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

F I N D I N G S

in Complaint

by

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

Complainers

against

ANDREW JOHN ROBERTSON, formerly of WW&J McClure Solicitors, Floor 5, Pacific House, 70 Wellington Street, Glasgow

Respondent

1. A Complaint dated 29 November 2023 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the Complainers") averring that Andrew John Robertson, formerly of WW&J McClure Solicitors, Floor 5, Pacific House, 70 Wellington Street, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was a Secondary Complainer.

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

4. Following sundry procedure, in terms of its Rules, the Tribunal appointed the Complaint to be heard on 30 July 2024 and notice thereof was duly served on the Respondent.

5. At the virtual hearing on 30 July 2024, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by William Macreath, Solicitor, Glasgow. The Tribunal allowed a revised Complaint dated 9 July 2024 and a Joint Minute to be received and the Answers to be withdrawn.

6. Having given careful consideration to the terms of the revised Complaint and Joint Minute, the Tribunal found the following facts established:-

6.1 The Respondent is Mr Andrew John Robertson. His date of birth is 3 November 1947. He was admitted as a solicitor on the 30 October 1973. He was partner/director with WW&J McClure Solicitors then WW&J McClure Ltd until 29 April 2021 when he became a consultant with Jones Whyte LLP. He retired on 31 October 2021. He holds a current practising certificate.

6.2 The Respondent acted for the father and mother of the Secondary Complainer (Client 1 and Client 2 respectively). He started to act for both in or around 2007. In 2011 on instructions, he drafted and executed Powers of Attorney for Clients 1 & 2. Each client appointed the other as their continuing and welfare attorneys, whom failing the Secondary Complainer.

6.3 Client 2 signed her Power of Attorney on the 7 March 2011. The Respondent witnessed her signature and certified her capacity to grant the same.

6.4 Client 2's Power of Attorney contained at clause FIVE *inter alia:*
"*...the powers granted by this Power of Attorney shall be suspended and shall be brought into effect only upon the earlier of (one) my legal incapacity (as such incapacity shall be determined by a qualified medical practitioner) and (two) my signing and delivering a letter to my Attorney to the effect that I wish the powers granted by this Power of Attorney be brought into effect immediately*".

6.5 Client 2 did not deliver a letter indicating her wish that the powers granted by the Power of Attorney be brought into effect. Clients 1 & 2 were involved in a road traffic accident in 2016. Following the accident both clients were seriously injured, and as result of Client 2's more serious injuries, Client 1 began to give instruction to the Respondent on the Client 2's behalf. The Respondent did not seek, nor obtain, Client 2's authority to accept instruction in this manner. The Respondent following meetings, considered Client 2 lacked capacity following the accident. There is no contemporaneous medical opinion relating to Client 2's capacity in 2016, 2017 or 2018.

6.6 Client 2's Power of Attorney was registered with Office of the Public Guardian on the 3 February 2017.

6.7 In April 2017 the Respondent wrote giving a quotation for work in connection with IHT planning. He quoted £18,000 for a "probate Plan" and £4,800 for Family Protection Trust (FPT) for Clients 1 & 2. The letter provided for part of their interest in the "family home" to be disponed into the FPT.

6.8 The Respondent, prior to embarking upon these instructions, did not obtain from a qualified medical practitioner, an opinion determining Client 2's in/capacity. Despite this, he considered Client 1 had authority to act for Client 2 in terms of the Power of Attorney.

6.9 The Respondent, on the instruction of Client 1, prepared or had prepared the following in Client 2's name whom the Respondent believed to be incapax following upon the road traffic accident:

6.9.1 FPT appointing Client 1 (and two of the Respondent's partners as trustees)
6.9.2 A disposition of part of Client 2's interest in the family home into the FPT and specifically in the names of the Trustees
6.9.3 A mandate to the Building Insurer of the family home
6.9.4 An affidavit confirming Client 2 was solvent.

6.10 Client 1 attended with the Respondent on the 6 June 2017. The Respondent observed Client 1 sign the documents narrated above. The Respondent witnessed:

6.10.1 Client 1 sign the FPT for Client 2 with his, Client 1's, signature;
6.10.2 the disposition on behalf of Client 2 with Client 1's signature – there was no explanation (that he was signing as attorney) in the testing clause.

6.11 The Respondent observed Client 1 sign the building Insurance mandate in his own name for Client 2.

6.12 The Respondent took and acted upon instructions from Client 1 in relation to Client 1 & 2's interests in their property in Millport.

6.13 The Respondent directed another solicitor in McClures Conveyancing department to enter into missives for sale of the Millport property in August 2018. The price was £220,000. The property was held in one half pro indiviso shares each by Client 1 and Client 2. The Respondent acted upon instruction from Client 1 only. The Respondent believed Client 1 had authority to act for Client 2 in terms of the Power of Attorney. The purchaser was Client 1 & 2's son. Their son was represented by R&RS Mearns Solicitors Glasgow as independent agents. The Respondent directed on instructions of Client 1 that missives be concluded on behalf of Client 1 & 2 on the 31 August 2018. The Respondent directed two dispositions be drafted. The Respondent met with Client 1 and witnessed him execute both dispositions on 4 September 2018. The Dispositions had been drafted and signed by Client 1 in his own right for his one-half pro indiviso share and as attorney for Client 2. Client 2's disposition had the word "attorney" in manuscript under Client 1's signature

6.14 As at September 2018, neither Client 1 nor the Respondent had correspondence from Client 2 activating the Power of Attorney nor an opinion from a qualified medical practitioner determining Client 2's incapacity.

6.15 The Respondent wrote to Client 2's General Practitioner at W Medical Practice on the 14 March 2019 seeking their opinion. He asked the following:-

"In your view does she have capacity to understand and give instructions re her affairs? This will include giving instructions regarding the negotiation of a settlement of her claim resulting from her car accident...there is some urgency in the matter."

6.16 On the 4 April 2019, Dr C a Speciality Doctor in Old Age Psychiatry from the Community Health Team, replied as follows:-

In my opinion, however, although she can participate in conversation about her affairs, she does need a lot of support and due to her cognitive impairment she is unable to follow, understand or retain fine detail. She frequently drifts off to sleep and loses track of the conversation in hand. I would therefore deem her incapable of giving instruction regarding her affairs or the insurance claim.

6.17 This is the first medical opinion the respondent sought and obtained regarding Client 2's capacity.

6.18 The Secondary Complainer made a complaint via her solicitors, Inksters, regarding the Respondent's handling of her parents and, in particular her mother's, affairs in August 2019. Following upon this, the Respondent took action in connection with the documents, signed by Client 1, when there was not a medical opinion activating Client 1's right to act under the Power of Attorney of Client 2. The Respondent considered the

- Disposition re the Millport property
- Disposition re the family home
- FPT
- Probate Plan

required to be re-executed by the Client 1 now that the Power of Attorney had been properly triggered following the medical opinion of 4 April 2019 confirming Client 2's incapacity.

6.19 The Respondent did not write to Clients 1 and 2 setting out and explaining the full facts, circumstances and legal implications which required corrective action by the respondent The only correspondence is as narrated in para 6.20 below There is no written correspondence on the Respondent's files setting out

6.19.1 advice on the validity or otherwise of the previously executed deeds and writings,

6.19.2 advice on the need or otherwise for new deeds/writings to be executed

6.19.3 whether there remained a need for the deeds/writings

6.20 The Respondent or one of his colleagues, on the Respondent's instruction, took the new documents (Client 2 Disposition of the family home, Millport and a FPT) to Client 1 and asked Client 1 to sign them. Client 1 was not given written advice on what was contained in the documents. Client 1 avers he was not given an opportunity to consider their terms. He was not given a copy of the document he signed. The Respondent issued a letter dated 22 August 2019 which stated:

"Please find enclosed a copy of the letter received from your wife's Dr. Due to the contents of said letter, we will now proceed to register the fresh Deed of Trust for [Client

2] in addition to the Disposition transferring her ¼ share to her Trust and your ¼ share to your Trust.

These documents will replace the previous documentation and cure any defects."

7. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of professional misconduct *singly* and *in cumulo* in respect that he:

7.1 In accepting instruction from Client 1, in respect of Client's 2's affairs, the Respondent:
(a) Accepted instructions which were not in Client's 2's best interests (Rule B1.4) and
(b) Accepted such instructions when he did not have the authority of Client 2 (Rule B1.5).

7.2 In failing to seek a letter from Client 2 authorising the powers in the Power of Attorney or obtaining a qualified medical practitioner's opinion determining Client 2's incapacity, the Respondent:
(a) Failed to act in Client 2's best interests (Rule B1.4) and
(b) Failed to act with diligence and appropriate skills (Rule B1.10).

7.3 In implementing Client 1's instruction regarding Client 2's interest in the family home, the Millport property and the FPT (to include drafting, executing and witnessing the dispositions FPT and letters etc.) the Respondent:
(a) Acted in a manner which was not in Client 2's best interests (Rule B1.4)
(b) Failed to act upon a proper instruction, as he did not have authority from Client 2 for his actings (Rule B1.5).

7.4 In acting to remedy/correct the incorrectly completed dispositions, family protection trusts and any other associated documents, by attending with or instructing others to attend with Client 1, the Respondent failed to provide a full written explanation of
(a) Why the incorrectly completed dispositions, family protection trusts and associated documents required to be signed of new;
(b) Why the failure in not obtaining Client 2's formal written instruction and failure to obtain a medical certificate confirming Client 2's incapacity to spring the Power of Attorney for Client 2 in favour of Client 1 was not explained; and
(c) Thereafter asking Client 1 to sign the disposition, family protection trust and other associated documents without the provision of a full written explanation and failing to

provide contemporary copies of the completed dispositions, family protection trust deeds and any other associated documents with written advice, the Respondent:

(i) Acted in a manner in which he failed to communicate effectively (Rule B1.9);

(ii) Acted in circumstances where he did not act in the best interests of client 2 in failing to preserve his own independence and principles of good professional conduct (Rules B1.4.2 and B1.4.2);

(iii) Acted in a manner which brought his personal integrity into question (Rule B1.2).

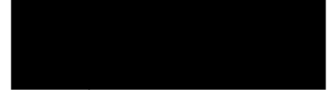
8. The Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 30 July 2024. The Tribunal, having considered the revised Complaint dated 9 July 2024 at the instance of the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh against Andrew John Robertson, formerly of WW&J McClure Solicitors, Floor 5, Pacific House, 70 Wellington Street, Glasgow; Find the Respondent guilty of professional misconduct in respect of his breach of Rules B1.2, B1.4, B1.5, B1.9 and B1.10 all of the Law Society of Scotland Practice Rules 2011; Censure the Respondent; Fine him in the sum of £6,000 to be Forfeit to His Majesty; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person; and Allows the Secondary Complainer 28 days from the date of intimation of these findings to lodge a written claim for compensation with the Tribunal Office if so advised.

(signed)
Ben Kemp
Vice Chair

9. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on 29 AUGUST 2024.

IN THE NAME OF THE TRIBUNAL



Ben Kemp

Vice Chair

NOTE

At the Hearing on 30 July 2024, the Tribunal had before it the revised Complaint dated 9 July 2024, a Joint Minute, and a List of Authorities for the Complainers. On the Fiscal's motion, the Tribunal corrected two minor typographical errors in the Complaint at paragraphs 3.1 and 5.4.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal outlined the agreed facts. He referred the Tribunal to the relevant duties on solicitors. He highlighted the test for professional misconduct contained in Sharp v Council of the Law Society of Scotland 1984 SLT 313. The Complainers averred that the Respondent had acted with a lack of integrity and the Fiscal referred the Tribunal to SRA-v-Wingate & Another [2018] 1 WLR 3969, particularly paragraphs 95, 97, 100, and 102. The Fiscal said the instructions received by the Respondent were not in the best interests of Client 2. The Respondent had no authority to dispose of part of her property and create a family protection trust. The Power of Attorney was in the McClure's style. The Respondent was aware of the triggering clause. The Respondent had failed to advise Clients 1 and 2 of the corrections which were required. There was no explanation as to why the documents had to be re-executed. The way the Respondent's integrity was called into question in the way he dealt with this matter once he realised his error. If a solicitor makes a mistake, this should be explained to the client. The client should be given an opportunity to seek advice elsewhere or allow the solicitor to fix the problem. The Fiscal invited the Tribunal to make a finding of professional misconduct.

In answer to questions from the Tribunal, the Fiscal said that the Complainers accepted that the Respondent met Client 1 and Client 2 after the accident and formed the view that Client 2 lacked capacity. The Respondent had witnessed the signing of the Power of Attorney. It was in the firm's usual style. It was staggering that he failed to get a medical report.

The Tribunal asked the Fiscal about the question of lack of integrity. The Fiscal said that the question of lack of integrity arose at the point at which the Respondent sought to redress the situation in communication with the client.

The Tribunal sought to explore the issue of Client 1's best interests and asked if it was the Complainers' position that there was something about these transactions which were not in the client's interests. The Fiscal said that the client's best interests would have been served by the Power of Attorney being triggered by a letter from her or a medical report as to her capacity. Without one of those documents,

taking instructions from her husband was not in her best interests. Transferring her property out of her control was not in her best interests.

SUBMISSIONS FOR THE RESPONDENT

Mr Macreath noted that the case had been the subject of much communication between himself and the Fiscal. A Joint Minute had been lodged agreeing the averments of fact, duties and misconduct in the revised Complaint. Professional misconduct was admitted. Breach of Rule B1.2 was restricted to events once the failure had been identified and it was known that corrective work would be required. Solicitors make mistakes and corrective action is sometimes required. However, there needs to be a written note saying why this occurred and whether prejudice had been occasioned to the client.

Mr Macreath noted that the "Sharp Test" required the Tribunal to take into account the whole context of the conduct. Clients 1 and 2 had been represented by the Respondent for many years from 2007. The Respondent had been involved in estates and inheritance tax planning. In 2011 they signed Powers of Attorney with triggering/springing clauses. Unfortunately, the clients were in a serious road traffic accident and Client 2 was seriously injured. Her claim was settled in 2019 by a well-known personal injury firm. The Respondent has been in practice for close to 50 years. He lost sight of the triggering clause. He thought she was incapax. His view was fortified by the medical report which was eventually obtained but he should have obtained his much earlier.

Mr Macreath said there was no doubt that Client 1, an experienced businessman of substantial worth and knowledge, had determined upon instructions regarding the trust. He wanted to sell the Millport property. The Respondent had initially advised against the transaction because of potential capital gains tax liability but Client 1 had insisted on the sale. The conveyancing was dealt with by someone else in the Respondent's firm. The son was separately advised. No one involved in the transaction looked at the Power of Attorney with any degree of care. The Respondent "took his eye off the ball" because of the family situation. The property was sold for full value in two tranches. The Respondent accepts he was the supervisor and managing director and takes responsibility for what happened. There was no indication of a complaint until the Secondary Complainer's solicitors contacted the Respondent in 2018. By March 2019, Client 2 had been declared incapax by a medical practitioner, fortifying the Respondent's initial view.

Mr Macreath noted the Fiscal's position that on one view an invalid Power of Attorney makes everything invalid, including the best interests of the client. With regard to the question of lack of integrity, Mr

Macreath noted that there was no averment of dishonesty, deceit or misleading. The clients were on first name terms. They were almost friends. The problem was in not setting out the mistake in writing for the client. The Respondent says that he had a conversation with Client 1 about the situation. However, this was not sufficient.

In answer to a question from the Tribunal, Mr Macreath indicated that had the Respondent dealt appropriately with the mistake once it was discovered, this Complaint might not have reached the Tribunal. He agreed that it was an aggravating factor that the mistake occurred in relation to a Power of Attorney which is designed to protect the vulnerable. He emphasised again that Client 1 had been insistent on the sale of the Millport property, so much so that he would not allow his son to withdraw from the contract. He noted the Complainers had made no averments of loss and believed that there had been no loss in this case.

DECISION ON PROFESSIONAL MISCONDUCT

On the basis of the admitted facts, the Tribunal was satisfied that the Respondent had acted in the manner set out in the revised Complaint. He had accepted instructions from Client 1 on behalf of Client 2 ostensibly on the basis of her Power of Attorney without the springing clause having been activated. He had implemented those instructions which included drafting and witnessing legal documents. When the mistake came to light, he failed to provide a full written explanation and his proposals to rectify it, giving the clients the opportunity to take alternative legal advice.

Solicitors must act in a way their personal integrity is beyond question (Rule B1.2). They must act in the best interests of the clients and preserve their independence (Rule B1.4). They must have the authority of their clients for their actings (Rule B1.5). They must communicate effectively with clients (Rule B1.9). They must only act in those matters where they are competent to do so and exercise the level of skill appropriate to the matter (Rule 1.10). The Respondent had breached these rules. Rule B1.4 was breached to the extent that it was not in Client 2's best interests for the Respondent to take instructions from Client 1 without triggering the Power of Attorney. On the available facts, the Tribunal could not assess whether the actual transactions themselves were in the best interests of the Client 2. The Tribunal had regard to the definition of lack of integrity in SRA-v-Wingate & Another [2018] 1 WLR 3969 and considered that the Respondent had lacked integrity at the point when he attempted to rectify his mistake without being candid with the clients in writing.

Although the Respondent admitted professional misconduct, it remained for the Tribunal to determine that matter. 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."

The Tribunal had regard to all the circumstances and the degree of culpability attached to the Respondent. It noted that the mistake related to one Power of Attorney and that the Respondent's judgment may have been clouded by his proximity to the clients and his own assessment of Client 2. A medical report was eventually obtained which supported the Respondent's initial assessment of Client 2's capacity, but the psychiatrist's opinion was not retrospective. The terms of the medical report were of limited significance to the question of misconduct which concerned the failure to consider the springing clause at the point of instruction. It is fundamental that in cases involving triggering or springing clauses such as this one, solicitors take meticulous care to ensure they are acting with proper authority. Powers of Attorney can only protect the vulnerable effectively if the professionals involved pay careful regard to their terms. There could have been potentially very serious consequences if Client 2 had in fact had capacity. The case involved significant, fairly high-value transactions and the Respondent had no authority to act on her behalf.

The Tribunal was satisfied that the Respondent's behaviour constituted a serious and reprehensible departure from the standards of competent and reputable solicitors. He was therefore guilty of professional misconduct. Each averment of misconduct was established singly and *in cumulo*.

SUBMISSIONS ON SANCTION, EXPENSES AND PUBLICITY

The Tribunal adjourned briefly to consider four references lodged on behalf of the Respondent.

The Fiscal noted that the Respondent had two findings of unsatisfactory professional conduct on his record card. The first concerned conduct in 2016 and a finding in 2018. This related to failure to respond to a letter of complaint. The second concerned conduct in 2018 and a finding in 2020. This related to a

failure to communicate effectively regarding the right to complaint to SLCC. The Respondent was censured on both occasions. The Fiscal referred to a note from the Secondary Complainer regarding anonymisation of her details. There was a concern that identification of the elderly clients could be made if her name was released. They should not be identified since they made no complaint about the Respondent. The Secondary Complainer believed that there was no public interest in identifying her but there was a risk of her privacy being breached and unwanted attention on her family. The Fiscal said it would be reasonable to anonymise the Secondary Complainer's name in those circumstances. The Fiscal moved for expenses on the usual scale.

Mr Macreath agreed that the Secondary Complainer's name should be anonymised. He asked that the Respondent's home address was not disclosed in the findings, although it had been provided in the Complaint. There is a great deal of interest in McClure's which is now in administration. There had even been a written comment made by an observer during the hearing which was inappropriate and included unseemly and hostile language. Naming the Respondent would be sufficient to identify him.

Mr Macreath said it was particularly sad to see a 76-year-old solicitor who qualified in 1973 before the Tribunal in his "twilight years". However, the Tribunal should focus on the misconduct. It had nothing to do with the *modus operandi* of a firm but rather related to an oversight in relation to a Power of Attorney. The Respondent was managing director of firm with many staff. His role was "rain making" and giving advice at a senior level on IHT planning and the like. Given his familiarity with these clients, with whom he was friendly, he lost sight of the fact that the springing clause must be obtempered. This case is not about McClure's or family protection trusts. It is straightforwardly about an invalid power which was ultimately validated. The error required a holistic all-encompassing letter enclosing draft documents. The documents could then be corrected.

Mr Macreath gave some details about the UPC cases. The Respondent has maintained his practising certificate although he is retired. He did this out of respect to his profession. Mr Macreath drew attention to the testimonials indicating that the Respondent had been a highly regarded professional. He has had a lengthy career. It was very sad that the firm went into administration. However, it was not just this firm that went into administration at that time. The Respondent will not renew his practising certificate in October 2024. He believed he had contributed to professional life and wished to do this on his own time and on his own basis. In Mr Macreath's submission, the matter could be dealt with by a censure and fine, given that Mr Macreath could give an undertaking that the Respondent's practising certificate would not be renewed in October and most significantly, that he was not currently undertaking legal work. The collapse of his firm during the pandemic has had a lasting effect on him and his clients. The Respondent

is anxious to retain his name on the roll but will not be practising from 31 October 2024. The Respondent was aware that expenses would follow success and would be significant since the case had been running since last December. There was a discussion between the Chair and Mr Macreath regarding publicity, and Mr Macreath provided the former business address to the Tribunal.

DECISION ON SANCTION, EXPENSES AND PUBLICITY

The Tribunal considered the potential mitigating factors in the case. There was no personal gain to the Respondent. There was no dishonesty. According to the references, he appeared to have been a highly regarded solicitor, practising for a lengthy period. The Tribunal did not consider that too much turned on the UPC findings which were analogous only to the extent that they turned on a failure to communicate. The Tribunal did not consider that the medical report eventually supported the Respondent's view that Client 2 was incapax was significant. The aggravating factors were the failure to protect the extremely vulnerable position of Client 2 and the lack of integrity. The reputation of the profession was likely to be impacted. The Tribunal noted that the Respondent did not intend to renew his practising certificate and that he was not currently undertaking legal work. It did not think that a restriction on his certificate was required and that a censure and fine of £6,000 would be sufficient to mark the Tribunal's disapproval of the behaviour.

The Tribunal found the Respondent liable in the expenses of the Complainers and of the Tribunal on the usual basis. It directed that publicity would be given to the decision and that this publicity should include the name of the Respondent and his former business address but need not identify any other person. It allowed the Secondary Complainer 28 days from the date of intimation of the findings to lodge a written claim for compensation with the Tribunal Office if so advised.

Ben Kemp

Vice Chair