

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

**F I N D I N G S**

**in Complaint**

**by**

**THE COUNCIL OF THE LAW  
SOCIETY of SCOTLAND  
26 Drumsheugh Gardens, Edinburgh**

**against**

**PHILIP GEORGE DAWSON,  
Solicitor, 1 East Craibstone Street,  
Aberdeen**

1. A Complaint dated 20<sup>th</sup> May 2005 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Philip George Dawson, Solicitor, 1 East Craibstone Street, Aberdeen (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.
  
2. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.

3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 20<sup>th</sup> September 2005 and notice thereof was duly served on the Respondent.
4. At the hearing on 20<sup>th</sup> September 2005 the Complainers were represented by their Fiscal, Walter Muir, Solicitor, Ayr. The Respondent was present and was represented by Mr Ferguson, Solicitor, Glasgow.
5. A Joint Minute was lodged which dispensed with the need for evidence to be heard. Various productions were lodged which the parties agreed to be admitted into evidence.
6. The Tribunal found the following facts established
  - 6.1 The Respondent is a solicitor enrolled in the Register of Solicitors in Scotland. He was born on 16<sup>th</sup> October 1954. He was admitted as a solicitor on 8<sup>th</sup> November and enrolled on 25<sup>th</sup> November, both days in 1977. He is at present a partner in the firm of James & George Collie, Solicitors, Aberdeen.
  - 6.2 **Mr & Mrs A**

The firm of James & George Collie had acted for Company 1 for about 20 years until it was liquidated sometime in or about 1995 and they continued to act for its successor, Company 2 and for Mr B who had acquired a controlling interest in Company 1 from his parents sometime in 1987. James & George Collie also acted for Mr B as an individual. The Complainers

believe that they sometime acted for Mr B in legal actions where his brother, Mr C and his sister, Mrs D were on the other side. On 14<sup>th</sup> October 1996 Mr and Mrs A granted a Power of Attorney in favour of their son, Mr C. Sometime in or about September 2002 Mr and Mrs A instructed the firm of Stronachs, Solicitors, Aberdeen to prepare Welfare Powers of Attorney (WPA's) under the Adults with Incapacity (Scotland) Act 2000 on their behalf. Stronachs prepared WPA's and Mr and Mrs A signed them on 4<sup>th</sup> September 2002. Mr C was appointed welfare attorney under these WPA's, both of which were registered with The Office of the Public Guardian on 22<sup>nd</sup> October 2002.

6.3 In December 2002 Mr and Mrs A were respectively 83 and 79 years of age and they were then in poor health. They were then residing at Property 1. Mr C, acting on the advice of his parents' doctor and also social services, then arranged for his mother to go into a private care home. His father, who had been her principal carer, was not coping with looking after his wife and it was felt that Mr A, in particular, would benefit from a period of respite care. Mr C obtained his father's consent to this move. Sometime on or about 15<sup>th</sup> December 2002 Mrs A moved to a care home but, within a few days of that, Mr A became very distressed at her absence. The outcome of this was that Mrs A went home within a week of moving to the care home. It was shortly after his mother had moved to the care home that Mr C began to take charge of looking after his parents.

6.4 On 17<sup>th</sup> December 2002 Mr B emailed the Respondent and instructed him to prepare revocations of the WPA's.

In this email Mr B alluded to differences between him and his brother, Mr C and Mrs D relating to the care and welfare of his parents and also to the fact that, according to him, his parents had signed documents the exact nature of which was unknown to them. On the same day Mr B faxed Stronachs with a mandate signed by his parents authorising Stronachs to send all documents held by them on behalf of his parents to James & George Collie. The Respondent accepted the instruction from Mr B to prepare these revocations and he was then aware that Stronachs had prepared the WPA's, that Mr C had been appointed welfare attorney thereunder and that this client, Mr B and Mr C then had differences of opinion in relation to the arrangements for care and welfare of their parents as well as having been in a state of dispute with each other. The Respondent prepared letters of revocation and sent them to his client, Mr B on 18<sup>th</sup> December 2002. The Respondent did not either seek or obtain direct instructions from Mr and Mrs A as to the preparation of these letters of revocation. Moreover he did not satisfy himself as to the capacity of Mr and Mrs A to grant these revocations. Mr and Mrs A signed the revocations on 19<sup>th</sup> December 2002. The Respondent did not advise them, prior to them executing the revocations, of either the nature of the documents or the consequences of revocation. Mr and Mrs A subsequently instructed Stronachs to reinstate the WPA's at expense to them. They authorised Mr C, their attorney, to pursue a complaint against the Respondent and by letter dated 27<sup>th</sup> May 2003 Mr C, in his capacity as attorney for his parents, wrote to the Complainers intimating a complaint against the Respondent.

7. Having considered the foregoing circumstances the Tribunal found the Respondent guilty of Professional Misconduct in respect of his failure to ascertain from Mr & Mrs A, his clients, that he had their instructions to prepare revocations of the Welfare Powers of Attorney and his failure to explain to Mr & Mrs A, his clients, the nature of the revocations which he had prepared for them and the consequential effect thereof.
  
8. Having heard the solicitor for the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 20<sup>th</sup> September 2005. The Tribunal having considered the Complaint dated 20<sup>th</sup> May 2005 at the instance of the Council of the Law Society of Scotland against Philip George Dawson, Solicitor, 1 East Craibstone Street, Aberdeen; Find the Respondent guilty of Professional Misconduct in respect of his failure to ascertain from clients that he had their instructions to prepare revocations of Welfare Powers of Attorney and his failure to explain to his clients the nature of the revocations which he had prepared for them and the consequential effect thereof; Censure the Respondent; Find the Respondent liable in the expenses of the Complainers and in the expenses of the Tribunal as the same may be taxed by the auditor of the Court of Session on a agent and client indemnity basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £11.85; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)

**Kenneth R Robb**  
**Vice Chairman**

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

**IN THE NAME OF THE TRIBUNAL**

**Vice Chairman**

**NOTE**

On behalf of the Law Society Mr Muir advised that he had two preliminary points. Firstly the Law Society is withdrawing the complaint of professional misconduct as specified in Article 4.3 of the Complaint. He advised that this was intimated to Mr Ferguson yesterday morning. Secondly in relation to the averments of duty in Article 3.3 the Law Society was not now relying on the guidelines issued in October 1998 regarding the sending of documents to unrepresented parties for signature because it is the Law Society's position that Mr & Mrs A were his clients at the time.

Mr Muir confirmed that this left the Tribunal considering the heads of Complaint in Articles 4.2 and 4.4 only.

**SUBMISSIONS FOR THE COMPLAINERS**

Mr Muir stated that in response to the Complaint detailed answers had been lodged by the Respondent and the Joint Minute reflects what has been agreed between Mr Ferguson and Mr Muir regarding the factual position. Mr Muir said that he wished to put on record his appreciation to Mr Ferguson for agreeing the Joint Minute. This agreement had resulted in no oral evidence having to be led before the Tribunal and as the productions have been agreed with Mr Ferguson that together with the Joint Minute comprises the proof in this case. Mr Muir stated that it is no part of the Law Society's case that the Respondent was art and part involved in some way in obtaining signatures for these revocations by fraud, facility or circumvention together with his client Mr B. The Law Society is not suggesting that the Respondent has acted improperly in that way. Mr Muir stated that the key facts are not in dispute and predominantly take place in the time frame between 17<sup>th</sup> and 19<sup>th</sup> December 2002. At no time before 19<sup>th</sup> December 2002 when Mr & Mrs A (hereinafter referred to as the parents) signed the revocation did the Respondent confirm with the parents that he had instructions from them to prepare these revocations and he did not explain the nature of the revocations prior to their executing them.

Mr Muir turned first to the averment of professional misconduct set out in Article 4.2 of the Complaint. He referred to the duty set out in Article 3.1 of the Complaint. Mr

Muir referred to document R1 of the Respondent's bundle of productions, a copy of the email sent to the Respondent at 08.32 on 17<sup>th</sup> December. Mr Muir stated that the terms of this email are crucial in considering what the Respondent actively knew on that date regarding the parents and the past history. Mr Muir submitted that it was the duty of the Respondent to confirm the instructions and that there was no impediment to prevent the Respondent calling the parents or going to see them to ascertain the instructions. Mr Muir submitted that the signing of the revocation was a significant act by the parents because the effect of revoking the Welfare Powers of Attorney were to return the parents to their previous position. Mr Muir submitted that it doesn't seem, from the correspondence, that there was any immediate prospect of further Powers of Attorney being granted and therefore the parents were without protection and that this should have been an issue for the Respondent.

Mr Muir referred to the decision of the First Division of the Court of Session in the case of Danish Dairy Company Limited-v-Gillespie 1922 SLT at page 487. He advised that in this case one of the issues was whether a solicitor had exceeded his authority by binding his clients by exceeding his instructions. Mr Muir referred to the Lord President's judgement at page 491 when he said "authority to make a complete and binding agreement on behalf of a client is not to be lightly inferred in the case of a law agent" and Lord President quoted from Begg on law agents in Section 14 "although law agents are very frequently employed to conduct negotiations with a view to contracts, especially in conveyancing business, no-one is entitled to assume that a law agent professing to act for a client has general powers to conclude a contract on his behalf". Mr Muir also referred to Lord Skerrington's judgement on page 292 of the same case where he stated "a law agent, even though he may be employed to collect the rents and to attend to the repairs of the property, has no general authority to grant leases on behalf of his employer. The existence of such an authority must be proved by the person who requires to found upon it". Mr Muir then referred to Lord Cullen's judgement at page 494 of the same case where he said "in transactions regarding heritable property, by way of leasing, selling otherwise, it is everyday practice for law agents to act as intermediaries. They may act as mere negotiators or they may have power to enter into binding contracts on behalf of their clients. While it is not uncommon for them to act in the latter capacity, there is no presumption that they have power to contract. This is freely conceded by the



pursuers.” Mr Muir submitted that looking to the decision in this case and to the excerpts quoted above the Respondent was not entitled to assume he had the authority to prepare the revocations. Mr Muir asked the Tribunal to consider whether the Respondent had instructions at all to prepare deeds of revocation. This is not clear from the terms of the copy email marked as production R1.

Mr Muir submitted that the Respondent’s actions do fall within the test of serious and reprehensible conduct as referred to in the case of McKinstry –v- The Law Society of Scotland 1996 SCLR at page 421 and the test in the case of Sharp –v- Council of the Law Society of Scotland 1984 SLT 313.

Mr Muir stated that on behalf of the Respondent it will be said that confirmation was obtained of the parents’ intentions on 23<sup>rd</sup> December. Mr Muir submitted that that confirmation is really irrelevant and misses the point as it comes too late. Mr Muir submitted that the granting or revocation of any Welfare Power of Attorney, indeed any Power of Attorney, are part of the same picture and not distinguishable as far as compliance with the duties referred to in Article 3 are concerned.

In conclusion, Mr Muir submitted that the Respondent failed to comply with the general duties set out in Article 3.1 and invited the Tribunal to conclude that misconduct has been established beyond reasonable doubt in accordance with the test in the Sharp case.

Mr Muir then turned to the second part of his case, the failure of the Respondent to explain to his clients the nature of the revocations and the consequential effect thereof. Mr Muir referred to the duty set out in Article 3.3 and stated that he accepted that there will be circumstances where ex facie the document is self explanatory and it is plain to the client what he is being invited to sign and the document doesn’t need any explanation. However, Mr Muir submitted that was not the case here and that the explanation was an essential part of the signing process. The consequence of signing these documents was potentially problematic for the parents and their family members. Mr Muir submitted it was incumbent on the Respondent on the basis that he did have instructions, and stated that in his view it was doubtful that the Respondent did, to speak to the parents and explain the impact of what they were

about to sign. The evidence was that they were capable of understanding what they were signing and Mr Muir submitted that the failure to explain did amount to professional misconduct in terms of the test in the Sharp case having regard to the fact that although the parents were mentally capable they were stressed, worried and vulnerable people.

### **SUBMISSIONS FOR THE RESPONDENT**

Mr Ferguson stated that this case is all about judgement and that lawyers have to exercise their judgement every day. Mr Ferguson submitted that even if his client exercised his judgement and was wrong, he did it in good faith and even if there was something reckless or cavalier about that exercise of judgement that that does not amount to professional misconduct.

Mr Ferguson stated that solicitors often have to exercise judgement when they receive instructions, for example, from joint spouses. They frequently receive instructions from one spouse only and have to confirm the instructions with the other spouse at a later stage of the transaction. He also referred to the circumstances of a solicitor being asked to submit an offer on behalf of joint clients by one of the clients at 11.50am when there is a 12 noon closing date. Mr Ferguson gave another example of acting on behalf of unconfirmed instructions, for example, when instructions are received by a Trade Union to enter a plea of not guilty on behalf of an accused person in a criminal matter. He submitted that the vast majority of solicitors in Scotland would be happy to proceed in these circumstances.

Mr Ferguson stated that the facts are substantially admitted by the Joint Minute and that what is left in dispute is in relation to an opinion and not the facts. Mr Ferguson submitted that his client did have instructions from the parents via the email of 17<sup>th</sup> December from Mr B. He stated that this was borne out by the evidence in relation to a file note referred to as production 5 of the Respondent's productions in which the Respondent stated that Mr A senior "confirmed that he was happy for us to continue doing things ....". Mr Ferguson submitted that the Respondent was not gung ho; that he got instructions and considered carefully in his judgement what he was going to do, considering the clients' wishes and how these might be achieved. Mr Ferguson

submitted that the document prepared was in very simple terms and would be easily understood by the grantees.

Mr Ferguson submitted that the Respondent's reaction to the email was that Mr B was acting out of concern for the parents and their wishes at that time and stated that the Respondent did not draw the conclusion that Mr B was involved as a result of animosity between the members of the family. Mr Ferguson stated that the instructions referred to in the email were not to appoint Mr B in place of Mr C but only to revoke Powers of Attorney in favour of Mr C. Mr Ferguson submitted that his client's actions were an entirely proportionate response to the email. He now deeply regrets not meeting with the parents, however they lived 30 miles away and he was not sure how they would react to a phone call from him.

Mr Ferguson submitted that the mandate at page 2 of the Respondent's productions is evidence that the Respondent had been appointed to act for the parents in relation to their personal and business affairs. Mr Ferguson stated that this backed up in writing what he had been instructed to do for them and that the Respondent did not see the preparation of the revocations as a breach of any duty. Mr Ferguson stated that the revocations were duly signed and witnessed by a doctor as the Respondent had requested.

Mr Ferguson stated that in his opinion the Respondent was employed to oversee the affairs of the parents and they were happy with him. Mr Ferguson submitted that this has not been challenged by any of Mr & Mrs A's family. He stated that at some point they changed their minds and authorised a complaint to be made. Mr Ferguson stated that if someone changes their minds they should have no complaint that this would cost them additional money.

Mr Ferguson submitted that there is no rule on the execution of such deeds. There is a guideline dated July 1998, which relates to Powers of Attorney only and is not a general statement of the law in relation to revocation of such documents. He stated that if the Law Society had wanted to make it such that they could have made it a general rule.

Mr Ferguson submitted that as shown in Respondent's production number 5, his client obtained retrospective confirmation of the position from the parents five days after the signature of the revocation documents.

Mr Ferguson accepted that there is a duty with regard to most documents to give an explanation of the terms of these documents. However he submitted that there is no rule that every document needs explanation. He submitted that some deeds are so simple there is no need to explain. He gave the example of a Standard Security which is an onerous document which needs explanation. However a discharge of a Standard Security needs little or no explanation. He said that in this case we are not dealing with a Power of Attorney, an onerous document covered by the Power of Attorney guidelines. It is evident that the document we are dealing with here was a revocation which was effectively a discharge of a Power of Attorney, a short document, clear in its terms. He stated that a revocation or a discharge of a document which returns powers to the granter is not a document which could be said to have prejudiced the position of the parents because powers were returned to them. Mr Ferguson submitted that the effect of such a deed is to neutralise the position.

Mr Ferguson referred the Tribunal to page 62 of Smith & Barton's book on Procedures and Decisions of the Scottish Solicitors Discipline Tribunal where there is a reference to case 607/85 where the Tribunal stated "it is always preferable that such instructions are taken personally whether at a meeting, or by telephone or by letter, but it is accepted that there are circumstances where such instructions may be given through a third party." Mr Ferguson submitted that the reason the Respondent did not get direct instructions was that the parents lived 30 miles away and he was concerned about the effect of telephoning. He felt he had enough faith in Mr B, for whom he had acted for many years, and was sure that he was telling him the truth.

Mr Ferguson referred the Tribunal to the case of Council of the Law Society of Scotland-v-J reported at 1991 SLT page 662 in which case the court approved of the Sharp test and found the solicitor not guilty of professional misconduct in a case where he had breached a rule because there was no prejudice to the client. Mr Ferguson also referred to the above mentioned case of McKinstry-v-The Law Society of Scotland at page 422, sub paragraph 5 where the court held that "it was

inconceivable that the actions of the petitioner could ever have been regarded as a 'serious and reprehensible departure' from the standards to be expected of competent and reputable solicitors, since they were the consequences of a generally held, but, on that assumption, wrong view of his position".

In conclusion Mr Ferguson submitted that the Respondent should be acquitted of both heads of the complaint.

## **DECISION**

There were some averments in the Complaint which were not insisted upon by Mr Muir and were therefore not included in the findings in fact.

The Tribunal were of the view that the case as presented by Mr Ferguson showed no demonstrable need for urgency. The Tribunal considered that the Respondent's immediate action in complying with the request of his client, Mr B and thereby disregarding all warning signs has not been adequately explained. In terms of the Sharp test taking into account the whole circumstances of the case, he proceeded to comply with the request in the face of all the indicators in Mr B's email that what he was undertaking was contrary to the professional obligation of a solicitor to know his client and have instructions from his client or if not at least to take reasonable steps to confirm instructions said to have come from the client.

The Tribunal does regard the parents as vulnerable as they were elderly people caught up in a dispute between their children. Their vulnerability was patent from the terms of the email received from Mr B. The Tribunal considered that the Respondent had a duty to seek clear and unambiguous instructions from the parents and had ample opportunity to do so. The Tribunal is of the view that Mr & Mrs A's vulnerability aggravated the Respondent's failure to do so.

The Tribunal is of the view that the revocations were not self-explanatory documents and that an explanation of the effect of the documents was an essential part of the signing process. The Tribunal is also of the view that the revocations were not neutral documents and that the consequences of their execution were potentially far more

material than that of tendering a not guilty plea as was suggested by Mr Ferguson. The revocation of the Welfare Powers of Attorney left the parents in a potentially vulnerable position and the effect of this should have been fully explained to them before they signed the documents. Again the Tribunal felt that Mr & Mrs A's vulnerability aggravated the Respondent's failure to explain the terms of the revocations.

Accordingly the Tribunal found the Respondent guilty of Professional Misconduct in relation to his failure to ascertain from Mr & Mrs A that he had their instructions to prepare revocations of the Welfare Powers of Attorney and his failure to explain to his clients the nature of the revocations which he had prepared for them and the consequential effect thereof.

#### **MITIGATION**

In mitigation Mr Ferguson submitted that in the absence of a rule or guideline his client tried his best with the instructions he received and had been found guilty on the basis that his judgement was found to be wrong. He stressed that his client acted entirely in good faith and was entitled to make such a judgement. Mr Ferguson submitted seven letters of reference from prominent members of the legal profession and noted that another reference had been received direct by the Tribunal. Mr Ferguson submitted that all referees know the Respondent well and had no hesitation in giving letters of recommendation in the circumstances.

Mr Ferguson stated that his client was a man whose character was previously without blemish and, in this case, had tried to adhere to what he thought was the correct position and did what he thought he was supposed to do and asked the Tribunal to take this into account.

#### **PENALTY**

The Tribunal considered that the misconduct was very much at the lower end of the scale of professional misconduct and took account of the Respondent's previous unblemished record and the references received on his behalf. The Tribunal Censured

the Respondent and found him liable for the expenses of the Complainers and of the Tribunal and Ordered that publicity be given to this decision and that such publicity should include the name of the Respondent.

**Vice Chairman**