

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

FINDINGS

in Complaint

by

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

Complainers

against

**MICHAEL GERARD KILKERR, of Michael G
Kilkerr, 1 Bridge Street, Stranraer**

Respondent

1. A Complaint dated 12 May 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 Michael Gerard Kilkerr, of Michael G Kilkerr, 1 Bridge Street, Stranraer (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer, James Alan Craig, 31 Park Road, Dunragit, Stranraer.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
4. In terms of its Rules, the Tribunal set the case down for a virtual procedural hearing on 30 August 2022 and notice thereof was duly served on the Respondent.
5. At the virtual procedural hearing on 30 August 2022, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was not present but was represented by William Macreath, Solicitor, Glasgow. The Tribunal set the matter down for a virtual hearing on 5 and 6 December 2022.

6. At the virtual hearing on 5 and 6 December 2022, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by William Macreath, Solicitor, Glasgow.
7. The Tribunal found the following facts established:-
 - 7.1 The Respondent is Michael Gerard Kilker, 1 Bridge Street, Stranraer. His date of birth is 12 March 1956. He was enrolled as solicitor on 22 January 1980. The Society's records show he was a partner in McCormick & Nicholson Symons & Macdonald between 8 March 1985 and 10 July 1992. He was an employee of Hunter & Murray between 13 July 1992 and 18 December 1995. He was an employee of AF, CD Smith between 30 January 1996 and 31 December 2008. He has since then practised as the principal of Michael G Kilker.
 - 7.2 In 2008, the Secondary Complainer ("JC") was estranged from his wife ("SC"). From May 2008, JC lived with his then partner Laura Kennedy ("LK") at 31 Park Road Dunragit ("Dunragit"). LK had moved from the USA to Scotland. Dunragit had been JC's mother's local authority house which she bought during the right to buy era. It was transferred to JC on his mother's death at some point prior to 2008.
 - 7.3 Shortly after LK began to cohabit with JC, he decided that LK should be gifted one half of Dunragit. JC instructed agents in Stranraer, AB & A Matthews (incorporating Hunter & Murray), to transfer a one-half *pro indiviso* interest in Dunragit to LK retaining a liferent interest over that one half share disposed to LK. This transfer was registered in the Land Register in late 2008 or early 2009. The property vested between JC and LK, equally between them and to the survivor, with JC having a liferent over the one-half share owned by LK. A Power of Attorney was granted by JC in favour of LK in December 2008.
 - 7.4 JC commenced a divorce action against SC in 2011. JC was initially represented by a solicitor from AB & A Matthews (incorporating Hunter & Murray). SC was not represented by agents and acted on her own behalf. The solicitor client relationship between JC and AB & A Matthews broke down and the JC's agent withdrew from acting. JC thereafter acted on his own behalf. LK assisted JC by attending court

on JC's behalf as she had been granted Power of Attorney. The Sheriff advised LK to get legal representation. The Sheriff made clear that a solicitor should be engaged to act for JC as pursuer.

- 7.5 LK had previously used the Respondent's offices to fax documents to the USA in connection with her own divorce proceedings and in connection with financial provision in relation to her marriage. LK discussed her USA business with the Respondent and asked for advice. The Respondent explained what would happen if her proceedings and ancillary disputes were subject to Scots law but could offer no advice on matters of US law. No letter of engagement was issued to LK. The Respondent acted as a Notary Public for LK on two occasions.
- 7.6 LK sought assistance regarding JC's divorce from the Respondent. LK first met with the Respondent alone on 12 April 2012. LK asked the Respondent (1) to consider acting for JC in divorce proceedings in which he was pursuer and (2) to consider an instruction by JC and LK to transfer the property at Dunragit already in joint names and to the survivor subject to the liferent, into the sole name of LK and without any liferent.
- 7.7 The Respondent wrote to LK acknowledging the instructions by letter dated 12 April 2012. The letter states "*...this [instruction] relates to divorce proceedings involving Mr Craig...I also understand that you wish to transfer the Title of 31 Park Road Dunragit...*"
- 7.8 A meeting was arranged between the Respondent and JC for 16 May 2012. Prior to that date, JC was not an established client of the Respondent. JC provided direct instructions to the Respondent to act in his divorce action and transfer one half share of Dunragit to LK. The Respondent commenced acting in the divorce action following that meeting in May 2012. The divorce action was the Respondent's priority.
- 7.9 JC provided the Respondent with a letter from his GP dated 9 March 2012, which he had obtained. The letter was addressed to "To whom it may be concern". It narrated that JC was "*not capable of understanding and responding to questions relating to legal matters*" and that the GP was "*supportive of his wish to postpone*

his court action.” The court action was the divorce matter. The Respondent accepted instructions directly from JC and LK.

- 7.10 The Respondent wrote with his terms of business letter to JC on the 22 May 2012. He set out he would act in the divorce action. In the terms of business letter the Respondent also noted he had received instructions from JC that he wished to “...*transfer your one half share in your property to [LK]...*”
- 7.11 The Respondent sought clarification of JC’s medical condition and the GP wrote on 18 June 2012 “...*Despite the lack of definitive diagnosis it is my opinion that he is currently unfit to attend court ...*”. The medical practitioner did not say JC lacked capacity to provide the Respondent with instructions.
- 7.12 The Respondent continued to act in the divorce action and separately issued terms of business, dated 9 July 2012 to both LK and JC regarding the transfer of property. In July 2012, the property remained in joint names of JC and LK with JC retaining a life interest. The Respondent’s terms of business included the following under the heading “Conflict of Interest”.

“If a conflict arises between clients in the course of dealing with their affairs, professional rules prevent me from continuing to act for all of them. In these circumstances, I will advise the clients concerned of the conflict, and I may be obliged to cease acting for some or all of them. Accordingly, I must reserve the right to decline further instruction and cease acting for you if a conflict of interest situation arises. Given that conflict of interest situations can have significant impact upon the interests of all parties, you must advise me at the earliest possible opportunity if you anticipate any such conflict arising.”

- 7.13 LK had previously been a client of the Respondent. He had assisted her in settling her USA affairs from Scotland. Prior to the meeting on 16 May 2012 the Respondent had not acted for JC.
- 7.14 The Respondent sent “conflict letters” dated 9 & 18 July 2012 to both LK & JC. The letters were in similar terms. The Respondent requested that JC and LK acknowledge them by signing and returning a copy of the letter. Both JC and LK

signed the letter dated 18 July 2012. The divorce action proceeded. There was a pre-proof hearing in the divorce action and the matter was continued to the proof hearing. The proof hearing was continued for settlement. A signed joint minute was lodged. Instalment payments were made. At times, the Respondent took instructions from LK and at times from JC. JC often advised the Respondent to take instructions from LK due to his health. The instructions for the transfer of the property came from both JC and LK.

- 7.15 The Respondent prepared paperwork, namely a disposition by both JC and LK in favour of LK, a matrimonial homes declaration and a deed relinquishing JC's liferent. By way of the disposition, JC and LK disposed their interests to and in favour of LK. JC waived his liferent. The consideration was "for certain good and onerous causes". The Respondent had advised JC that the property was not matrimonial property for the purposes of the fair sharing provisions in relation to divorce.
- 7.16 LK and JC attended the Respondent's office on the 24 September 2012 to sign papers. The Respondent met separately with LK and JC. His file note records he advised parties of the implication of signing the deeds.
- 7.17 The Respondent registered the disposition in favour of LK, thus vesting all property rights in Dunragit with LK.
- 7.18 The Respondent continued to act for JC and on his instructions settled the divorce proceedings in April 2013.
- 7.19 LK and JC's relationship broke down in 2016. LK sought to enforce her property rights. JC thereafter made a complaint against the Respondent.
- 7.20 JC obtained extract decree for production and reduction at Stranraer Sheriff Court of both dispositions transferring title of Dunragit to LK on the 5 January 2022.

8. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct singly and *in cumulo* in respect that he:

- 8.1 Failed to communicate effectively in breach of Rule B1.9.1 by failing to explain in writing to the Secondary Complainer the full extent of the loss of rights in Dunragit which were a consequence of relinquishing the liferent and signing the disposition transferring title of his one half share of Dunragit to LK;
- 8.2 Acted in a conflict of interest situation in breach of Rules B1.7 and B2.1.4 when he acted for both the Secondary Complainer and LK.

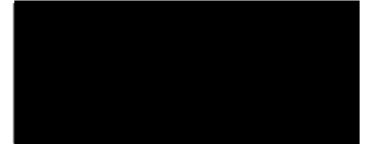
9. Having heard the Solicitor for the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 6 December 2022. The Tribunal having considered the Complaint dated 12 May 2022 at the instance of the Council of the Law Society of Scotland against Michael Kilkerr, of Michael G Kilkerr, 1 Bridge Street, Stranraer; Find the Respondent guilty of professional misconduct singly and *in cumulo* in respect that he failed to communicate effectively with the Secondary Complainer in breach of Rule B1.9.1, and acted in a conflict of interest situation in breach of Rules B1.7 and B2.1.4, all of the Law Society of Scotland Practice Rules 2011; Censure the Respondent; Fine the Respondent in the sum of £1,000 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; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent and the witnesses who gave evidence at the hearing but need not identify any other person; and Allow the Secondary Complainer 28 days from the date of intimation of these findings to lodge a written claim for compensation with the Tribunal Office.

(signed)
Colin Bell
Chair

10. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on **23 JANUARY 2023.**

IN THE NAME OF THE TRIBUNAL



Colin Bell

Chair

NOTE

At the Hearing on 5 and 6 December 2022, the Tribunal had before it the Complaint as adjusted to 12 July 2022, Answers, one Inventory of Productions for the Complainers, Authorities for the Complainers, Authorities for the Respondent, a List of Witnesses for the Complainers, a List of Witnesses for the Respondent, and a Joint Minute of Admissions. By way of the Joint Minute the parties agreed that the productions for the Complainers were true and accurate copies of the Respondent's files. It also agreed other facts which are reflected in the findings in fact above.

EVIDENCE FOR THE COMPLAINERS**Witness 1: James Allan Craig**

Mr Craig gave evidence on oath. He is 69 years old and retired. He explained that he inherited his house from his mother. In 2008 he was separated from his wife and engaged to LK who lived with him. He said LK was worried that if something happened to him, his sisters would put her out the house. She pestered him and so he signed over half the house to her. He retained a liferent. His understanding was that LK would look after him and he would not have to go into a home.

In 2011 JC saw a solicitor about a divorce. However, that solicitor had to withdraw from acting in 2012. The Respondent's health was not good at this time. He had lost 10 stone in weight. He thought he might have cancer.

Having been directed to an Interlocutor contained within the Productions for the Complainers, JC agreed that he personally attended Court on 9 March 2012. However, he did not remember being there. He was on powerful medication at that time. He had problems with concentration. LK attended court on his behalf on other dates. That was her decision. She was his attorney and carer. He did not remember asking her to attend. If LK said something different, he would not believe her, but it was possible he asked her to appear. She did not ask him to see the Respondent. There is no way JC would have instructed the Respondent. It was a lie to say LK saw the Respondent with JC's permissions. He said LK was a liar. He was not happy for LK to speak to the Respondent on his behalf.

JC was referred to various productions tending to show that he had instructed the Respondent directly. He denied that he had ever met the Respondent, except on one occasion when he had accompanied LK at Christmas when she dropped off a bottle of whisky for him. JC was referred to various medical letters which described the memory issues he was experiencing at that time. JC denied that his memory

problems at that time could have caused him to forget meeting the Respondent. He accepted that mail from the Respondent was addressed to him but said that LK opened the mail at home.

When shown the disposition, JC said he had not signed it before the Respondent in Stranraer. He said he would have had to have been "crackers" to sign a liferent away. He did not receive any advice about the effect of the document. He said it was not possible he had forgotten the advice.

JC said that the LK moved out of the house in 2016. JC agreed that there is some animosity between him and LK. He has had the disposition reduced. The action was undefended. He now owns his house alone.

During cross examination JC confirmed that only on one occasion did he attend the Respondent's office and that was to deliver whisky. He barely remembered attending court. JC agreed that he had granted LK a power of attorney over his affairs. He agreed that in 2008 he instructed another firm of solicitors to transfer the property into joint names with a liferent. He could not say what advice he got from those solicitors. It was many years ago. JC had been due to marry LK. She wanted to know that if something happened to him, she would not be put out of the house. He was aware when divorcing his wife that the house was not a matrimonial asset. JC said he did not instruct the Respondent regarding his divorce.

There was no re-examination. The Tribunal asked questions. JC said his health has improved but he still has some difficulties. He confirmed that he now owns the house in question. LK failed to defend the action for reduction.

Witness 2: Laura Kennedy

Ms Kennedy gave evidence on oath. She is 59 years old. She is retired. She moved into JC's home in 2008. They granted powers of attorney in each other's favour. JC gave her half the property. He did not want his wife to get it in the divorce. He was due to go on a five-month sailing trip. She had paid to have parts of the house remodelled and had bought furniture. AB & A Matthews (incorporating Hunter & Murray) dealt with the transfer. JC dealt with all instructions. That firm also dealt with the divorce case initially but JC fell out with his solicitor and sent LK to court instead. LK said she thinks she attended court twice because JC had refused to go. He could not face his wife. LK had power of attorney. JC wanted LK to represent him but LK did not have sufficient knowledge. The Sheriff told LK and SC that they were out of their depth, and they needed a solicitor. They were basically told not to come back without one. She discussed the matter with JC and told him she was going to speak to the Respondent because she already had a relationship with him. She had been to his office before. She had been in and out of his office to fax papers relating to her own divorce and sale of property. The Respondent did not

give her any legal advice although they discussed the Scottish legal system. The Respondent did not charge her any fees. LK tried to get him to accept money but he would not take it. JC was content that LK consulted the Respondent but said that she would have to pay for it. JC also wanted to transfer his half of the house to LK. He did not want SC to have it.

LK consulted the Respondent. She asked him to handle the case. She did not have a medical report. The Fiscal suggested that LK could not act as attorney because there was no medical report confirming that JC was incapax. LK said JC wanted her to act on his behalf.

After the first meeting LK said she gave all instructions although she included JC in everything. Sometimes JC would be with her and she would have to ask him questions. The Respondent met JC on 22 May 2012. LK had asked him to come with her to the meeting because she could not answer all of the Respondent's questions. JC gave specific instructions to the Respondent. JC asked the Respondent to put the second half of the house into LK's name.

When LK and JC attended the Respondent's office to sign the disposition, the Respondent gave LK advice as to the effect of signing the document. LK remembered signing the document. She identified her signature and that of JC. She did not know if there was any advice given at the meeting about the import or effect of signing the disposition. She did not know if there was any correspondence about what the transfer would mean. She said although mail was delivered to their house, she did not receive all of it. LK explained that her relationship with JC broke down some time later and things have been acrimonious between them since then.

In cross examination, LK confirmed that in 2008 JC agreed to transfer a half share of the house to her. She had paid for JC to attend a five-month training course in Gibraltar at a cost of £3,000-£5,000. She partially remodelled the house (and later undertook further renovations) at a cost of £35,000-£40,000. They spent eight weeks in Lanzarote while the work was being done.

LK agreed that the Respondent had on two occasions notarised documents which had been required for her divorce in the USA. She had provided her passports to the Respondent, and he had taken copies.

LK said she had lived with JC for four years before the Respondent was invited to deal with JC's divorce. She was able to understand JC. He was not confined to bed. They had a normal daily life. She did the shopping. He went to the pub. He became unwell. He lost a lot of weight. However he was also doing courses and founding companies. LK was asked whether she had any concerns regarding the capacity of

JC to instruct the Respondent. LK said JC could take care of that. He would occasionally take extra medication so he would appear as if he did not know what was going on.

LK agreed that the Respondent wrote to her and JC separately about conflicts of interest. She was told that if a conflict arose, she and JC might require independent legal advice. They signed the acknowledgement of the conflict letters.

On 24 September 2012, the Respondent saw LK and JC separately. JC was not discomfited or put under undue pressure to sign the disposition. He was fine with it until several months later. He said if LK decided to sell the property or evict him he would go after the Respondent for taking advantage of him and for conflict of interest. LK said JC had capacity when he signed the disposition.

LK said that JC gave instructions to answer SC's defences. JC thought the amount of money SC wanted was a joke. He was able to give instructions to answer her assertion that she was entitled to £36,000. LK passed those instructions on to the Respondent. JC was present when the defences were discussed. LK would not have been able to answer questions about the history of the marriage.

LK said she paid the settlement to SC. She paid for the home to be transferred and the legal fees for the divorce to be paid. She estimated she had spent about \$750,000. She sold her home in the USA. She realised investments. She paid JC's legal fees. She paid for a car and holidays. She said JC was lying if he said LK acted without his consent.

LK was asked whether she considered she was a client of the Respondent. She said she trusted him to help her sign papers she needed for her own divorce. They already had a rapport. She had JC's authority to speak to the Respondent about the situation.

In re-examination, LK said that she saw the Respondent in her capacity as JC's attorney. However, she had no concerns about his capacity. She had not read the power of attorney documents. She did not know she could only act if JC was incapax. She believed she had the power to act in his interests and for financial reasons. JC could choose to be unwell when it was to his advantage. However, he was competent.

The Tribunal asked questions. LK reiterated that she did not receive all mail sent to her address. She would open mail for JC if she was asked. Sometimes signatures were required. JC was capable of reading and understanding the content of letters. He was working and writing code at this time.

The Tribunal asked about the transfer of the house. LK said the transfer was to prevent SC getting the property and it also reflected that LK had spent so much money on the house, and JC had received so much money from her. LK said that the Respondent had always been honest and straightforward. This complaint was vindictive.

EVIDENCE FOR THE RESPONDENT

Witness 3: Michael Kilkerr

The Respondent gave evidence on oath. He is 66 years old. He has practised for 42 years. He currently undertakes criminal, family and conveyancing business. In the course of his criminal work, he deals with people with vulnerabilities and assesses their capabilities.

In early 2012, the Respondent met LK. She spoke to him about her divorce in the USA. He notarised some documents for her. He satisfied himself regarding her identification and put her on oath.

The Respondent met LK again on 12 April 2012. She explained she was representing JC in his divorce proceedings. She was anxious about appearing in court and her position as attorney. She was nervous about her own exposure. She had been encouraged to seek legal advice. The Respondent sent her a letter of engagement after the consultation covering the divorce and the transfer of the house. He was aware there was a triggering clause in the power of attorney document. The Respondent was aware there was a GP report of a few lines.

After he had consulted LK, the Respondent insisted JC came into the office. It was apparent to the Respondent he would have to carry out an assessment of JC. The medical letter specifically dealt with appearing in court. It was a fraught situation but JC might be able to give instruction. After 12 April 2012, the Respondent considered LK to be an established client. The initial consultation was about her exposure or inadequate representation. The focus on 12 April 2012 was on the divorce. SC had made a claim for money. If he did not insist on his position, SC's case could proceed in his absence. The Respondent met LK again on 15 May 2012. He made it clear he needed to see JC himself and assess his capacity to give instructions.

The Respondent met JC on 16 May 2012. JC gave him detailed information about his circumstances. The Respondent reassured him that the house was not a matrimonial asset. It was clear that JC had some physical health problems. He was undergoing some assessments. His health was deteriorating. The

Respondent was content that JC had capacity to understand the meeting and give instructions. He was able to correct information or incorrect assumptions the Respondent had made. He retained information the Respondent gave him at the start of the meeting. The Respondent was satisfied JC had followed his train of thought. The Respondent referred the Tribunal to his file note of the meeting on 16 May 2012 and his letter to JC of 22 May 2012 referring to their “lengthy” meeting.

The Respondent needed to send a mandate to get the divorce papers from another firm. The GP letter was out of date. The Respondent wanted more detail about JC’s health. He needed a letter to persuade the court that the case should be put off for a while. He got authority from JC to get medical information. It was possible that even if JC was unfit to attend court, he might be able to give instructions to the Respondent to have him deal with the matter. The medical letters disclosed no exact underlying problem. It did not say the Respondent was unfit to give instruction.

In July the Respondent wrote to LK and JC about the transfer of title. The letter of engagement relates specifically to the property transaction. This occurred some months after the divorce instructions. The Respondent considered JC and LK to be established clients by that stage. LK and JC were given information about what would happen if a conflict arose.

The Respondent was referred to his attendance note of 24 September 2012. JC attended to sign the disposition and declaration of solvency. He had attended on various occasions between 16 May 2012 and 24 September 2012. The Respondent would write out to him inviting him to come into the office for an appointment. He would respond and attend. He would also respond to written requests for information. The Respondent was able to address SC’s defences in detail.

On 24 September 2012, the Respondent met with JC and LK separately. He explained what he had already discussed with JC in the context of the divorce proceedings. JC was effectively giving the whole title of Dunragit to LK. The property was not a matrimonial asset. He did not have to do that to protect the house from his wife. There was no follow up advice in writing. However, he considered that he did provide full information to JC on more than one occasion and culminating in that given on 24 September 2012. He gave both parties appropriate advice. They both independently confirmed that they wished to have the conveyancing carried out.

In cross examination, the Respondent confirmed that neither JC nor LK were clients before 1 April 2012. However, he said that LK became a client when he notarised one of her documents. He believed that created a solicitor-client relationship. He gave her advice regarding the oath and explained the

consequences of giving false information. The Respondent agreed with the Fiscal that there was no difference between that and a person giving evidence in court. The Respondent said he did not open a file on 2 April 2012. He did not intend to charge a fee. He did not issue terms of business.

The Respondent agreed that there were no file notes regarding LK's instructions on 12 April 2022. The Respondent said he would have taken notes but they are not on the file. He thought LK might have brought the Interlocutor with her but he wasn't sure. He did receive the Power of Attorney Document and a GP letter as he acknowledged in his letter to LK of 12 April 2022. He agreed that the Power of Attorney was only activated in the event of JC's incapacity. The only medical information he had was the letter from the GP. There was no evidence of incapacity. It remained to be seen if instructions could be taken from LK as attorney. The Respondent did not at any stage get a report on capacity. He assessed JC as capax.

The Fiscal referred the Respondent to his letter of engagement dated 12 April 2012 which referred to "instructions in relation to conveyancing" (Production 3/6). The Respondent accepted he took LK's instructions regarding the conveyancing. She was already a client because of the notarisation on 2 April 2012. He did not issue terms of business for the notarisation. He might have chosen to render a fee later.

The Respondent said he viewed JC as his client after meeting him on 16 May 2012. Terms of business were sent to him enclosed with the letter of 22 May 2022 although these are not on the file. In that letter, the Respondent noted that JC wished to instruct the Respondent regarding his divorce and the conveyancing matter.

With reference to the medical report, the Respondent noted that none of these had been provided on soul and conscience. He confirmed again that he met JC for an hour on 16 May 2012. He produced a two-page note. He did not take notes on capacity. However, the Respondent noted that JC was providing detailed information and his recall was adequate for the purposes of instructing the Respondent. He was able to remember things at the end of the meeting which the Respondent went over at the beginning. He continued to seek medical information. This was for the benefit of the court and to address whether JC could withstand a proof.

The Respondent received a report dated 18 June 2012 from the Respondent's GP. It contained an assessment regarding JC's memory. The Respondent said this did not cause him particular concern because he had met JC and assessed his ability to instruct and follow advice. The Respondent did not carry out any formal assessment of memory but did note that JC was able to recall at the end of the

meeting information which had been given about the proceedings, progress in the case and the impending proof.

The Respondent said he believed he got information about the case from the Sheriff Clerk. There was no file note of this conversation. However, her understanding was the same as the position described by LK and JC. The Respondent said he was cautious with JC because of the number of medical issues he was experiencing. The principal issue was conducting the proof. It was not going to be possible for JC to attend a proof.

The Fiscal noted that JC had memory problems and poor concentration and suggested he could have been a vulnerable client. He asked the Respondent how he generally dealt with these individuals. The Respondent said he would explore with them whether they understood the implications of what he was saying. He would not usually do this in writing because typically he saw criminal clients in an interview room at court. He would take notes.

The Respondent said he met JC at least four times. He met him on three occasions between 16 May 2012 and 24 September 2012 and also had other meetings outwith that period. The Respondent covered other things with him in correspondence and as an example referred to a letter of 6 September 2012. The Respondent did not send any letter to JC explaining the consequences of the transfer of title. He did not explain to him in writing he would lose a real right. He did explain to JC that LK could eject him from the property. That was discussed at the start and the end of the meeting.

As of 16 May 2012, the Respondent agreed that JC was not an existing client. The clients were not related by blood. There was no civil partnership or marriage. He was engaged to LK but still married to SC. The Respondent said that when he received instructions on 16 May 2012, he did not consider that there was any conflict of interest. He agreed that a simple definition of a conflict of interest was when two clients required different advice. He did not give them different advice. He did not give LK advice on how to eject JC. It was axiomatic. She had title and owned the property. He agreed that JC needed to know LK could eject him from the property. He did not explain the grounds for doing that, just that it could happen. He did not believe these parties' interests were in conflict. There was unanimity between them as to what they wanted to do. They did not require different advice. Their rights might be in conflict. However, they had made the decision that this was how they wanted to proceed.

The Fiscal suggested that the Respondent should have been aware there was a potential conflict. JC had memory problems and was undertaking a significant transaction for no monetary value. The Respondent

did not agree the memory problems were an issue. He agreed it was a significant transaction. The transfer was done for good and onerous causes. JC had received money from LK. He was receiving assistance from her with his day-to-day living. The Respondent was not aware of any other place JC had to stay. The Fiscal suggested the advice to JC should have been put in writing. The Respondent said he would not disagree.

In re-examination, the Respondent said he issued two different letters of engagement. The focus of the first one was the divorce and the second one related to the conveyancing. Although there was reference to conveyancing in the first instruction the pressing issue was the divorce and he was not concerned about the transfer of the title at that time. When instructions were taken in July 2012 regarding the conveyancing, the Respondent was by then an established client, having given instructions regarding his divorce in May 2012. LK was an established client from April 2012. There was unanimity between the couple in wanting to effect the transfer. He agreed that there was nothing in writing to either client to say if the relationship failed, JC would be at risk. The Respondent clarified that he did not rely on incapacity in relation to the Power of Attorney when representing JC. He took instructions directly from JC.

In answer to questions from the Tribunal, the Respondent said the liferent was discussed with JC in person. His impression was that unencumbered title was to be given to LK due to the financial support she had given JC. JC had made the decision when he came to see the Respondent and confirmed it at the meeting. He had already transferred a half share before the Respondent's involvement. The Respondent considered conflict of interest, explored that with the clients and gave the conflict letters.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal invited the Tribunal to make findings of professional misconduct as set out at paragraphs 5.2 and 5.3 of the Complaint.

The Fiscal discussed the witness evidence. He said it was clear JC had medical difficulties. His evidence has to be considered in the light of the medical reports. JC had poor concentration and memory. It was the Complainers' position that JC did attend meetings with the Respondent and sign documents. However, he has no memory of any advice being given at these meetings. The Fiscal suggested that LK was generally credible and reliable despite the breakdown in her relationship with JC. Her evidence was supported by the contemporaneous records. The Fiscal said the Respondent did his best to assist the Tribunal. He made appropriate concessions during cross examination. However, the Fiscal noted that

without supporting contemporaneous records, the Tribunal must take the Respondent's evidence "with a pinch of salt". The Fiscal said it was not wholly reliable. The Fiscal noted that the Respondent had admitted in cross examination that he accepted instructions regarding the divorce and conveyancing matter on 16 May 2012. The file does not contain evidence of any advice.

The Fiscal noted that it was a matter of agreement that the files are true and accurate. LK met the Respondent on 12 April 2012 following a court hearing on 30 March 2012 having been invited to get legal advice. There was no medical report identifying JC as lacking capacity. LK could not therefore have instructed the Respondent was attorney for JC. The Respondent issued terms of business regarding the divorce and conveyancing matters.

In the Fiscal's submission, the client relationship started with LK when terms of business were issued on 12 April 2012. The client relationship started with JC when he gave the Respondent instructions on 16 May 2012. Terms of business were issued on 22 May 2012. JC instructed the Respondent regarding the divorce and conveyancing. In the Fiscal's submission, the terms of business issued on 9 July 2012 did not create a solicitor client relationship regarding the conveyancing. That started in May at the same time as the divorce.

The Fiscal noted that there were no file notes or correspondence kept by the Respondent of advice given to either client regarding rights lost or gained in ownership or liferent. No consideration was given as to whether JC needed a liferent. No advice was given to JC about his living situation. The Respondent did not explain that LK could sell the home. There was no written advice to LK that the transaction could be voidable or reduced. No advice was given to her about how to evict JC. That should have been discussed when transferring ownership of a house with a sitting occupant.

In his submission, the Respondent had acted in a conflict of interest situation, or at least a potential conflict of interest. The advice did not fall within one of the exceptions in Rule B2.1.4. The Respondent had failed to communicate effectively with his clients. He did not communicate things in writing to JC despite having an overarching knowledge of his poor memory and concentration.

The Fiscal referred the Tribunal to Sharp v Council of the Law Society of Scotland 1984 SLT 313. He referred to paragraphs 7.01 and 7.03 of Paterson and Ritchie's "Law, Practice and Conduct for Solicitors". He noted that it is for the solicitor to identify conflict, not the client. He said that "dispute" was wider than "conflict". The Respondent should have given different advice to LK and JC. JC was left with no right to occupy the home. LK could evict or eject him. There was no financial consideration.

LK was getting the second half of the property unencumbered by liferent. JC could have retained a liferent. The only potential exception was that for established clients. However, even then, care must be taken in cases of potential conflicts.

The Fiscal said the Respondent had also failed to communicate effectively in breach of Rule B1.9.1. JC was ill when he consulted the Respondent. He was not lacking capacity but the Respondent needed to pause and think how best to communicate with him. JC needed sufficient information to make an informed decision. It was necessary and appropriate to send him that information in writing. There is no evidence the Respondent did anything to assess how JC had retained information outside of the meeting. If there had been a long relationship between client and solicitor, this might have been a basis for verbal communication. However, neither LK nor JC were clients until Spring 2012.

The Fiscal said the Respondent's failings were serious and reprehensible. He should have advised of all the implications of the conveyancing transaction and this should have been put in writing. Loss of a real right should not be dealt with in the course of a one-hour meeting followed by a 15-minute meeting.

SUBMISSIONS FOR THE RESPONDENT

Mr Macreath noted that the onus is at all times on the Complainers to set out a cogent and compelling case for misconduct. The test for misconduct is high and is the conjunctive one set out in Sharp v Council of the Law Society of Scotland 1984 SLT 313.

Mr Macreath referred to paragraph 3.9 of the Complaint which averred that LK was previously a client of the Respondent. Prior to 12 April 2012, LK was a client of the Respondent assisting her with her affairs. He had notarised documents for her in April and May 2012.

It was clear that the Respondent met JC and LK on 16 May 2012. The Respondent spoke to an hour-long meeting. He had a file note which contained information that could only have come from JC regarding financial eligibility for advice and assistance, and proof dates.

In Mr Macreath's submission, Paterson and Ritchie's "Law Practice and Conduct for Solicitors" was only a textbook. The guidance of the Complainers was much more important than the history of conflicts set out in the textbook.

In Mr Macreath's submission the evidence supports the Respondent's analysis. LK, already a client, consulted him on 12 April 2012. She produced a letter of six lines from JC's doctor. That letter was no more than the GP's view that the Respondent was experiencing certain symptoms. On 9 March 2012, the Sheriff recommended that LK should seek legal advice. She thought she could act under the power of attorney. The Respondent issued a letter of engagement to her because she raised the issue of a transfer of the property. The Respondent does not progress the conveyancing matter but does meet JC on 16 May 2012. The Respondent wrote to JC on 22 May 2012. The terms of engagement sent to JC were linked to the divorce proceedings. The Respondent got a mandate from JC for further medical evidence. There is an inference that inherited property and matrimonial assets were discussed.

Mr Macreath noted that these events occurred ten and a half years ago. Recollections may vary. It is more likely than not that JC consulted the Respondent in relation to the divorce on 16 May 2012. Only on 9 July 2012 was a letter of engagement sent regarding acceptance of the conveyancing instructions. The Respondent knew another firm had acted previously. JC had retained a liferent at that stage after taking advice on the matter.

The Respondent arranged for affidavits to be submitted in the divorce action. A sum was paid to JC's wife. A detailed Minute of Amendment was lodged dealing with the defences. Only in July was there a progression of the conveyancing matter.

Mr Macreath noted that the guidance on Rule B1.9.1 says that where necessary or appropriate instructions should be confirmed in writing. This does not preclude advice being given orally. Rule B1.9.2 refers to advising clients of significant developments. The question is whether a client has the relevant information on which to come to an informed view. It is for the solicitor to make a judgment based on the client whether to send out advice in writing. Otherwise, solicitors could be writing "War and Peace" to every client. It is a matter for individual assessment. That is why the guidance refers to instructions being confirmed in writing where "necessary or appropriate".

Mr Macreath said that there are separate letters of engagement for good reason. One deals with the divorce and the other the conveyancing matter. There was effective communication and no conflict of interest. LK was an established client in April 2012. It is only guidance that to be a client, a solicitor should have opened a file and done work which could incur a fee even if no fee is charged. A solicitor client relationship can be formed by implication. A failure to issue a letter of engagement gives rise to other regulatory issues but does not affect the solicitor client relationship. LK thought she was a client. Nothing was done on the conveyancing matter until July 2012 by which time the relationship with JC

was established. Conflict letters were issued in July. These were both signed. The Tribunal should take care to focus on the issues in the Complaint which relate to communication and conflict of interest, not capacity.

The question is whether the conduct is serious and reprehensible. Would any competent and reputable solicitor say that the Respondent had crossed the line in an egregious way? Given the whole facts and circumstances, the Tribunal ought to discount JC's evidence. The Tribunal is entitled to pick and choose what it finds established. There was no compulsion on LK to give evidence. The Sharp case is authority that the Tribunal must set the conduct within its context. LK said that the Respondent indicated he would complain about the Respondent if she put him out of the house. He did not raise a complaint against the Respondent until 2016.

Mr Macreath referred the Tribunal to Law Society-v-Damien Tonner (2022) which involved effective communication. That was a stark case. The client needed information to make an informed decision. If she had known that the instance had fallen and her case was time barred, she could have taken steps to protect her position. The Complainers in the present case say that JC did not have full information. However, JC knew that the property was not a matrimonial asset and he had previously transferred half of the house to LK.

The Respondent's primary position was that LK and JC were established clients and so the Respondent was entitled to act for both. His alternative argument was that applying the Sharp test, the behaviour did not constitute professional misconduct.

DECISION

Tribunal considered the admitted facts in the Joint Minute and witness evidence. It assessed the credibility and reliability of the witnesses.

JC gave his evidence in an assured and confident manner. However, the Tribunal was wary of taking his evidence at face value due to the medications and memory problems he was experiencing in 2012. The Tribunal had doubts about the reliability of his evidence when it was compared to the other evidence in the case. It decided that it could only accept the parts of JC's evidence which were corroborated by other evidence.

LK's evidence was assured and relatively convincing. It was consistent with the productions and the Respondent's evidence. However, there was a degree of reluctance to concede certain issues where appropriate. Her evidence also had to be seen in the context of the breakdown of her relationship with JC and the continuing animosity between them. She was keen to cast aspersions on JC. The Tribunal questioned her judgement when she believed JC to have capacity but also purported to act on his behalf because he wished to be considered incapax.

The Respondent gave evidence well. He was trying to be honest and made appropriate concessions. However, he gave evidence in a slightly defensive way.

Taking the agreed facts, the productions and the witness evidence into account, the Tribunal was satisfied beyond reasonable doubt that the Respondent had acted in the manner set out in its findings in fact. The Respondent failed to explain in writing to JC the full extent of the loss of rights in his property which would follow him relinquishing the liferent and signing the disposition. He acted in a conflict of interest situation when he acted for both JC and LK.

Solicitors must communicate effectively (Rule B1.9.1). They must not act for two or more clients in matters where there is a conflict of interest between the clients (Rules B1.7.1). Even where there is only a potential conflict of interest, solicitors must exercise caution. Where the potential for conflict is significant, solicitors must not act for both parties without the full knowledge and express consent of the clients (Rule B1.7.2). Rule B2.1.2 provides that solicitors shall not act for two or more parties whose interests conflict. Rule B2.1.4 provides that without prejudice to that generality, a solicitor shall not act for both seller and purchaser in the sale or purchase or conveyance of heritable property but that where no dispute arises or might reasonably be expected to arise between the parties, the rule shall not apply if both parties are established clients.

A large proportion of the evidence in this case concerned the status of LK and JC as established clients. However, the Tribunal's starting point was that the Respondent ought not to have acted for both LK and JC because there was a conflict of interest between them. The clients required very different advice. It was for the Respondent to identify this and take action. It did not matter that the clients had indicated that they both wished the transfer and renunciation of the liferent to take place. A dispute might reasonably have been expected to arise between the parties. Therefore, whether LK and JC were established clients was irrelevant. The Tribunal was satisfied that the Respondent had breached Rules B1.9.1 and B1.7.1 and B2.1.4. Solicitors should not act where there is a conflict of interest. The

exceptions in Rule B2.1.4 cannot be utilised if a dispute might reasonably be expected to arise. In the present case, there were clear warning signs that a dispute might arise.

Breach of the practice rules may be misconduct but regard must be had to all the relevant circumstances. According to the definition of professional misconduct contained in Sharp v Council of the Law Society of Scotland 1984 SLT 313,

“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.”

Not every communication has to take place in writing. However, the circumstances of this case were such that the key points ought to have been communicated by letter to JC. He required a detailed letter setting out the consequences of the transfer and the fact he would no longer have a liferent over the property. He was giving away his half share of the house for no consideration. He was giving up his right to own the property and giving up the protection of a liferent. This was occurring at a time when he was getting divorced from his wife and was in a relatively new relationship. The Respondent was aware of the health and memory problems JC was experiencing at that time. They were detailed in three separate letters from his doctors which were on the Respondent’s file. In all these circumstances, the failure to communicate with JC in writing was a serious and reprehensible departure from the standards of competent and reputable solicitors.

The conflict of interests between the clients was very clear. Both clients, and particularly JC, needed independent and separate advice about the consequences of the transfer of title and renunciation of the liferent. Proceeding to act for both clients in these circumstances was a serious and reprehensible departure from the standards of competent and reputable solicitors.

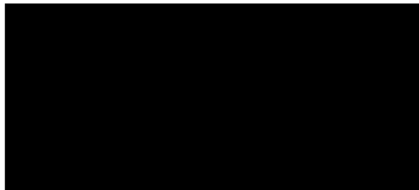
The Fiscal noted that the Respondent had a conduct matter on his record involving conflict of interest. He made no motion regarding publicity. He moved for expenses.

Mr Macreath made submissions in mitigation. The Respondent was 66. He was enrolled as a solicitor in 1980. The previous finding related to conflict of interest and concerned clients of the Respondent buying a hotel owned by the Respondent's firm. It is 27 years since that decision.

Mr Macreath noted that the circumstances of the current case go back over ten years. The Respondent has had to deal with this matter for a long time. The disposition has been reduced and JC is now the registered owner of the property. Mr Macreath suggested that the misconduct fell at the lower end of the spectrum. He made no submission on publicity and noted that expenses will generally follow success.

The Tribunal had regard to the very long delay in bringing this case to a conclusion. It noted that the Respondent has apparently practised since this incident without further conduct issues arising. There was a previous finding of misconduct, but this was from a long time ago. The Respondent had cooperated with the Fiscal and the Tribunal and had entered into a joint minute. He had attended the hearing. The Tribunal was of the view that the conduct was at the lower end of the scale. There was no requirement for supervision. There was no risk to the public if the Respondent continued to practise. The conduct demonstrated a lack of thought and consideration of conflict but was not more serious than that. In all these circumstances, the Tribunal was of the view that the appropriate sanction was censure and a fine of £1,000.

The Fiscal confirmed that there were no issues of publicity arising in relation to anonymisation of JC or LK. The Tribunal decided that the appropriate award of expenses was one in favour of the Complainers. The Tribunal ordered that publicity should be given to the decision and that publicity should include the name of the Respondent and the witnesses who gave evidence at the hearing. 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. The Secondary Complainer will have 28 days from intimation of these findings to update his claim for compensation if so advised.



Colin Bell
Chair