amongst health professionals that she did not have capacity to make decisions regarding her welfare. Dr Bather was of the view the nature of her impaired judgement and reasoning was secondary to long standing cognitive impairment exacerbated by chronic physical health problems. However, AJ was capable of fooling a lay person with regard to her capacity. She could give an account of herself. She did not present with obviously bizarre or psychotic symptoms. She could sound normal, despite the fact her reasoning was affected. Superficially, AJ could give the impression she had capacity.

9.3 Highland Social Work Department sought powers of intervention in respect of AJ. Two medical reports dated 24 August 2015 were obtained in support of the application in terms of the Adults with Incapacity (Scotland) Act 2000. Both medical opinions were formed after discussions with AJ and the nursing staff at Golspie Hospital who were looking after AJ. The local authority submitted an application to the Sheriff presiding at Tain Sheriff Court. Warrant for intimation in respect of the application was granted on 17th September 2015. Intimation was sent to AJ, her son and to a staff nurse on the ward of Golspie Hospital where AJ was a patient. It is the practice of the local authority when serving these documents to include a copy of the medical report along with the application.

9.4 The Respondent opened a file concerning a Power of Attorney relating to AJ. The instruction sheet completed by the Respondent is dated 14 October 2015. There is no file entry recording or identifying who instructed the Respondent to attend Golspie Hospital to meet AJ. The handwritten information on the proforma sheet identified the client by name and made reference to ascertaining her address from a previously opened file for her Will. The proforma sheet reminded the

Respondent to ascertain whether the client had mental capacity to execute. The form completed by the Respondent did not identify the length of time the Respondent spent with AJ or provide any detail of any conversation the Respondent had with AJ in establishing whether she had the necessary capacity. It did not reveal whether the Respondent made enquiry of any medical personnel responsible for the care and treatment of AJ to ascertain their opinion concerning the capacity of AJ. There was no note detailing the Respondent's assessment of AJ and her capacity to instruct him. The Respondent had met AJ at least once before 14 October 2015.

9.5 The Respondent's file contains two letters dated 14th October 2015. One letter was addressed to AJ at her home address, even though the Respondent knew she was in hospital, enclosing a Power of Attorney in draft. The second letter was addressed to JC, the proposed attorney, advising him that AJ had nominated him as her Attorney in terms of the Power of Attorney document. On 15th October 2015 the Respondent wrote to AJ again at her home address enclosing his Terms of Business and Engagement Letter.

9.6 On 16th October 2015 the Sheriff at Tain Sheriff Court pronounced an Interlocutor appointing the local authority as guardian to AJ for a period of 5 years. On the same date the Sheriff granted an Intervention Order dealing with the financial affairs of AJ.

9.7 On 28 October 2015, JC contacted the Respondent's office to advise that AJ was happy with the draft Power of Attorney. He requested that the Respondent attend Golspie Hospital and sign the deed. The Respondent visited said hospital on 29 October 2015. A copy of the Power of Attorney is in the file. The deed was signed by the Respondent on behalf of AJ who *"declared that she is unable to write and that she does not wish the document read over to her"*. The Respondent signed a certificate in terms of the Adults with Incapacity (Scotland) Act 2000. Said certificate confirmed that the Respondent:

(a) interviewed the granter immediately before the granter subscribed the document;

(b) was satisfied either because of his own knowledge of the granter or because he consulted with other persons (named in the certificate) who had knowledge of the granter, that at the time the continuing Power of Attorney as granted the granter understood its nature and extent;

(c) had no reason to believe that the granter is acting under undue influence or that any other factor vitiates the granting of the power.

The file maintained by the Respondent did not contain a note of his attendance with AJ on 29 October 2015.

9.8 The Respondent delivered the Power of Attorney to the Office of the Public Guardian by letter dated 2 December 2015.

9.9 On 3 December 2015 the Respondent had a telephone conversation with a representative of the Office of the Public Guardian. During this telephone conversation the Respondent was made aware that a Guardianship Order had been granted by the Sheriff at Tain Sheriff Court in October 2015.

9.10 On 8 December 2015 the Respondent had another telephone call with a representative of the Office of the Public Guardian. Following that conversation, the Respondent sent an e-mail to the Office of Public Guardian which stated in relation to AJ, *"I have met her three times now in connection with this and other legal work. I have always interviewed her at the hospital in Golspie. She is usually accompanied by her friend (appointed as Attorney) but I forget his name and I am not in my Wick office today to look at the file, who is a former lover, indeed, I think they lived together for a considerable while. I perceive no issue of force or facility. Indeed they get on very well and have a jokey relationship. On one occasion I recall that he was not there when I first arrived and we had a good conversation outwith his presence. They are merely friends now. My perception (only that) was that she may have no other friend/relatives. Certainly I asked if she would want a fall back Attorney and she was not able to suggest anyone. She is physically disabled, extremely thin and looks ill but she appears to me to know exactly what she is doing. I have held a number of conversations with her which went beyond the business in hand and she is orientated in time and space and has*

opinions. I perceive that she is very frustrated that she is in hospital and that she is ill and indeed probably angry that she is approaching the end of life. We did not talk about her specific illness but looking at her present fragility/frailness I find it difficult to believe that she will be able to live independently in the future. There are times when I see clients for Powers of Attorney that I am indecisive regarding their understanding of what they are doing. I have never had any indecision with A."

9.11 On 9 December 2015, a representative of the Office of the Public Guardian sent an email to the Respondent stating, *"I can confirm that we will register the POA today. Going forward from this we will contact the financial intervener with regards to the actions taken since his appointment and bring the order to an end."*

9.12 The Power of Attorney prepared by the Respondent and submitted by him was registered by the Office of Public Guardian on 9th December 2015.

9.13 The Social Work Department of the local authority spoke with the Respondent by telephone on 15 December. He advised them that he had registered a Power of Attorney.

9.14 The Guardianship Order and Power of Attorney ran concurrently. A Guardianship Order granted after a Power of Attorney would render that Power of Attorney void. However, there is no legislative provision regarding the granting of a Power of Attorney after a Guardianship Order is place.

10. Having given careful consideration to the established facts and the submissions made by parties, the Tribunal found the Respondent not guilty of Professional Misconduct. The Tribunal did not consider that the conduct established met the test for unsatisfactory professional conduct and therefore declined to remit the Complaint to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980.

11. Having heard further submissions from parties on expenses and publicity. the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 27 November 2019. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Bruce Gregor De Wert, Georgesons, 22 Bridge Street, Wick; Find the Respondent not guilty of professional misconduct; Find the Complainers liable in the expenses of the Respondent, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person.

(signed)

Nicholas Whyte

Chair

12. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on 17 January 2020.

IN THE NAME OF THE TRIBUNAL

[redacted]

Nicholas Whyte

Chair

NOTE

At the hearing on 27 November 2019, the Tribunal had before it a Record which had been amended to take account of the Tribunal's directions in its Interlocutor of 24 May 2019. Various amendments were also made to the Record on the morning of the hearing. The Tribunal had before it the Interlocutor and Note of 24 May 2019. The Complainers had previously lodged a list of witnesses and three inventories of productions. The Respondent had lodged a list of witnesses and three inventories of productions. These were before the Tribunal. The Tribunal also had sight of the authorities the Respondent lodged for the preliminary hearing on 24 May 2019. A joint minute was lodged at the close of the Complainers' case agreeing some matters in relation to the productions.

EVIDENCE FOR THE COMPLAINERS

WITNESS ONE: MR IAN RITCHIE

Mr Ritchie gave evidence on oath. He is a solicitor and one of the Clerks to the Professional Conduct Sub Committees of the Law Society. He was aware of the case against the Respondent and familiar with the SLCC summary of the local authority's complaint (contained at Production 1 of the First Inventory of Productions for the Respondent). A solicitor of the local authority complained about the actions of the Respondent in connection with the drafting, execution and registration of a Power of Attorney. The first complaint was that the Respondent had failed to act in the best interests of the client by drafting and registering a Power of Attorney without taking adequate steps to sure she had capacity to grant it and having been made aware that the Guardianship over the client had been granted to Highland Council. The second complaint was that the Respondent had failed to act in the best interests of the client by failing to liaise with Highland Council Social Work Department prior to registering the Power of Attorney despite being made aware that Guardianship had been granted in favour of Highland Council. Mr Ritchie indicated with reference to the summary of the local authority's complaint that the co-existence of the Power of Attorney and the Guardianship created some difficulties.

The witness was referred to Production 3 of the First Inventory of Productions for the Complainers. Mr Ritchie explained that this document was "Vulnerable Clients' Guidance" produced by the Law Society for the profession. He confirmed that Item 4 of the First Inventory of Productions for the Complainers was "Guidance on Continuing and Welfare Powers of Attorney". These productions had been amended over the years but had been available to the profession in various forms since 2011. Adrian Ward had

also written an article in the Journal of the Law Society of Scotland in 2013 on vulnerable clients and Powers of Attorney.

This witness was not cross-examined.

WITNESS TWO: DR CAROLINE BATHER

Dr Bather gave evidence by way of affirmation. She is a registered medical practitioner. Her qualifications are MBChB. She has been in practice since 1992 and a psychiatrist since 1998. She works at Newcraigs Hospital, Inverness as an associate specialist in old age psychiatry.

The witness explained that she knew the patient, AJ. She had been asked to see AJ while she was an inpatient at the Lawson Memorial Hospital in Golspie. She remembered AJ because she was relatively young compared to other dementia patients. She was very frail and had problems with her mobility. She was young to be so infirm. AJ had a history of alcohol misuse. Her physical health was in a poor state and she was very thin. She looked much older than she was. She needed nursing care. The staff had noticed difficulties with cognition. She wanted to go home and did not think she needed any help. The patient was suffering from chronic delirium as a result of her brain injury. This manifested itself in confusion and cognitive impairment. There were also lots of underlying physical problems. She had chronic cardiac and chest problems. It was possible her physical state was adversely affecting her cognitive function too. The witness was asked to see AJ regarding her capacity to make decisions about going home without help. The witness found AJ's judgement to be impaired.

The witness was asked when she saw AJ. She indicated it was "about 2015". She was referred to Production 11 in the First Inventory of productions for the Complainers which was a report of incapacity to accompany an application for guardianship. She agreed that she was the author of the report. With reference to it, she noted that she examined AJ on 21 August 2015. Her first encounter with AJ must therefore have been some time prior to that. The witness noted that she was asked to report and give an opinion on AJ's capacity to made decisions on her welfare. This was different to capacity to grant a Power of Attorney. The witness had asked the patient about a Power of Attorney. AJ did not want to grant one because she thought it could be used against her. She did not trust her son not to put her into a home.

The witness explained that dementia is a disease of the brain which initially affects memory and begins to cause difficulty with judgement, reasoning, mood and personality. This particular patient had vascular

dementia but also had alcohol-related brain damage. Primarily, her executive function was impaired. This is a symptom of frontal lobe damage. Someone with these issues can have a good working memory, for example, can recall what they had for breakfast, but cannot make a reasoned decision which requires weighing of factors and consideration of the consequences of the decision. They will display "black and white thinking". They can lose the ability to consider the broader picture although they can appear able initially. The impairment can be subtle if someone does not have a good medical understanding of dementia. It might not be obvious they are lacking judgement because they can come across as capable.

When the witness assessed AJ, she could tell her memory was affected but more pressing was her inability to understand her own situation and consider her future. She did not understand the seriousness of her condition and what would have to change to allow her to cope at home. Her mental functioning was not likely to improve and would last for the rest of her life. Although after a significant degree of abstinence, sometimes there can be an improvement, this patient had a significant vascular burden in the brain and had not shown much improvement throughout her lengthy hospital stay. She wanted to go home but was not able to make a go of recovery because she did not recognise what was wrong with her. She was released home for a short period but readmitted very quickly despite the significant package of care. The witness' assessment of the patient came from her own consultation with her but also from conversations with her carers.

The witness confirmed that she signed Production 11 in the First Inventory of Productions for the Complainers which was a report of incapacity to accompany an application for guardianship. Dr Janet Nicoll had also signed a similar report. The witness agreed with Dr Nicoll's assessment that AJ lacked *"insight into her lack of ability to care for herself or understand and remember discussions regarding her place of residence and lacks capacity to look after her finances."*

The witness was referred to Production 9 in the First Inventory of Productions for the Complainers, which was Dr Nicoll's report from November 2018. Mr Burnside objected to the witness speaking to this document. Parties made submissions outwith the presence of the witness. The Chair indicated that it would be inappropriate to ask the witness to comment on the report, but its contents could be used to formulate specific questions about her own knowledge. She should not be asked to comment on Dr Nicoll's opinion. On her return to the Tribunal hearing room, the witness was asked about the patient's handwriting. The witness said she could write a simple sentence or her name but would not have been able to produce fluent writing. She did not remember AJ being tremulous but she was physically very frail.

The witness was referred to Production 5 in the First Inventory of Productions for the Complainers which was her letter of 10 December 2018 to the former Fiscal prosecuting the professional misconduct case. That letter recorded that the witness had seen AJ on 31 October 2014. It was evident from her assessment that AJ had no significant understanding of her physical health needs and was very unrealistic regarding the prospect of being able to manage at home. The witness said she discussed granting a Power of Attorney with the patient as part of the capacity assessment. AJ did not wish to grant a Power of Attorney suspecting that her son would place her in a care home, and she was not able to understand the broader concept of Power of Attorney and how this could be of benefit to her. She was dismissive of the idea. She did not ask any questions about it. She was irritable and dismissive of everything and everyone. She was not able to discuss the advantages and disadvantages of a Power of Attorney. She was adamant that she did not need it. Her thinking was very "black and white". The witness did not feel that AJ was capable of granting a Power of Attorney. She did not think that she could have regained capacity after her assessment. This was not a case where her capacity fluctuated. She could not make a decision, act on it and remember it.

The witness was referred to Production 8 in the First Inventory of Productions for the Complainers which was an email which said a member of NHS staff had placed a letter on AJ's file to be shown to any solicitor who called, explaining that the Local Authority was seeking Guardianship of AJ. The proposed attorney had also been made aware of the Guardianship application. The witness said she was not aware of any of the information contained in this email.

The witness was referred to Production 1 in the Third Inventory of Productions for the Complainers which was a medical report written by the witness dated 5 July 2019. The witness agreed that she had recorded that it was very clear that the patient did not have capacity on 21 August 2015. She said it was still her view, as expressed in the report, that it is most unlikely that, given the diagnosis of dementia, she would have regained sufficient capacity to understand the nature of what she was discussing and signing. She had no doubt that AJ did express strong views to the Respondent.

The witness was asked what she could say about the patient's ability to grant a Power of Attorney. The witness said that she did not think AJ would remember the decision and its consequences. She could not keep any one thought in her head for any time. She displayed disjointed thinking. She could not keep on topic. She wanted to go home. She saw a Power of Attorney as a barrier to her going home. She did not understand what it was. She could not reflect on why she was back in hospital. She could not recall any events around being released from hospital and being back at home.

In her view, the patient would not have understood in August 2015 that an attorney could assume complete authority over her affairs. She would not have understood that the attorney could do anything with her property. She was already mentally incapable so she would not have understood that the power would continue if she became mentally incapable. She would not have understood that in that instance, the power would become irrevocable if she became mentally incapable. The patient could not understand the complexity of this concept. It was unlikely that anything would have changed by October 2015. She was frail and there was no evidence of significant improvement.

The witness was cross examined by Mr Burnside. She was asked about the letter she received from the Law Society Fiscal. She said that the letter asked her to look at AJ's medical notes which were kept in Sutherland. The Fiscal asked her to give an account of her assessment of the patient and also comment on whether there was a degree of fluctuation in her condition. She was told about the background to the case and the involvement of the Respondent. She was not given the Complaint or any other papers.

Mr Burnside noted that the witness said in her letter that she had no doubt AJ did express strong views to the Respondent and was asked to expand on that. The witness said it was not for her to comment on a conversation between the Respondent and AJ. No doubt the patient was able to express a view. She was a strong-minded lady. The witness said she was only able to comment on AJ's capacity.

Mr Burnside asked whether superficially, the patient could have given the impression she had capacity. The witness said that was possible, especially if "black and white" questions were put to her. The witness believed there was a difference between the medical and legal assessment of capacity. She made no criticism of solicitors but the way the professions approached capacity was different. Neither profession has great insight into the other's way of working. She would tend to ask open questions which would test capacity. AJ might have been able to answer "black and white" questions. She did not know the questions the Respondent used. AJ could answer a direct question with a direct answer but could not manage the nuances of broader questions.

The witness agreed that a skilled medical practitioner with access to the patient's medical notes was in a different position to a solicitor. She said that each profession was entitled to make an assessment and sometimes they disagree. A medical assessment is also based on the views of a skilled mental health officer, the GP, nursing staff and carers. She did not know how much information-gathering legal professionals carried out.

The witness agreed that solicitors are empowered to make a judgement call regarding capacity. Mr Burnside noted that the Respondent's view was different to that of the witness. She said that her view was the view of all concerned in the patient's care. She noted that she and the Respondent were assessing two different things.

Mr Burnside asked whether the Respondent could have accessed the medical records. The witness confirmed that he could not. However, speaking to the staff would have revealed the application for guardianship.

Mr Burnside asked about the AJ's view that she did not want to grant a Power of Attorney because she was concerned her son would put her in a home. He asked whether this showed the patient was capable of debating the issue. The witness said it was not a debate. There was no discussion regarding the appointment of another attorney, what a Power of Attorney was, how you granted one etc. A person in her situation with capacity and deteriorating health should consider a Power of Attorney. However, AJ did not understand her situation and saw a Power of Attorney as a threat rather than a positive thing. In her view AJ was not capable of making that decision because there was no reasoning behind it. It was an irrational decision.

Mr Burnside suggested to the witness that in October 2015 the patient had a conversation with the Respondent, and he explained to her what a Power of Attorney was and she decided to "go for it". The witness said that AJ may have been "worn down". There were lots of reasons for her to go along with it. It seemed as though the Power of Attorney was arranged for her.

Mr Burnside asked whether the witness accepted that the way in which a Power of Attorney is explained could affect someone's understanding of it. The witness said that lots of people grant Powers of Attorney and have no idea what they have done. A solicitor may in good faith have arranged it, but the patient has no recollection of signing it. This was a matter for the Respondent's judgement, but the witness is uncomfortable about it. If the Respondent had asked her, she would have told him AJ had no capacity. Mr Burnside asked whether she was referring to medical or legal capacity and the witness said she was referring to both. Mr Burnside asked whether it was possible to get different answers from different professions. She said that was a matter for higher authorities.

Mr Burnside noted that the Respondent met the patient four times and had no access to the medical notes. He asked whether the Respondent was wrong in his assessment of AJ. The witness said that in terms of

AJ's recollection and organisation and acting on decisions, as defined by the Adults With Incapacity Act, she did not have capacity.

Mr Burnside asked whether it was the witness' view that the Respondent had made a mistake. She said she did not agree with the Respondent's decision. It was a very different view to her own and her colleagues. He may have made the decision in good faith, but she has come across lots of occasions where incapable people have granted Powers of Attorney because the professions have different ways of assessing capacity.

Mr Burnside asked whether superficially, the patient could have come across as capax. The witness said she was not saying the Respondent had acted in bad faith. However, there were people available who might have been able to inform his decision. However, this might be something doctors are encouraged to do, rather than solicitors.

The witness was re-examined. She indicated that when making an application for guardianship, two medical practitioners will assess the patient along with a mental health officer. All kinds of others might also be involved, for example, family, carers, social workers and psychiatric nurses. The witness was referred to Section 1(6) of the Adults With Incapacity (Scotland) Act 2000. She agreed that all the elements in that subsection had to be assessed to make a proper decision. With reference to AJ, she could communicate but could not reason. She was not capable of retaining information.

The members of the Tribunal asked the witness various questions. In answer to these, the witness indicated that the unit where AJ was staying is the geriatric ward of an old-fashioned GP-run cottage hospital. People are admitted from the community or for rehabilitation from larger hospitals. Lots of people on the ward will have dementia but it is a general geriatric ward rather than a mental health unit. Anyone with significant behavioural symptoms of dementia could not be dealt with there. General and geriatric nursing is provided. When AJ was first admitted it was not clear whether she would be able to return home. The witness indicated that the patient had been resident on the ward for months before she saw her in October 2014. The staff did not know what to do with her. She had been given as much rehabilitation as was going to make a difference. The witness agreed that her role was to dip in and out of AJ's care. She saw her twice and that was normal in this type of case.

In answer to a question about AJ's diagnosis of dementia, the witness noted that it had been confirmed by CT scan which showed she had small vessel disease. She also had alcohol-related brain damage. The witness was asked whether the patient was prone to confabulation. The witness described this as

falsification of information due to later memories not being retained. She said that the patient could have been said to be confabulating in the sense that her account of her function was inaccurate. Her physical function was "very very poor" but her account suggested she was fine and everything was OK.

A member asked whether a lay person might be capable of being fooled regarding AJ's capacity. The witness acknowledged that this can arise, particularly when people are not obviously cognitively impaired, for example, they can remember the nurses' names and can give an account of some things. However, the problem is the understanding or reasoning. In those circumstances a person would have to speak to the nurses for information. A psychiatrist speaking to someone who is saying they are fine but is obviously not fine will not take the patient's word for it and would speak to the patient's carers and the GPs.

In answer to a question from a member, the witness confirmed that the patient was not under psychiatric services when living in the community. She was admitted into hospital chronically ill. She needed detoxification from alcohol. She was not being seen by mental health nurses in hospital. Staff hoped she would improve with abstinence and proper nutrition. However, they came to a standstill with rehabilitation.

Parties were asked whether they had any questions arising from the answers to the panel's questions. Mr Lynch noted that the witness had been asked about whether a lay person could be fooled, and the witness had answered in general terms. He asked whether this particular patient could have fooled a lay person. The witness said that AJ could give an account of herself. She was not coming out with bizarre or psychotic symptoms. She would sound normal but there would be a mismatch between how she appeared and what she was saying. However, she could not exclude the possibility that a lay person might be fooled by AJ.

SUBMISSIONS FOR THE COMPLAINERS

Mr Lynch submitted that since the Respondent had failed to lead any evidence the Tribunal ought to draw the most favourable inferences from the Complainers' evidence. In support of this he relied upon Ross v Associated Portland Cement Manufacturers Ltd [1964] 1 WLR 768 and O'Donnell v Murdoch McKenzie & Company Limited 1966 SC 58.

He submitted that as at 31 October 2014, AJ did not understand the nature and effect of a Power of Attorney. She was suffering from dementia. Her incapacity did not change and therefore she lacked capacity when she granted the Power of Attorney in October 2015.

He reminded the Tribunal of the terms of the vulnerable clients' guidance for solicitors reproduced at Production 3 of the Complainers' First Inventory of Productions. This guidance provides that failure to comply may be taken into account in disciplinary or other proceedings. Where a solicitor considers a departure from the guidance, a written record of the circumstances and reasons should be kept. He noted that it was agreed that the whole file had been lodged with the Tribunal. There were no papers beyond the extent of the file. He noted that paragraphs 8 and 9 of the guidance provide that expert guidance should be sought in some cases. However, solicitors retain responsibility for compliance. Paragraph 10 provides that the possibility of vulnerability should be considered whenever a solicitor is consulted or instructed in any matter. The granter of a Power of Attorney is the client. Mr Lynch said there was no evidence on the file of any enquiries made regarding capacity.

Mr Lynch referred the Tribunal to the Guidance on Continuing and Welfare Powers of Attorney reproduced at Production 4 of the Complainers' First Inventory of Productions. Paragraph 4 of that guidance notes that it may be appropriate to defer taking instructions until capacity to grant the Power of Attorney has been established. Paragraphs 5, 6 and 8 provide that solicitors must discuss the potential Power of Attorney in detail with the client. Mr Lynch noted that absent any attendance files or evidence by the Respondent there is no evidence that this was done.

Mr Lynch referred the Tribunal to the Respondent's file contained at Production 2 of the Complainers' First Inventory of Productions, and in particular the Respondent's instruction sheet at 2/79. It was to be a continuing and welfare power of attorney, not of limited duration. The document and the fee note were to be sent to the Attorney.

Mr Lynch submitted that there was no evidence to explain the circumstances in which the Respondent went to see AJ on 14 October 2015. There is no evidence of who asked him to attend. It was unlikely to have been the patient herself. He invited the Tribunal to find as a fact, the Respondent completed the instruction sheet contained at Production 2/79 of the First Inventory of Productions for the Complainers and wrote the letter to AJ at 2/70 of the same Inventory which notes *"I hope that these follow the instructions that you gave me but if you have any queries, please do not hesitate to be in touch with me."* This letter was addressed to the patient's home address. On the same day, the Respondent wrote a letter to the Attorney. This was contained at 2/71 of the same Inventory. My Lynch submitted that the draft

Power of Attorney at 2/83-90 of the same Inventory was drafted despite AJ having no capacity or memory. Mr Lynch said that on 15 October 2015 the Respondent wrote and sent Terms of Business to the patient at her home address, knowing that she was not resident there. This letter was at 2/55 of the same Inventory.

Mr Lynch drew the Tribunal's attention to the email at 2/54 in the First Inventory of Productions for the Complainers which notes that the proposed attorney attended at the Respondent's office and confirmed that the patient was happy with the draft document. He suggested that the Tribunal could infer from this that the Respondent did not discuss or take instructions from the granter. It is not known if the attorney discussed the draft with the granter.

Mr Lynch asked the Tribunal to find that the Power of Attorney was notarially executed by the Respondent in the presence of SS at Golspie. AJ is supposed to have declared that she was unable to write and did not want the document read to her. The draft was not posted to the hospital, and the Respondent did not take instructions from her.

Mr Lynch asked the Tribunal to look at Production 2/51 in the First Inventory of Productions for the Complainers which was a letter from the Respondent to the Office of the Public Guardian dated 2 December 2015 enclosing the Power of Attorney and seeking registration. On that same day, the Respondent sent the letter at 2/49 in the First Inventory of Productions for the Complainers which was the fee note sent to the attorney.

Mr Lynch invited the Tribunal to find that on 3 December 2015, the Respondent spoke to GJ at the Office of the Public Guardian. During that conversation, the Respondent became aware of the intervention order (Production 2/49 in the First Inventory of Productions for the Complainers). He spoke to TS on 8 December 2015 (Production 2/45 in the First Inventory of Productions for the Complainers). During the course of that conversation she sought information from him in writing. Production 2/46 in the Complainers' First Inventory is an email from the Respondent to the Office of the Public Guardian dated 8 December 2015. In it the Respondent noted that he had met the patient three times. That statement is repeated in the letter sent by his representative to the Law Society on 28 May 2018 (Production 3 in the Respondent's First Inventory). In that letter it was noted that it was not disputed that the Respondent met AJ three times. Despite this, he now asserts in his Answers that there were four meetings. Mr Lynch invited the Tribunal to find that there were only three meetings.

Mr Lynch referred the Tribunal to Production 2/46 in the First Inventory of Productions for the Complainers, an email to TS at the Office of the Public Guardian. The Respondent said it was his perception that AJ might have no friends or relatives other than the attorney. This was despite the fact that the will which the Respondent drafted appointed her son as executor and beneficiary. This statement was calculated to mislead the Office of the Public Guardian. The Chair noted that the email also specified that the Respondent did not have access to the file when he drafted the email. Mr Lynch said the Respondent ought to have remembered he had drafted the will.

My Lynch referred the Tribunal to Production 7 of the Complainers' First Inventory of Productions. This was a letter of 16 December 2015 from the Respondent to the attorney enclosing a copy of the Power of Attorney and noting that there appeared to be a Guardianship in force and the attorney would have joint powers with the local authority. The Fiscal submitted that this was misleading. In his submission, the letter demonstrated that in the knowledge of the existence of the court order, the Respondent, without further inquiry, carried on with registration when it was within his power to put the matter on hold and take appropriate medical advice. By sending the letter he tried to secure the settling of his account by putting his own interests above that of the patient.

Mr Lynch submitted that even if the Respondent did nothing wrong up to the point of disclosure of the existence of the guardianship order, once he became aware of it he ought to have acted differently. Knowing that a guardianship had been granted meant that a court had been satisfied on the basis of medical reports that the patient did not have capacity and therefore he should not have proceeded with registration. That had consequences for AJ. No explanation by the Respondent's agent can fill that gap and the Tribunal is entitled to draw the inferences most favourable to the Complainers' case.

SUBMISSIONS FOR THE RESPONDENT

Mr Burnside noted that it was not unusual for a Respondent to choose not to give evidence. It was for the Fiscal to prove the Complainers' case to the high standard required. The Fiscal had fallen far short of that standard and there was no need for the Respondent to give evidence.

Mr Burnside note that there were two parts to this Complaint and in both instances, the evidence fell short. The hearing was proceeding as a proof before answer regarding dishonesty and lack of integrity.

The first part of the Complaint referred to the preparation of a Power of Attorney. Dr Bather was fair in her concession that a lay person could be fooled by AJ. Dr Bather was in a different position because she had access to the medical notes and also brought her professional experience to bear.

Mr Burnside noted that capacity is a legal, not a medical issue. The Act empowers solicitors to make a judgement. In his submission, a person's ability to understand depends to a large degree on how the matter is handled. A Power of Attorney is not an everyday matter for most people. Even people of average intelligence may "glaze over" when one is discussed. If time is taken, a solicitor can certify that in his opinion, a person is capable. A solicitor only has to go to a medical practitioner if in doubt.

Mr Burnside noted that the Respondent maintained he had four meetings with AJ. However, even three would be one more than Dr Bather had with her.

It was submitted that the files indicated that in his opinion, the Respondent certified that, in his opinion, AJ understood the granting of the document. File notes are not mandatory. This was a fairly routine matter for a practitioner of thirty years. It is a counsel of perfection to write everything down.

In Mr Burnside's submission, the Fiscal drew a lot of inferences in his submissions. However, the Fiscal has a duty to prove his case beyond reasonable doubt and failed to do so.

Mr Burnside suggested that capacity can come and go. People can have good and bad days.

With regard to the suggestion that the Respondent lacked integrity, Mr Burnside asked why a professional would put his reputation and career on the line for a modest fee. He asked what the Respondent's motivation would be for stating the patient was capax if he knew that she was not. Mr Burnside said that if the Respondent had not acted dishonestly or without integrity, then the case must fail. Mr Burnside submitted that the Complainers' case at its highest suggested that the Respondent had been mistaken as to AJ's capacity. The Tribunal heard from Dr Bather that this was entirely possible. There was no evidence to prove dishonesty or a lack of integrity and therefore no breach of Rule B1.2.

Mr Burnside said there was no evidence that instructions came from anyone other than AJ. Correspondence was sent to the patient's home address but there should be no criticism of this. Someone might have been picking up AJ's mail. There was no benefit to the proposed attorney in having a Power of Attorney granted. A Power of Attorney was "a burden, not carte blanche to spend the granter's money". There was no evidence to support a breach of Rule B.1.5.1.

Mr Burnside submitted that it was clear from the chronology that at the time the Power of Attorney was executed, the Respondent was not aware of the intervention order or the medical reports produced in support of it. He only found out about the intervention order when he went to register the Power of Attorney. By that stage his function was complete. Mr Burnside referred the Tribunal to Production 2/30-31 in the First Inventory of Productions for the Complainers. This is an email exchange between the Respondent and a member of staff at the Office of the Public Guardian on 9 and 10 December 2015. The representative of the Office of the Public Guardian informed the Respondent that the Power of Attorney would be registered that day. That person would contact the financial intervener with regards to the actions taken since his appointment and bring the order to an end. Mr Burnside submitted that the Power of Attorney was sent to the Office of the Public Guardian in good faith. The Office of the Public Guardian informed him of the Guardianship but told him they would contact the Social Work Department and bring the order to an end. An allegation of fraud, deceit or lack of integrity cannot be supported. Even if inconvenient consequences flowed from that decision, it does not mean that the Respondent showed a lack of integrity.

Mr Burnside reminded the Tribunal of the definition of professional misconduct contained in Sharp v Council of the Law Society of Scotland 1984 SLT 313. He suggested that the conduct might be serious but not reprehensible. He noted that this was a third-party complaint. The solicitor's primary duty was to his client. He acted on his client's instructions and she raised no complaint.

The Chair noted that Mr Lynch had invited the Tribunal to find as a fact there was no capacity. The Chair asked Mr Lynch whether he was asking the Tribunal to find that the Respondent knew there was no capacity. Mr Lynch asked the Tribunal to find that there must have been sufficient in the demeanour of the patient to put the Respondent on notice that he should make further inquiries. He accepted that the doctor had indicated that she could not exclude the possibility that a lay person might be fooled. He did not suggest that there was dishonesty or fraud. However, once he was aware there was already a court order, he should not have proceeded to invite the Office of the Public Guardian to register the Power of Attorney. The Chair asked what the Tribunal was to make of the emails between the Respondent and the staff at the Office of the Public Guardian. Mr Lynch said that he did not know the level of seniority of the clerical staff dealing with the case. However, the Respondent knew then that she did not have capacity and that should have been the trigger to withdraw the application and make further enquiries. The Chair asked whether, once certified and lodged, the Respondent had an obligation to request registration, even if he knew the circumstances. The Fiscal indicated that the registration process was incomplete. The process could only proceed to completion with input from the Respondent.

A Tribunal member quoted from the email of 9 December 2015 from the Office of the Public Guardian, as follows: *"I can confirm that we will register the POA today. Going forward from this we will contact the financial intervener with regards to the actions taken since his appointment and bring the order to an end."* She asked whether this implied it was not for the Respondent to do anything else. Mr Lynch noted that the author of those remarks was an investigations officer. She had different professional responsibilities to a solicitor.

DECISION

Allegations of misconduct were raised against the Respondent regarding his conduct in relation to the drafting, execution and registration of a Power of Attorney for his client, AJ. The Tribunal heard evidence from Mr Ritchie and Dr Bather on behalf of the Complainers. It considered both witnesses to be credible and reliable and accepted their testimony. Facts were also admitted in the Answers and by Joint Minute. The Tribunal carefully considered the evidence upon which it was being asked to make a finding of professional misconduct.

In short, the Respondent visited a client, AJ, in hospital. He had previously prepared a will for this client. AJ was accommodated on a general ward of a cottage hospital. She had been admitted due to physical frailty and had been in hospital for a long time. She had dementia exacerbated by alcoholism. At the time the Respondent saw her, there was broad agreement amongst health professionals that she did not have capacity to make decisions regarding her welfare. A Guardianship Application had been made by the Local Authority to the local Sheriff Court. When the Respondent met AJ on 14 October 2015, he did not know that the health professionals considered AJ to lack capacity and he did not know of the Guardianship Application. Dr Bather, a specialist in old age psychiatry who met the patient on two occasions and certified that she was incapable for the purposes of the Guardianship Application, gave evidence that AJ was capable of fooling a lay person with regard to her capacity.

The Respondent completed the instruction sheet which was contained in the file. The Respondent sent all correspondence to AJ at her home address although he knew that she was resident in hospital. It was AJ's friend and the proposed attorney who indicated to the Respondent that AJ was content with the draft Power of Attorney. When the Respondent attended to have the document signed, AJ declined to have the document read over to her and it was notarially executed by the Respondent.

The Respondent sent the Power of Attorney to the Office of the Public Guardian. On 3 December 2015, a representative of the Office of the Public Guardian informed the Respondent that a Guardianship Order

had been granted in October 2015. There followed another telephone conversation and an email exchange between the Respondent and the Office of the Public Guardian. The representative of the Public Guardian sent an email to the Respondent stating that the Power of Attorney would be registered and that staff of the Office of the Public Guardian would contact the financial intervener with regards to the actions taken since his appointment.

The Complainers alleged that the Respondent was guilty of professional misconduct by preparing and notarially executing the Power of Attorney. They claimed that there were sufficient warning signs which should have alerted the Respondent to AJ's lack of capacity and his failure to made further enquiries constituted professional misconduct. Further, they argued that it was professional misconduct to register the Power of Attorney in the knowledge of the Guardianship. The Complainers maintained that the Respondent's conduct was in breach of Rules B1.2 and B1.5 of the 2011 Practice Rules and did not follow the guidance the Complainers have produced for the profession.

Having carefully considered the evidence led and the agreed facts, the Tribunal did not consider that there was sufficient evidence to prove the Complainers' case beyond reasonable doubt, which is the standard of proof applied in professional misconduct proceedings before this Tribunal. The Respondent's conduct did not call into question his integrity and there was no evidence that the Respondent had taken instructions from anyone other than the client. Even applying a favourable interpretation to the Complainers' evidence was not enough to meet the standard of proof.

When a client is in hospital, it is not unusual for the initial contact with the solicitor to be made by a friend or relative of the patient. Age, physical frailty or presence in hospital are not reasons in themselves requiring a solicitor to make additional enquiries as to capacity. The Tribunal noted that AJ was not housed within a psychiatric unit and that this particular unit was not suitable for patients with severe dementia. AJ was not receiving any active intervention from psychiatry professionals. Superficially, AJ could have given the impression she had capacity. She could therefore have fooled a lay person, although medical professionals were satisfied that she did not have capacity. This evidence raised a reasonable doubt in the mind of the Tribunal about the Complainers' case that the Respondent had disregarded warning signs which he ought to have taken into account and should have caused him to make further enquiries. The benefit of that doubt must be given to the Respondent.

The Tribunal did not hear from the Respondent regarding the matters he took into account when determining that AJ understood the nature and extent of the Power of Attorney. However, his file was admitted by Joint Minute. The Tribunal had the benefit of the Respondent's conclusion regarding

capacity in his instruction sheet, the certificate on the Power of Attorney document and his email to the Office of the Public Guardian. The instruction sheet records that AJ appeared to have the mental capacity to execute the document. It would be usual to record the solicitor's conclusion regarding capacity, but not the whole conversation with the client. The Respondent signed the certificate saying that he interviewed her and that she understood the nature and effect of the document. It is noted on the form that he satisfied himself because of his own knowledge of the granter. There was no evidence that the proposed attorney was present or that he had otherwise influenced her. Full file notes would have been of assistance in this case. However, the Tribunal accepted that this was a counsel of perfection. The Respondent's email to the Office of the Public Guardian noted that he had no concerns about AJ's capacity. The client was entitled to decline to have the document read over to her and to have the document notarially executed. The Tribunal drew no adverse inferences from this course of action.

The Respondent sent all correspondence to AJ at her home address although he knew that she was resident in hospital. The Tribunal drew no adverse inference from this. Clients in hospital might request for good reason that their mail is sent to their home address. The solicitor might have considered that AJ was more likely to get her mail if it was sent there.

The Office of the Public Guardian informed the Respondent of the Guardianship order. The Respondent engaged with that office. The Fiscal submitted that the Respondent's email which stated that he did not think AJ had any other friends or family was misleading. The Fiscal said the Respondent ought to have remembered that he had drafted a will previously for AJ naming her son as executor and beneficiary. The Tribunal did not consider that this was misleading. It was not realistic to expect the Respondent to remember the terms of the will without the file. The Respondent explained earlier in that same email that he was not in the Wick office and therefore did not have access to his files. The email correspondence showed that the Power of Attorney was registered by the Office of the Public Guardian in the full knowledge of the Guardianship. Indeed, it was that office which drew the matter to the Respondent's attention. The Respondent was bound to register a signed Power of Attorney. The Office of the Public Guardian was aware of the situation and could have rejected the application had they thought it appropriate to do so. Staff of the Office of the Public Guardian said that they would contact the financial intervener with regards to the actions taken since his appointment. The Tribunal was of the view that the Respondent was entitled to rely on this statement and that the seniority of the representative of the Office of the Public Guardian was not the Respondent's concern. Their response suggested that no further action was required by the Respondent. He asked to be kept informed of developments. The Tribunal drew no inference from the Respondent's desire to recover his fee at the conclusion of the case. He was entitled to do this.

Much was said about capacity during the course of this case. Mr Burnside repeatedly maintained that medical and legal capacity are different. There will frequently be little difference in effect. However, the tests are structured differently. Dr Bather referred to the test for incapacity contained at Section 1(6) of the Adults with Incapacity (Scotland) Act 2000. Under that provision, "incapable" means incapable of acting, making decisions, communicating decisions, understanding decisions, or retaining the memory of decisions. The Tribunal accepted the evidence of Dr Bather that according to the test as applied by the medical practitioners, AJ was incapable. This decision had been reached following assessment by two medical practitioners who had also sought the views of those involved in the patient's care. However, a solicitor certifying a Power of Attorney needs only to be satisfied that the granter understands the nature and extent of the document (Sections 15 and 16 of the Adults with Incapacity (Scotland) Act 2000). This is a matter of judgement of the solicitor. Doctors and solicitors therefore consider different things when making their assessments and it is not surprising that different opinions can be reached, particularly in circumstances such as this, where the patient/client was capable of fooling someone who was not a medical practitioner. In a hospital setting it may be helpful for a solicitor to try and ascertain, if possible, whether a client is considered by the staff to have medical capacity. This would give the solicitor an opportunity to consider whether or not the client has legal capacity and whether further investigation is required.

However, the Tribunal considered that capacity was not the main issue in this case. The crucial element was whether there were sufficient warning signs whereby the Respondent ought to have made further enquiries about capacity and whether a failure to do so constituted misconduct. The Respondent may have been wrong in his judgement that AJ understood the nature and extent of the Power of Attorney. However, a mistake, carelessness or negligence do not necessarily amount to professional misconduct.

According to the test set out within Sharp v The Law Society of Scotland 1984 SLT 313, there are certain standards of conduct to be expected of competent and reputable solicitors and 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. It is necessary to consider all the circumstances and the degree of the Respondent's culpability. The Tribunal was not persuaded that there were sufficient warning signs in this case such as to render the Respondent's decision to draft and register the Power of Attorney, professional misconduct.

Having decided that the Respondent was not guilty of professional misconduct, the Tribunal was obliged to consider if he might be guilty of unsatisfactory professional conduct. It noted that unsatisfactory

professional conduct is defined as professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor. The facts proved did not impinge on the reputation of the solicitor. The Tribunal noted that carelessness or incompetence alone would not be sufficient to satisfy this test. A competent and reputable solicitor could have acted as the Respondent did. Therefore, the Tribunal declined to remit the complaint to the Council of the Law Society of Scotland under Section 53ZA of the Solicitors (Scotland) Act 1980.

The Tribunal invited submissions on expenses and publicity. The Chair noted that the Tribunal had already directed that the Complainers would be liable in the expenses of the discharged hearing on 29 August 2019. Mr Clark moved for expenses and noted that the Respondent would prefer that the matter was not given publicity. Mr Lynch referred to Baxendale-Walker v Law Society [2006] EWHL 643 and suggested that the appropriate approach was no expenses due to or by. He submitted that despite the finding of the Tribunal, the Respondent did bring the prosecution "on his own head".

The Tribunal considered the submissions of the parties on expenses and in particular the submission of Mr Lynch that there should be no award of expenses due or by either party. In this case the Tribunal had concluded that the Complainers had failed to prove professional misconduct or that there should be a remit under Section 53ZA of the Solicitors (Scotland) Act 1980 on the evidence of the Complainers' witnesses and the productions alone. This was not a case where the Complainers' case failed because of evidence of the Respondent or his witnesses. The important evidence of Dr Bather about the possibility that a person not medically qualified could be fooled by AJ into thinking that she had capacity could have been ascertained by the Complainers before commencing these proceedings. Dr Bather was the witness of the Complainers. Taking account of this and the whole circumstances (including the fact that the Respondent had been successful in respect of both averments of professional misconduct) the Tribunal decided that the appropriate award of expenses was one in favour of the Respondent. Publicity should be given to the decision and should include the name of the Respondent. However, there was no requirement to identify any other person as publication of their personal data may damage or be likely to damage their interests.

Nicholas Whyte

Chair