

**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

**ISABEL JAYNE MACLEOD, Anderson
MacArthur Limited, Solicitors, Old Bank of
Scotland Building, Stornoway, Isle of Lewis**

Respondent

1. A Complaint was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that, Isabel Jayne MacLeod of Anderson MacArthur Limited, Solicitors, Old Bank of Scotland Building, Stornoway, Isle of Lewis (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer, Mr B, care of Cannons Solicitors, Glasgow.
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 appointed the Complaint to be heard on 28 August 2018 and notice thereof was duly served on the Respondent.
5. At the hearing on 28 August 2018, the Complainers were represented by their Fiscal, Elaine Motion, Solicitor-Advocate, Edinburgh. The Respondent was present and represented by Greg Sanders, Advocate.
6. Of consent and on the Complainers' motion, the Complaint was amended to add the words "substantive" between the words "no" and "response" where they appeared in

paragraph 3.17. A Joint Minute of Admissions was lodged. Said Joint Minute agreed that the Respondent admitted the averments of fact, duty and misconduct contained within the Complaint as amended. The Tribunal heard submissions from both parties.

7. Having given careful consideration to the terms of the Complaint as amended, the Joint Minute of Admissions, the Productions for the Complainers, the Productions for the Respondent, the Authorities produced by the Fiscal, and the parties' submissions, the Tribunal found the following facts established:-

- 7.1 The Respondent is a solicitor enrolled on 5 December 2013. She is employed as a solicitor with Anderson MacArthur Limited, solicitors at their office in Stornoway as detailed above, commencing employment on 13 December 2013 as a newly qualified solicitor.
- 7.2 In or around 2015 the Respondent was instructed by Mrs A to transfer a property owned by her, Property 1, to Mr B and Mr C in equal shares. The property had been inherited by her on the death of her mother in 2012. Mr B is her brother and Mr C her son.
- 7.3 The Respondent issued a letter of engagement/terms of business to Mrs A dated 17 November 2015. That confirmed that the firm would be acting on her behalf in relation to the transfer of Property 1 and that the Respondent would be the person responsible for the work carried out. A fee quote for the transfer was given and included an outlay of £240 for the registration of title.
- 7.4 On 17 November 2015 the Respondent spoke with Mr B and explained the intended course of action.
- 7.5 No letter of engagement/terms of business was issued to Mr B.
- 7.6 No letter in terms of Rule B2.1.2 to 2.1.4 of the Law Society of Scotland Practice Rules 2011 (formerly known as a Rule 5(2) letter) was issued by the Respondent to either Mr B or Mrs A. Said letter was mandatory.

- 7.7 Throughout the transaction detailed above the Respondent acted on behalf of the three parties, Mrs A, Mr B and Mr C. They were all accordingly her clients. She proceeded to carry out the necessary work and submitted the appropriate application and supporting documents, including a disposition in favour of Mr B and Mr C, for registration. Mr B and Mr C were the applicants in the application. She did not seek any instructions from Mr B at any stage either prior to or after lodging the application for registration.
- 7.8 By letter dated 7 March 2016 the Respondent advised Mr B that he became the joint owner of the property as of 6 December 2016 (read 2015) and enclosed a copy of the Registers of Scotland acknowledgement of the title deeds for registration.
- 7.9 On 25 April 2016 the Respondent was instructed by Mrs A to cancel the application for registration.
- 7.10 On the basis of Mrs A's instructions alone the Respondent proceeded to withdraw the application for registration.
- 7.11 The Respondent withdrew said application without advising or taking instructions from Mr B.
- 7.12 If the Respondent had done so Mr B would not have given said instructions.
- 7.13 In addition, and in any event, the Respondent did not recognise (or take action to show that she recognised) that she was acting in a conflict of interest situation and that when she received the instructions from Mrs A to withdraw the application for registration she did not recognise that a dispute had arisen. She did not recognise that, if she would give different advice to different clients on the same subject matter, there was a conflict of interest. She did not recognise in particular that when she received instructions from Mrs A she ought to have taken immediate steps to cease acting for at least Mrs A or Mr B and advise them that they should consult an independent solicitor.

- 7.14 On 5 May 2016 Mr B telephoned the Respondent as he had been advised by Mrs A that the application had been withdrawn. The Respondent's note of that call states:-

"He phoned for clarification that what his sister had texted him was true. He said he was only trying to help his nephew. He said he would take it on with him, they would let it out, could still be used by family.

I said if he wasn't happy then he would have to go to another solicitor. He said he wanted payment for the work that he did to the house so he is going to go to another solicitor to make a claim.

He's been trying to speak to his sister but can't get hold of her."

- 7.15 The telephone call as noted in the preceding paragraph did not comprise an acceptance or retrospective instructions agreeing to the withdrawal of the application.

- 7.16 On 19 May 2016 Mr B's newly appointed solicitor, Cannons, emailed the Respondent as follows:-

Subject Mr B, dispute over subjects at Property 1

"[Mr B] has consulted me regarding recent occurrences at, and intrusions with, the family croft at the above address.

Following upon your letter to him of 7 March, informing him that he was the owner, along with [Mr C], he carried out improvement works and subsequently let the house to a needy third party.

Recently [Mr D] flew up from Glasgow and ejected the tenant. Tut tut!!

I have been asked to obtain an explanation, before going back to [Mr B] and taking his instructions.

I look forward to hearing from you."

- 3.17 By letter of 12 September 2016, marked for the attention of the Client Relations Partner, Cannons repeated that they had been instructed by Mr B in relation to the property. It noted that they had sent an email to the firm on 19 May 2016 but no substantive response had been received. It stated the following:-

“Our client advises us that his sister inherited his mother's property upon the death of the latter in 2012. Late in 2015 the family made an agreement whereby the house would be conveyed jointly to our client and [Mr C].

By your letter to our client dated 7th March, you confirm that our client became joint owner of the subjects, along with [Mr C]. With the said letter you enclosed a copy of the relative acknowledgement of registration from Registers of Scotland. You also confirmed that you will forward a copy of the title deeds to our client once they are registered.

The registration application was subsequently withdrawn from registration at your request. We are very concerned to note that this appears to have been done without our client's consent, that he was never informed by you of that fact, and that you appear to have done so in circumstances where you clearly had a conflict. It was our client's application (albeit one-half pro indiviso) and as such you had absolutely no right to withdraw it without our clients' instruction.

We also point out that our client became joint proprietor of the house as soon as his deed was presented to the Keeper for registration, assuming that his deed was not withdrawn. In that connection our client has a right to ask the court for reduction of any subsequent conflicting deed that has now emerged onto the register.

We now request to know how you intend to remedy the present situation.....”

- 3.18 The Respondent's firm's response of 13 September 2016 (ref: IM) advised that they had replied by email on 26 May 2016. They had not heard back from [Mrs A] and therefore could not revert further. The following was stated:-

“We were instructed by the owner of the property, [Mrs A], to transfer ownership of the property to her son [Mr C] and her brother, [the complainer]. We arranged for the deed to be signed and sent to the Registers. [Mrs A] then instructed us to withdraw the application as she no longer wished for her brother and son to take title to the property. This was due to [the complainer] breaching the terms of the agreement established between the family members. The family had agreed that the property would go into the joint names of [Mr C] and [the complainer] but only if the property could continue to be used by the family. [The complainer] breached this agreement by arranging for third party tenants to lease the property. Since he did not adhere to his side of the agreement, [Mrs A] was no longer bound to keep her side of the agreement.

We were instructed by [Mrs A] but informed [Mr B] and [Mr C] by telephone the steps we would take to have the property registered in their names. They were both happy for us to deal with the whole matter, including the registration of the property.

His sister informed [Mr B] of the withdrawal of the title and he subsequently phoned us to discuss the matter. He did not object to our actions. He asked if he could be compensated for the improvements he had made to the property and we confirmed to him he could make a claim for those expenses. We have to date not received a claim from him.

A copy of this correspondence has been passed to our Client Relations Manager, Margaret Mackay. If your client remains dissatisfied then any future correspondence should be directed to Miss Mackay.”

- 3.19 Cannons’ further letter to the Respondent’s firm’s Client Relations Partner of 6 October 2016 referred to the above letter and stated:-

“[Mr B] denies that the transfer was subject to the condition you refer to, and in any event, nothing entitles [Mrs A] to withdraw the Disposition from registration once the application has gone forward.

Since it is not for the granter to withdraw the application, we can only suppose that you purported to do so on behalf of the applicants, including [Mr B]. Given the conflict of interest which had arisen between the parties, this was wholly unacceptable.

[Mr B] confirms that he did call your office after learning about the foregoing, and while it appears to be true that he did not object to what you did, neither did he sanction it.

[Mr B's] position remains unchanged from that set out in our letter of 12th September. we require to hear from [you] as a matter of great urgency.

Separately, we understand that your firm holds the title deeds for [Mr B's] property [1], and we would be obliged if you will send these to us by return. We enclose [Mr B's] mandate for this purpose."

- 3.20 The Respondent's firm's Client Relations Partner's response letter to Cannons of 12 October 2016 stated that she would consider the submissions made and respond within 21 days. If they wished to add anything they were asked to do so by 21 October 2016. Reference was made to the mandate.
- 3.21 The Respondent's firm's Client Relations Partner's further letter to Cannons of 31 October 2016 noted that the last correspondence was the firm's letter to them of 12 October 2016, to which there had been no response. It was assumed that Mr B did not wish to make any further submissions and that Cannons' letters of 12 September and 6 October 2016 set out his full submissions and his issues with the Respondent. It was stated that she had considered the terms of these submissions in relation to the property and the following was stated:-

"I understand that [the respondent] was acting for [Mrs A] who was the proprietor of the property. [Mrs A] was seeking to complete a love, Favour and Affection transfer to family members and there is an indication on the file that [Mrs A] was carefully considering the transfer and to whom the property would be conveyed. The file indicates there was a verbal agreement between family members, which appears to, at least, date back to the time of their mother's

passing, whereby the property would be available for the use of family members. I understand from the file that [Mrs A] was seeking to ensure that the terms of the verbal agreement were adhered to by whoever was to benefit from the proprietorship of the subjects themselves. You indicate in your letter of 6 October that [Mr B] denies the verbal agreement existed although other family members, according to the file, have indicated its relevance and existence to [the Respondent] - in addition to [Mrs A] herself referring to it. Therefore, I am satisfied that [the Respondent] reasonably considered that the family were all in agreement regarding the existence of the verbal undertaking in respect of the future of the property. There was no indication from [Mr B] or any other family member that the verbal agreement did not exist or that there was a conflict between the family members at that stage.

I understand that the application for registration of the disposition in the joint names of [Mr B] and [Mr C] was instructed for withdrawal from the Register by [Mrs A] when it became apparent that the terms of the verbal agreement were not going to be adhered to. The disposition had been submitted for registration on behalf of [Mrs A] and her family, noting [Mr B] and [Mr C] as the applicants. There was no indication that [Mr B] or [Mr C] had their own legal representation or objected to the registration of the title by our firm.

Subsequently, I understand that [Mr B] became aware of the withdrawal of the disposition from registration and contacted [the Respondent] to discuss the matter. There was no indication in the correspondence and discussions between them that [Mr B] objected to the withdrawal at that stage. [Mr B] was made aware that he would be reimbursed for any costs he had incurred in respect of the renovation of the property and he was invited to make a claim in respect of those expenses. [Mr B] has not to date made any claim to [the Respondent] and not, as far as the file indicates, made a claim direct to the family members.

You indicate in your letter of 6 October that [Mr B] did not object to the withdrawal of the Disposition and this is crucial to the consideration of the complaint. You indicate that he did not sanction the withdrawal of the Disposition, however his failure to object is fundamental to the matter at hand. In the event [Mr B] had objected then [the Respondent] would have been required to

consider that she was at conflict and that the withdrawal may not be wholly advisable.

It is extremely disappointing that a family is in conflict over a property and I can appreciate that [the Respondent] found herself in a difficult situation towards the conclusion of this file. However, I am satisfied that [the Respondent] acted reasonably and took precautions to ensure that matters were properly dealt with. I do accept that [the Respondent], with hindsight, should perhaps have taken the specific instructions of [Mr B] and [Mr C] prior to instructing the withdrawal of the Disposition from the Land Register. However, given the fact that neither [Mr B] or [Mr C] objected to that withdrawal when they became aware of the same, I do not accept that the complaint may be withheld (sic) in that aspect."

8. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct in respect that:-
- (a) She failed to provide Mr B with terms of business in connection with the registration of title to property (Rule B4.2);
 - (b) She failed to issue a letter to any or all of Mrs A, Mr B and Mr C in terms of Rule B2.1.12 – 2.1.14 (formerly known as Rule 5(2) letters) (Rules B2.1.12 – 2.1.14);
 - (c) She failed to obtain Mr B's instructions in connection with withdrawing the registration of the title to Property 1 in March 2016 (Rule B2);
 - (d) She failed to advise Mr B, prior to doing so, that she was withdrawing the registration of the title to Property 1 in March 2016. (Rule B2); and
 - (e) She acted in a conflict of interest situation and accepted instructions from Mrs A in March 2016 to withdraw his registration of title to Property 1. (Rule B2).
9. Having heard further submissions from the parties, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 28 August 2018. The Tribunal having considered the amended Complaint at the instance of the Council of the Law Society of Scotland against Isabel Jayne

MacLeod of Anderson MacArthur Limited, Solicitors, Old Bank of Scotland Building, Stornoway, Isle of Lewis; Find the Respondent guilty of professional misconduct in respect of her breaches of Rules B4.2, B2.1.12 – B2.1.14 and B2 of the Law Society of Scotland Practice Rules 2011; Censure the Respondent; 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 but need not identify any other person.

(signed)

Kenneth Paterson

Vice Chairman

10. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on 18 SEPTEMBER 2018.

IN THE NAME OF THE TRIBUNAL



Kenneth Paterson

Vice Chairman

NOTE

At the hearing on 28 August 2018, the Tribunal had before it an amended Complaint, a Joint Minute, an Inventory of Productions for the Complainers and a List of Authorities for the Complainers, and an Inventory of Productions for the Respondent.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal noted that the parties had reached agreement in terms of the Complaint and Answers and had entered into a Joint Minute of Admissions. She indicated that she had no objection to the revised Answers as the matters raised related only to mitigation.

The Fiscal said that the Complaint narrated several occasions upon which potential or actual conflicts of interest arose. In her submission these should have “jumped out” to the Respondent and she should have acted. The Fiscal claimed that it should have been obvious from the beginning, given that three parties were involved, that there was potential for a conflict to arise. At the start, the Respondent should have sent letters to all parties in terms of Rules B2.1.2 to B2.1.5 (formerly Rule 5 letters), informing the parties that if a dispute arises, they or one of them would have to consult an independent solicitor. The Respondent acted appropriately regarding Mrs A but did not do anything in relation to the other two individuals. At no stage was there recognition of conflict and for a significant period the Respondent refused to concede that she had acted inappropriately, including in her later correspondence with Mr B’s solicitor.

The Fiscal referred to paragraph 9.01 of Smith and Barton’s “Procedures and Decisions of the Scottish Solicitors’ Discipline Tribunal” which refers to Tribunal case 565/82. In that case the Tribunal acknowledged that it was not infrequent practice, particularly in remote areas for solicitors to act for both parties in a conveyancing transaction but in such circumstances there is a heavy onus on the solicitor to ensure that there is no prejudice to either party in the transaction.

The Respondent was instructed by Mrs A to cancel the application for registration. However, the Respondent did not seek instructions from Mr B and she did not advise him to take independent advice. The Fiscal submitted the terms of the Respondent’s letter quoted in paragraph 3.14 where reference is made to “another solicitor” suggested that the Respondent was aware that she was acting for Mr B as well as Mrs A. With reference to Paterson and Ritchie’s “Law, Practice and Conduct for Solicitors” the Fiscal reminded the Tribunal that when an application for registration is being lodged,

that is done on behalf of the disponent, whoever gave the instructions. The disponent in this case was Mr B.

SUBMISSIONS FOR THE RESPONDENT

Mr Sanders adopted the Fiscal's submissions on the law. He explained that the allegations of professional misconduct were admitted entirely. The Respondent had cooperated and entered into a Joint Minute. He did not seek to dilute the gravity of the situation by anything he said in mitigation.

The Respondent is 30 years old and has had a wholly unblemished professional life. There are no matters pending before the Law Society. The misconduct occurred at a relatively young age and stage of her career. She is a young solicitor who was out of her depth from the moment she became involved in this transaction.

Mr Sanders noted that it is often said that if you have to ask the question whether there is a conflict of interest then there is usually one. However, the problem in this case was that the Respondent did not consider that she was acting for any party other than Mrs A. She was therefore not live to the possibility of conflict. That is unsatisfactory to the Tribunal but is an honest explanation of how things started to go off the rails. To the Respondent, this was a routine transaction. The family were getting on when she was first consulted. However, that is why these rules exist. The Respondent is under no illusion as to why the Tribunal takes these matters seriously. Apart from anything else it is a very material consideration in indemnity policies. However, the misconduct itself is at the lower end of the scale given the gravity of matters which come before the Tribunal on occasion.

Mr Sanders sought to persuade the Tribunal that this was an isolated incident. The Respondent has reconsidered the rules and has actively sought continuous professional development training to remedy the gap in her knowledge. She did not behave wilfully. She has shown insight and remorse. She cooperated with the Tribunal and the Fiscal. The Secondary Complainer's claim for compensation has been resolved without having to involve the Tribunal.

Mr Sanders referred to various references which he had submitted in support of the Respondent's character and integrity. He submitted that the legal profession in Scotland is a relatively small world and even more so on the Western Isles. She is held there in high professional and personal regard. The publication of the Tribunal's decision will have a considerable effect upon her. He invited the Tribunal to dispose of the case by way of Censure.

DECISION

Although the Respondent admitted professional misconduct, it remained for the Tribunal to consider whether the admitted conduct met the test as set out within Sharp v The Law Society of Scotland 1984 SLT 313. In that case it was emphasised that a serious and reprehensible departure from the standards of conduct to be expected of competent and reputable solicitors may be properly categorised as professional misconduct. However, in every case it is essential to consider the whole circumstances and the degree of culpability of the individual against whom the Complaint is made.

The Respondent failed to provide Mr B with terms of business, did not issue conflict letters to the parties and failed to obtain instructions or advise Mr B she was withdrawing registration of title. She acted in a conflict of interest situation. She did not act in the best interests of Mr B. She could not give him independent advice. Although at the time of taking instructions there may have been no apparent conflict, these do frequently arise in family situations. Acting for both sides in a conveyancing transaction almost invariably will raise significant potential for conflict and that is why these transactions are regulated by Rule B2 of the Law Society Practice Rules 2011. These rules protect clients and solicitors. The Tribunal accepted that the Respondent only thought of Mrs A as her client. However, if she had paid regard to the principle that submitting an application to register or record a disposition is always done on behalf of the disponent, whoever gave the instructions, she may have avoided acting in the actual conflict situation by withdrawing registration of title.

The Tribunal had regard to the fact that the Respondent was a newly qualified solicitor. As a relatively inexperienced practitioner, she got caught up in an unexpected family dispute. It is unfortunate that the transaction was not subject to more careful supervision by a more senior member of the firm. If it had, this situation may not have arisen. However, ignorance of the rules does not absolve a solicitor from responsibility, and a qualified assistant has the professional responsibility of a solicitor. The Respondent's conduct clearly fell below the standards of competent and reputable solicitors to a degree that was serious and reprehensible.

The Respondent rightly recognised that her conduct had fallen short of the standards expected of her. She acknowledged her guilt at an early stage in proceedings. She cooperated with the Fiscal and had entered into a Joint Minute. She showed obvious remorse and attended the Tribunal in person. There were no other conduct matters on her record or pending. The Respondent had taken steps to improve her knowledge in this area by seeking relevant CPD. Having had this experience, the Tribunal did not think that the Respondent would act in the same way in the same situation again. It did not consider

that there was any risk to the public in allowing the Respondent to practise unrestricted. Therefore, in all the circumstances, the Tribunal Censured the Respondent.

Following submissions on expenses and publicity, the Tribunal awarded expenses to the Complainers. The Tribunal ordered that publicity should be given to the decision and will name the Respondent but need not identify any other persons other than those referred to in paragraph 14A of Schedule 4 to the 1980 Act. The Tribunal noted that compensation had been dealt with by the parties and allowed the Secondary Complainer's claim for compensation to be withdrawn.



Kenneth Paterson
Vice Chairman