

**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

**ALAN LIVINGSTONE, Borders Legal Limited
trading as Hastings Legal, 15 The Square, Kelso**

Respondent

1. A Complaint dated 12 August 2019 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that Alan Livingstone, Borders Legal Limited trading as Hastings Legal, 15 The Square, Kelso (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer, Ms A.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged for the Respondent.
4. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 12 December 2019 and notice thereof was duly served on the Respondent.
5. At the hearing on 12 December 2019, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by William Macreath, Solicitor, Glasgow. The Respondent having no objection and on the Fiscal's motion, the Tribunal amended the Complaint by deleting

“respondent” where is appeared in paragraph 5.2(c) and substituting “Secondary Complainer”; deleting “responded” where it appeared in paragraph 5.2(d) and substituting “Respondent”; deleting “responded” where it appeared in paragraph 5.2(f) and substituting “Respondent”; deleting “responded” where it appeared in paragraph 5.2(g) and substituting “Respondent”; deleting “2018” where it appeared in the penultimate line of paragraph 5.2 and substitution of “2008”; and deleting “respondent” where it appeared in the first line of paragraph 5.3 and substitution of “Complainer”.

The Tribunal received a signed Joint Minute of Admissions which admitted the averments of fact and misconduct in the Complaint. No evidence was led.

6. Having given careful consideration to the terms of the Complaint, The Tribunal found the following facts established:-

6.1 The Respondent is Mr Alan Livingstone. He has a place of business at Borders Legal Limited trading as Hastings Legal, 15 The Square, Kelso. His date of birth is 22 July 1959. He was admitted to the roll of solicitors on the 29 September 1982. He was an employee in the Scottish Borders until 1991 when he became a partner and practised in several differently named firms within the region. Since 2003 he has practised as a partner/director of Borders Legal Limited.

6.2 The secondary complainer separated from her husband, Mr B, in 2005. She (along with children of the marriage) remained in the family home (“the Property”). The title and mortgage of the Property remained in the joint names of Ms A and Mr B. The secondary complainer formed a new relationship with Mr C. The secondary complainer sought a way to remain in the Property along with her children. Due to her credit score she could not obtain a mortgage to “buy” her husband’s share of the property.

6.3 Prior to consulting the Respondent, the secondary complainer and Mr C agreed a way to allow the secondary complainer to “buy out” her husband’s interest in the Property. The plan was that Mr C would obtain ownership of the Property, and let it to the secondary complainer, when the secondary complainer was in a financial position to obtain a mortgage Mr C would convey the property to her. To carry

out his plan both the secondary complainer and Mr C met with Respondent. The first meeting took place on or about the 24 January 2009.

6.4 Prior to this meeting both the secondary complainer and Mr C had separately been clients of the Respondent. The secondary complainer continued to instruct the Respondent in respect of her separation/divorce.

6.5 At the meeting on the 24 January 2009, the solicitor was advised of the agreed plan. He advised the secondary complainer and Mr C that to implement the plan he would carry out the following legal transactions,

6.5.1 Transfer of ownership of the Property from Mr B and the secondary complainer to that of the sole ownership of the secondary complainer, which would involve a payment to Mr B of £40,000.

6.5.2 Repayment of the outstanding mortgage on behalf Mr C and the secondary complainer.

6.5.3 Transfer of ownership from the secondary complainer to Mr C

6.5.4 Completion of a security in favour of Mr C's lender

6.5.5 He recommended he draft a minute of agreement in terms of the agreement reached between the secondary complainer and Mr C.

6.6 The Respondent issued a terms of business letter to Mr C – only - on the 25 February 2009. In that letter he advised the work to be carried out was

“You have asked us to carry out the remortgage of your property. We will obtain the titles from your existing lender, prepare a Disposition conveying the property from the joint names of [Ms A and Mr B] into your name, prepare the appropriate Deed of Variation of the mortgage, prepare a Discharge of the existing Security and the new Security over the property, pay off the existing loan from the proceeds of the new loan and do all conveyancing necessary to complete the remortgage including the registration of all the necessary deeds.”

It quoted the fee as £650 + vat of £97.50, a total of £747.50.

- 6.7 In a covering letter sent with the letter of engagement to Mr C the Respondent wrote
- “I am pleased to say that I have now received the loan instructions from Halifax for you. Have written off to G E Money for [Ms A and Mr B’s] titles and as soon as I have these I will get matters progressed.*
- In the meantime, I am preparing a draft Minute of Agreement between you and [Ms A] and will let you see a copy of this shortly.*
- My Letter of Engagement is enclosed. This is addressed to you in the first instance because primarily you are the client named in the loan instructions, although I appreciate that the reasoning behind all this is for [Ms A’s] benefit. “*
- 6.8 The loan instructions identified the property value as £135,000.
- 6.9 The Respondent wrote to the secondary complainer and Mr B’s lender indicating he acted for both requesting title deeds (despite not being consulted by Mr B) and a redemption figure for their mortgage over the Property; drafted a disposition from Mr B and the secondary complainer in favour of the secondary complainer; drafted a discharge of the standard security granted by Mr B and the secondary complainer; drafted a disposition from the secondary complainer in favour of Mr C; completed and sent a report in title for Mr C’s lender; drafted that standard security; drafted the minute of agreement between the secondary complainer and Mr C to regulate their agreement regarding the Property.
- 6.10 The Respondent did not send a letter of engagement to the secondary complainer in respect of either of the property transfers, the discharge of her standard security nor the Minute of Agreement.
- 6.11 Mr B instructed his own agents who represented his interests in regard to the property transfer for which he received the sum of £40,000.
- 6.12 The disposition from the secondary complainer to Mr C recorded the purchase price as £100,000. The Respondent received from Mr C’s lender the sum of £100,000. That sum was dispersed in the following manner: £40,000 to Mr B;

£28,371 to the secondary complainer's & Mr B's lender; £30,414.45 to the secondary complainer. That left a balance of £1210.55.

- 6.13 The Respondent issued a fee note to secondary complainer narrating the work carried out as "*Conveyancing fee in connections with the sale of [the Property], taking your instruction, drawing Minute of Agreement, carrying through all conveyancing and generally all work in connection with sale*" the fee was £650 and vat £97.50. The fee note contained outlays and further fee element narrated as "*completion & submission of simplified divorce application*" the total fee vat and outlays was £1210.55.
- 6.14 The Respondent drafted a minute of agreement purporting to regulate the agreement between the secondary complainer's and Mr C's interest in the Property. In short the agreement provided that a mortgage should be taken over the Property by Mr C for the benefit of the secondary complainer; that the secondary complainer will dispense ownership of the Property to Mr C; Mr C will borrow £100,000 secured over the Property, no further lending will be granted or obtained by Mr C; the secondary complainer will be responsible for meeting the mortgage payments, maintenance and repair of the property; the secondary complainer can at any time request that Mr C transfer the title of the Property into her name subject to the mortgage being transferred into her name only/pay off the loan obtained by Mr C; Mr C will grant a short assured tenancy to the secondary complainer, the rent being equivalent to the mortgage repayment.
- 6.15 The secondary complainer and Mr C did not enter into a short assured tenancy.
- 6.16 The Respondent completed the Application for registration (to the registers of Scotland) of a dealing on behalf of (1) Mr B and the secondary complainer; (2) the secondary complainer and; (3) Mr C. The Respondent separately submitted, on behalf of the secondary complainer and Mr C, in respect of their purchase transactions, a Land Transaction return form (to the Inland Revenue) on which he was narrated as their agent.
- 6.17 The secondary complainer signed the disposition transferring title from herself and Mr B in her favour before the Respondent as witness on the 29 April 2009.

The secondary complainer signed the disposition in favour of Mr C, before the Respondent as witness, on the 21 March 2009. The Respondent completed the registration of these documents and that of the standard security granted by Mr C in favour of his lender.

6.18 The Respondent did not write to the secondary complainer to advise her he was not acting on her behalf in connection with minute of agreement. He did not assist the secondary complainer in securing a legal right to remain in the Property after the sale. The Respondent presented the disposition in favour of Mr C to the secondary complainer without informing her in writing the signature of which had legal consequences or that she should seek independent legal advice. He did not advise the Secondary Complainer in writing of the consequences of signing the disposition in favour of Mr C, nor more discreetly, the acceptance of funds from him in exchange for the disposition or that she should take separate legal advice. The Respondent did not advise Mr C or his lender that the purchase was below value and the potential consequences thereof. The Respondent did not advise the secondary complainer or Mr C of the legal implications of signing the Minute of Agreement. The Respondent presented to the secondary complainer the Minute of Agreement without informing her in writing the signature of which had legal consequences or that she should seek independent legal advice.

6.19 In 2015 the secondary complainer's relationship with Mr C broke down. He instructed solicitors to recover the Property from the secondary complainer and her children's occupancy. He alleged *inter alia* the secondary complainer had missed mortgage payments which he had been required to pay. Mr C instructed agents to serve, and the agents served, notices to quit upon the secondary complainer and her children. The Respondent entered correspondence on behalf of the secondary complainer with Mr C's agents. It was pointed out to him the only right the secondary complainer had against Mr C was she was "to request [Mr C] to transfer the title of the property into her name " subject to some conditions, there were no words of compulsion on which she could enforce the transfer.

7. Having considered the foregoing circumstances the Tribunal found the Respondent guilty of Professional Misconduct in respect that:

7.1 The respondent acted for both the secondary complainer and Mr C where their interests conflicted, and the following matters had at least the potential for a conflict arising *esto* an actual conflict existed:

- a) The purchase/transfer of the Property by Mr B & the secondary complainer to the secondary complainer was at risk of being declared as at under value;
- b) The transfer between the secondary complainer to Mr C was at undervalue
- c) The respondent did not fully advise the secondary complainer and Mr C of the full implications of the whole transaction;
- d) The respondent did not explain to the secondary complainer the legal consequence of disposing the property to Mr C;
- e) The respondent did not offer advice to the secondary complainer or Mr C of their respective rights under the minute of agreement;
- f) The respondent did not explain to Mr C his rights should the secondary complainer default on payment or any other breach of the agreement;
- g) The respondent did not explain to the secondary complainer her rights should Mr C breach the terms of the agreement;
- h) The respondent did not offer advice to the secondary complainer or Mr C of their respective obligations under the minute of agreement;
- i) That the obligations and rights of Mr C and the secondary complainer were diametrically opposed in the Minute of agreement;

All in breach of rules 3, 5 & 7 of the 1986 Practice Rules and Rules 3 & 6 of the 2008 Practice rules.

7.2 In failing to ensure the secondary complainer was advised in no uncertain terms that the Respondent was acting for Mr C in drafting the Minute of Agreement he failed to act in best interests of the secondary complainer in breach of Rule 3 of the 2008 Practice rules *separatim esto* – he failed to act in the best interest of the secondary complainer as the Minute of Agreement does not contain an enforceable right in favour of the secondary complainer to compel Mr C to transfer the Property to her in breach of Rule 3 of the 2008 Practice rules.

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

Edinburgh 12 December 2019. The Tribunal having considered the Complaint dated 12 August 2019 at the instance of the Council of the Law Society of Scotland against Alan Livingstone, Borders Legal Limited trading as Hastings Legal, 15 The Square, Kelso; Find the Respondent guilty of professional misconduct in respect of his breach of Rules 3, 5 and 7 of the Solicitors (Scotland) Practice Rules 1986 and Rules 3 and 6 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008; Censure the Respondent; Fine him in the sum of £2,500 to be Forfeit to Her Majesty; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; 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; Allow the Secondary Complainer 28 days from date of intimation of these findings to lodge a written claim for compensation.

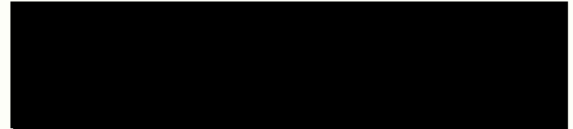
(signed)

Beverley Atkinson

Vice Chair

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

IN THE NAME OF THE TRIBUNAL



Beverley Atkinson

Vice Chair

NOTE

At the hearing on 12 December 2019, the Tribunal had before it the Complaint, a Joint Minute of Admissions, a List of Authorities for the Complainers and an Inventory of Productions for the Respondent which contained two references.

SUBMISSIONS FOR THE COMPLAINERS

With reference to the Complaint, the Fiscal described the Respondent's conduct which was the subject of this case. He submitted that the conduct breached the 1986 and 2008 Practice Rules. He described the test for professional misconduct contained in Sharp v The Law Society of Scotland 1984 SLT 313. He referred to the authorities lodged on behalf of the Complainers. He noted that as a result of the Respondent's conduct, the Secondary Complainer did not have a legal right to purchase the Property. He submitted that the Respondent's conduct was a serious and reprehensible departure from the standards of competent and reputable solicitors and therefore constituted professional misconduct.

SUBMISSIONS FOR THE RESPONDENT

Mr Macreath noted that the Respondent admitted professional misconduct although he accepted this was a matter for the Tribunal to determine. He described the background to the Respondent's involvement in the case. Ms A and Mr C came to the Respondent with the scheme agreed. The Respondent ought to have given parties advice given the background of the relationship between them. He should have advised the Secondary Complainer in writing to take independent legal advice. It was his obligation to identify the conflict. The Respondent has always accepted culpability. He always conceded it was unsatisfactory professional conduct and after the case between the Secondary Complainer and Mr C was judicially determined, he accepted that it was professional misconduct. The Respondent had erred while trying to give effect to the parties' agreement.

DECISION

The Practice Rules provide that solicitors must not act for parties whose interests conflict. They must act in the best interests of their clients. Provided no dispute arises or might reasonably be expected to arise between parties, solicitors can sometimes act. However, parties must be advised by the solicitor at the earliest practicable opportunity that the solicitor or firm has been requested to act for all parties and if a dispute arises, they or one of them will require to consult an independent solicitor. This advice must be confirmed in writing as soon as possible. No document requiring signature of another party should be issued without informing that party in writing that such signature may have legal consequences and the party should seek independent legal advice before signing.

The Respondent breached these Rules. He acted for both the Secondary Complainer and Mr C when their interests conflicted. He failed to fully advise the Secondary Complainer and Mr C about the consequences of their proposed scheme should their relationship end. He failed to act in the Secondary Complainer's best interests. She was not advised that the Respondent was acting only for Mr C in drafting the Minute of Agreement. Alternatively, if he was acting for her too, as appeared to be the case, he did not ensure she had an enforceable right to compel Mr C to transfer the property to her.

The Respondent's conduct constituted a serious and reprehensible departure from the standards of competent and reputable solicitors. The conflict of interest between these parties was clear. The Respondent appears not to have identified it and therefore did not comply with his obligations under the Rules. The Respondent carried out various conveyancing transactions and Minute of Agreement of the parties. This should have provided time to reflect and take appropriate action. The financial and emotional consequences for the Secondary Complainer in not having an enforceable right to purchase the Property could have been very serious. The Respondent did not appear to have applied his mind to what might go wrong for the Secondary Complainer. If she had come to him with the draft Minute of Agreement from another solicitor, the Tribunal doubted he would have advised her to sign it. She appeared to be transferring the house under value, but no questions were raised about this. The Respondent's actions cost the Secondary Complainer the opportunity to negotiate or consider other options.

The Fiscal indicated that the Respondent's record card did not disclose any previous conduct decisions against the Respondent.

SUBMISSIONS IN MITIGATION

Mr Macreath gave an outline of the Respondent's career and the firms he had worked for. He is currently a partner in his firm. He previously served on a variety of committees of the Law Society. It was a source of sadness to him to come before the Tribunal.

With regard to the circumstances of the misconduct, Mr Macreath noted that the housing market in the Borders "fell off a cliff" in 2009. Business was perhaps more eagerly retained than in the past. However, the firm now has a process whereby it passes conflict cases to other firms through a referral scheme.

Mr Macreath noted that the Respondent had lodged two references from solicitors who know him and the nature of the professional misconduct allegation against him.

Mr Macreath noted that any delay in the case reaching the Tribunal was not down to the Secondary Complainer or the Respondent. Following the breakdown in their relationship, a court action was raised by Mr C against Ms A and that was the catalyst for this matter. A complaint was intimated to the SLCC in 2017 and part of that complaint is still before the SLCC as a service issue. The Respondent's firm will have to deal with that.

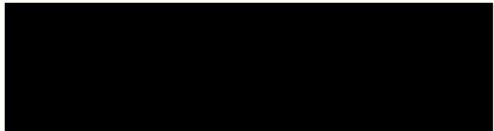
Mr Macreath made reference to the authorities which were referred to by the Fiscal. He suggested that a Censure was appropriate in the circumstances of this case.

The Fiscal moved for expenses. Mr Macreath did not oppose that motion. Mr Macreath expressed the view that publicity of the decision was inevitable.

DECISION ON SANCTION, EXPENSES AND PUBLICITY

The Tribunal considered its indicative outcomes guidance and the references provided on behalf of the Respondent. The Tribunal noted that this was an isolated incident in a long career throughout which the Respondent had contributed to the profession. The Respondent acknowledged misconduct at an early stage. There was little risk of repetition now he had a referral system in place for conflict cases. This also demonstrated insight. He appeared to be remorseful. Balanced against this was the serious nature of the Respondent's failure to identify and act upon a clear conflict of interest and his failure to act in his client's best interests. In all the circumstances, the Tribunal was satisfied that a Censure and a Fine of £2,500 was appropriate in the circumstances.

Following success, expenses were awarded to the Complainers. The decision will be given publicity but only the Respondent need to be named as publication of third parties' personal data was likely to be detrimental to their interests. The Tribunal allowed the Secondary Complainer 28 days from the date of intimation of these findings to lodge a claim for compensation, if so advised.



Beverley Atkinson
Vice Chair