

FACULTY OF ADVOCATES DISCIPLINARY RULES 2015

(Ref: 2019/04)

DECISION
OF THE
DISCIPLINARY TRIBUNAL
IN APPEAL

by
ANDREW SMITH KC

Member

in the complaint

by
STEVEN ELLIOT

Complainer

Introduction

[1] This is a decision of the Disciplinary Tribunal (“the Tribunal”) established under the Faculty of Advocates Disciplinary Rules 2015 (“the 2015 Rules”) in respect of an appeal by Andrew Smith KC (“the Member”) against decisions of the Complaints Committee dated 20 May and 19 July 2024. The procedure in this matter has been assigned Faculty Reference 2019/04.

[2] The Tribunal comprises Lord Menzies, Alan Dewar KC, Sarah Trainer Advocate, and three lay members selected from the panel of lay members nominated by the Scottish Ministers, namely Alison Mitchell, Hilary Sangster and Stephen McGoldrick.

[3] The Complaints Committee considered three issues of complaint made against the Member by the Complainer, which were set out in the Summary of Issues of Complaint as follows:

“I, Mr Steven Elliot wish to complain about Advocate Andrew Smith QC, who was instructed by a particular firm of solicitors to represent Mr A and Mr B on numerous occasions, in a number of court actions involving me or my trustee in bankruptcy, between 2011 and 2018. Specifically:

...

5. Advocate Andrew Smith QC from 31 January 2015 to May 2018 continued to accept instructions from the solicitors to represent Mr A and Mr B in Case 200/15, despite his close personal involvement in their business affairs that made it inappropriate for him to do so.

...

10. Advocate Andrew Smith QC, on 18 May 2018 inappropriately accepted an instruction to appear in court for Mr A and Mr B despite having such a close personal involvement with Mr A and Mr B and their intended business dealings that it would have created a conflict of interest and affected his ability to remain impartial and independent.

...

14. Advocate Andrew Smith QC was improperly in direct contact with my Trustee in bankruptcy Ms Z in, or around, May 2018 as confirmed by her email to me dated 31 May 2018.”

[4] After sundry procedure, including a decision dated 30 April 2021 to remit to an Investigating Committee in terms of paragraph 18b of the 2015 Rules, and a report by that Investigating Committee dated 24 February 2023, the Complaints Committee issued its decision on these three stated Issues on 20 May 2024. It found each of these issues proved. It determined (at paragraphs [37] and [38] of its decision dated 20 May 2024) that:

“the committee determined that its findings, taken individually and together, demonstrated conduct which failed to have regard to fundamental obligations on the part of counsel. As such it could only be described as a serious departure from the standards of competent and responsible advocates and that would be regarded as serious and reprehensible. The committee therefore found the Member’s conduct to amount to professional misconduct.”

[5] The Complaints Committee convened again on 4 July 2024 to hear oral representations on behalf of the Member in relation to penalty, and thereafter considered whether it was appropriate to impose a penalty and, if so, what that penalty should be.

By decision dated 19 July 2024 the Complaints Committee unanimously agreed to impose an overall penalty in respect of Issues 5, 10 and 14 to direct that a severe written censure be issued to the Member.

[6] The Member has appealed to this Tribunal against the decisions of the Complaints Committee dated 20 May and 19 July 2024, in terms of Rules 34 and 35 of the 2015 Rules. By a majority decision dated 7 November 2024 the Complaints Committee granted leave to appeal. Both the Member and the Complainer were represented before this Tribunal by senior and junior counsel. The Member was represented by Mr Peter Gray KC and Mr Giles Reid advocate. The Complainer was represented by Mr Euan McKenzie KC and Mr Bilaal Shabbir advocate.

Background

[7] There is a lengthy factual background to the Issues which were considered by the Complaints Committee. We give as brief a summary as possible here to enable the reader to understand the context of the complaints against the Member, but it is neither necessary nor helpful to set out here the whole detail of the complaints. We refer to the detailed history of events set out in the Complaints Committee's decision to remit dated 30 April 2021, the Investigating Committee's report dated 24 February 2023, and the Complaints Committee's decision dated 20 May 2024.

[8] The underlying theme of all three Issues considered by the Complaints Committee was the Complainer's contention that the Member inappropriately acted, and accepted instructions to act, on behalf of persons with whom he had a close personal involvement in their business affairs, creating a conflict of interest and affecting his ability to remain impartial and independent.

[9] In about 2009 the Complainer, Mr Steven Worbey (“W”) and Mr Kevin Farrell (“F”) discussed the development of a gay dating app. In pursuit of this development a company was formed called Bender Social Networks Limited (“BSNL”). The relationship between W and F on the one hand and the Complainer on the other broke down in 2011. Two proceedings in the Court of Session ensued - (First) CA109/13, which was an action of count reckoning and payment raised by W and F against the Complainer. In the course of this action BSNL went into liquidation (the liquidation commencing on 26 January 2015) and the Complainer was made bankrupt, the bankruptcy order being made on his own petition on 29 January 2015. Subsequently, on about 2 October 2015, a second action was raised (CA200/15) which resulted in a decision of the Inner House on 26 July 2017. In each of these proceedings the Member represented W and F.

[10] The Member also admits to providing W and F with assistance in other proceedings in England that involved applications to the Intellectual Property Office in order to effect changes to the Register of Trade Marks in respect of the trademarks Bender and Brenda. The Member also appeared at the Complainer’s public examination before Deputy District Judge Constantine on 31 July 2015 when he questioned the Complainer.

[11] The Complaints Committee considered the issue of the Member’s involvement in the business affairs of W and F in the context of Issue 5 at paragraphs [20]-[26] of its decision dated 20 May 2024. Paragraph [20] sets out certain facts which the Complaints Committee found proved, and which are of such importance to this appeal that we consider that it should be repeated *verbatim* here:

“[20] The Committee then turned to consider the issue of the Member's alleged involvement in the business affairs of Mr Worbey and Mr Farrell at that time. The Committee found proved the following:

- (1) An email was sent on 31 January 2015 by the Member to Elias Paourou, then one of two joint liquidators of Bender Social Networking Limited (BSNL), whom he identified in the email as the registered owner of the trademarks,

Bender and Brenda¹. The subject of the email was 'BSNL' and the email concluded 'Kind regards, Andrew. Andrew Smith QC Advocate and Barrister'. In the email the Member referred to, variously 'our clients' and 'my clients' and set out concerns as to how the apps might be operated by the Complainer. It stated:

'Plainly you and we have an interest on having this matter controlled. And we are prepared to work with you to attempt to sort some kind of solution out as an interim measure.'

The email went on in relation to the trademarks and other matters:

'... We dispute that the company has any right to use them for reasons outlined previously. But, for now, we will be prepared to work with you without that causing difficulty. This of course means that we are fact creditors of the company and shall have a claim for breach, including an accounting for profits made by the use of the mark. In addition, it may be that we have a claim against the company for knowing receipt of profits to which it was not entitled. But again, I simply raise this to point out the financial interest our clients have as creditors.'

What we wish to do is to obtain control of the App. The only method of doing so is for Mr Elliott to disclose the various codes. We can provide the technical input to then commence operating the apps, and indeed to market it in a way that makes it lucrative and progressive. The contract that is standard between Apple and an app developer contains a clause terminating the contract upon insolvency, so it may be necessary for a new company to be established to contract with those individuals.'

I realise that Mr Elliott will be difficult about disclosing the details of the codings, or deny that he has them. I would anticipate though that you would have the ability to enforce that via the courts and to that end we would also wish to work with you. I agree that it would be sensible for you to be appointed as his trustee in bankruptcy, and that would of course permit you to take such steps against him personally as were necessary to investigate his personal affairs.'

I have no doubt - largely from the smirk on his face in court - that he sees this as a clever trick that he has pulled. He has no job other than these apps, and no income as far as we know apart from that derived from them.'

Would you be able to engage in a conference call with us at 3.00 on Monday to discuss where we go from here? As a personal creditor of Mr Elliott, holding a

¹ This was an email provided by the Member to the SLCC and was referred to by the SLCC in its decision to refer the complaint to the Faculty.'

judgment debt against him, we would wish to make an application for your appointment as his trustee. That application could be made in very short time if we have an action plan to try to stop the damage to the company asset. You may also wish, in the circumstances, to notify the Intellectual Property Office of the company's status and your appointment, lest another application be made to change the registered owner to another company. The company would then be able to stop any other company from using the names.' (sic)

- (2) The Member took part in a conference call with the liquidator on 2 February 2015. That call was on the instructions of solicitors, with an instructing agent present. (Investigating Committee Report ('IC')§ 65).
- (3) On 31 July 2015 the Member attended the public examination of the Complainer at Brighton County Court and questioned him on behalf of Mr W and Mr F. He did so on instructions as a barrister in England and Wales (IC § 51)."

[12] The Complaints Committee had before it other conduct on the part of the Member (as set out in paragraph [21] of its decision dated 20 May 2024), but did not take this into account in reaching its decision because it was unable to conclude beyond reasonable doubt that the conduct occurred during the period August 2016 and 1 September 2017.

The relevant provisions of the Guide to the Professional Conduct of Advocates

(Fifth Edition, October 2008)

[13] The introduction to the Guide provides as follows:

"The work of an Advocate is essentially the work of an individual practitioner whose conscience, guided by the advice of his seniors, is more likely to tell him how to behave than any book of rules.

In places in this Guide, it has been found convenient to state 'the rule' or 'the general rule'. Although convenient, use of the word 'rule' would be misleading if it were thought to imply that the rule is absolute and subject to no exceptions whatever the circumstances. The Guide must be read as a whole and interpreted according to its spirit rather than its letter. For the same reasons, it must not be assumed that it is enough for an Advocate to keep within the letter of a 'rule' as stated in the Guide.

It cannot be stressed too strongly that the ultimate test of an Advocate's conduct is whether it is such as to impair the trust and the confidence which others place in him and his profession."

Paragraph 1.2.3 of the Guide provides *inter alia* as follows:

"1.2.3 An Advocate acts as such in performance of an office and has no contractual relationship with his client. It follows that he cannot perform any act which must, in law, be performed by the client or by someone empowered to act as an agent on his behalf. The acts of an Advocate are acts done upon his own responsibility in performance of an office and he does not, and cannot, in any sense, act as agent of his client; that is the function of a solicitor or other professional. Although it is commonly said that an accused person or litigant is 'represented by an Advocate' or 'represented by Counsel', the use of these expressions should not be allowed to obscure the difference in law between the status and function of the Advocate and those of the agent."

Paragraph 1.2.4 provides as follows:

"1.2.4 It also follows from the fact that an Advocate acts as such in performance of an office that he cannot act in his professional capacity as an Advocate on his own behalf. He is, of course, free to plead his own cause in civil, criminal or other proceedings in exercise of his rights as an ordinary citizen, but he has no special rights or privileges by reason of the fact that he is an Advocate, nor may he wear wig or gown when doing so."

Paragraph 2.1.1 provides as follows:

"2.1 Independence

2.1.1 The many duties to which an Advocate is subject require his absolute independence, free from all other influence, especially such as may arise from his personal interests or external pressure. Such independence is as necessary to trust in the process of justice as is the impartiality of the judge. An Advocate must therefore avoid any impairment of his independence and be careful not to compromise his professional standards in order to please his client, the Court or third parties."

Paragraph 2.2 provides as follows:

"2.2 Trust and personal integrity

Relationships of trust can only exist if an Advocate's personal honour, honesty and integrity are beyond doubt. For the Advocate, these traditional virtues are professional obligations."

Paragraph 8.2.4 provides as follows:

“8.2.4 While there is no rule which prevents an Advocate giving legal advice to a relative or friend, he should remember that it is not always possible to advise a relative or friend with the degree of objectivity which the case requires.”

Paragraph 8.3.11 provides as follows:

“8.3.11 An Advocate may not allow his personal interests to affect the performance of his professional duty. Accordingly, he should not accept instructions to act in his professional capacity in circumstances where he has a direct personal interest in the outcome. Where he has, or may have, an indirect personal interest in the outcome (e.g. where he is asked to act for a company in which he is a major shareholder or for an organisation in which he holds office although unremunerated), he should consult the Dean before accepting instruction.”

The merits of the appeal

[14] We now turn to the merits of the appeal. The Complaints Committee considered each of the three issues in turn, and both senior counsel addressed us on the basis of the three issues before the Complaints Committee. We shall deal with each of these issues in turn (bearing in mind the whole of the Grounds of Appeal, the Notes of Argument, and the oral submissions as we do so). We shall then turn to the Grounds of Appeal, insofar as these have not already been addressed.

Issue 5

The Member from 31 January 2015 to May 2018 continued to accept instructions from the solicitors to represent W and F in case 200/15, despite his close personal involvement in their business affairs that made it inappropriate for him to do so.

Submissions for the Member

[15] Senior counsel for the Member submitted that the Complaints Committee erred in fact and in law in its consideration of this issue, in particular in its treatment of the report of the Investigating Committee. The framework for the remit to the Investigating Committee was Rule 18(b) and Rules 20-22 of the Faculty's Disciplinary Rules 2015. The Complaints Committee had power to make such further enquires as it considered appropriate, including remitting the matter to an Investigating Committee (with or without directions) to investigate and report back to the Complaints Committee. In this case, the Complaints Committee provided full directions to the Investigating Committee: it set out the evidential issues arising at paragraphs [27]-[63] of its decision dated 30 April 2021, and the scope of the remit was set out in paragraphs [64]-[73] of that decision.

[16] It is clear that the Complaints Committee required the Investigating Committee to determine issues of disputed fact, with the power to interview or take statements, and to ingather documents or other evidence as may bear upon the facts of the case. The Complaints Committee regarded this as necessary to enable it to give proper consideration thereafter to which of the provisions of the Guide may have been breached, if any, and to invite representations on that issue in that event. The Complaints Committee stated that its understanding of certain factual matters was incomplete, and it was a matter for the discretion of the Investigating Committee to determine what additional evidence may bear upon the facts of the case (see paragraphs [69] and [71] of the decision dated 30 April 2021).

[17] The Investigating Committee fulfilled its remit; it investigated all disputed matters in relation to Issues 5, 10 and 14 and made findings of fact and observations on credibility and reliability. However, senior counsel for the Member submitted that the Complaints

Committee had had no regard to the report of the Investigating Committee. He contrasted the findings of the Investigating Committee at paragraph 65 of its report (placing particular emphasis on paragraph 65(f)) with the Complaints Committee's consideration of the evidence at paragraphs [22] to [25] of its decision dated 20 May 2024, and submitted that they were completely at odds with each other. The Investigating Committee had found that the nature of the Member's involvement in his communications with the Liquidator between 30 January 2015 and 2 February 2015, was that they were all conducted, actually or ostensibly, as counsel on behalf of W and F as his clients, notwithstanding his use of the first person plural at points in his emails on 30 and 31 January 2015. However, the overall impression drawn by the Complaints Committee was of a commonality of interest and thus involvement beyond professional endeavour. Furthermore, the Complaints Committee found the email to be outside of its experience of communications by counsel, both in terms of its nature and content. The email bore more resemblance to a communication sent by a solicitor, or agent, on behalf of the agent's principal. Taking those two considerations together and mindful of paragraph 1.2.3 of the Guide, the Complaints Committee's view was that when read in the round the email demonstrated close personal involvement by the Member in the business affairs of W and F (paragraph [22] of the decision dated 20 May 2024 - reference also being made to paragraphs [23], [24] and [25]).

[18] Senior counsel's primary position was that, once the Investigating Committee had made a finding of fact, the Complaints Committee was not entitled to depart from that finding of fact, and was bound to accept it and proceed on it. He was asked by a member of the Tribunal if the Complaints Committee was not entitled to take a different view, and his initial position was that it was not. However, if it did take a different view, it would need to set out the basis for its rejection of the Investigating Committee's finding, and

the basis for its reaching a different view. It should have been slow to interfere with the decision of the Investigating Committee, and ought to have given comprehensive reasons for doing so. It should only have interfered with the Investigating Committee's finding if it was clearly wrong, and it should have given the Member an opportunity to comment. It failed to do so. The Investigating Committee was able to consider the email of 31 January 2015 in the context of the conference calls, and to assess the Member's credibility and reliability. By contrast, the Complaints Committee had regard to the email in isolation, and made no reference to the Investigating Committee's decision on this. Moreover, the Complaints Committee gave no notice to the Member that it intended to depart from, or revisit, paragraph 65(f) of the Investigating Committee's decision, and gave the Member no opportunity to comment on this matter. (These submissions were also relevant to Issues 10 and 14).

[19] The Complaints Committee's errors in fact, were compounded by errors in law, as set out in paragraphs 38-47 of the Note of Argument for the Member. The Complaints Committee found that the Member's conduct had been well intended, and that he had acted in good faith (paragraphs [17] and [20] of the Complaints Committee's decision dated 19 July 2024). The Complaints Committee appeared to take the view that for an advocate to give the impression that he/she is acting as an agent, even if well intended and in good faith, is a breach of the duty of independence. The Complaints Committee conflated counsel's duty of independence with the requirement for judicial impartiality and a lack of bias, but the test relating to advocates is not the same as that for judges. Paragraph 2.1.1 of the Guide sets out a positive requirement or responsibility on counsel to avoid impairment of his independence: there is no suggestion that there is a responsibility to avoid the impression of an impairment of independence. If this had been intended, the Guide would have stated

this. There is no rule which prevents an advocate giving legal advice to a relative or friend, or a close family member (paragraphs 8.2.4 and 8.3.11 of the Guide). The test is one of substance, not impression. If the test were truly one of impression, an advocate could never act properly for friends or family, and paragraph 8.3.11 of the Guide would be redundant. A breach of the duty in paragraph 2.2 of the Guide cannot be established merely on the basis of impression - particularly when the Member was found to have acted honestly, and in good faith.

Submissions for the Complainer

[20] Senior counsel for the Complainer invited us to refuse the appeal. Appearances matter. He advanced two principal propositions:

- (a) When acting in the office of Advocate there requires to be, and to be seen to be, a clear separation between the Advocate's personal and professional interests (see paragraph 1.2.4 of the Guide);
- (b) When acting in the office of Advocate there requires to be, and to be seen to be a, clear separation between the status and function of an Advocate, and the status and function of a solicitor or other professional.

These proposition run throughout the Complaints Committee's proceedings, and it is the failure of the Member to observe them that has given rise to these complaints. The Complaints Committee had not erred in its findings in any way that would entitle this Tribunal to interfere with its findings, even if the Tribunal may have been minded to reach a different view on the merits.

[21] With regard to the submission on behalf of the Member regarding a possible departure from the Investigating Committee's report at paragraphs 65(f), on a proper

analysis the main facts on which the Complaints Committee relied were not controversial. What might be controversial was the inferences to be drawn from those facts, and whether the conduct amounted to professional misconduct. These were properly matters for the Complaints Committee. The Complaints Committee looked at the facts found in paragraph 65 of the Investigating Committee's report against the whole evidence before it. The Member had an opportunity to make representations to the Complaints Committee on this issue, and the Complaints Committee were entitled to draw the inferences which they did from the material before them.

[22] Although the word "impression" is not used in the Guide, it should be remembered that the Guide must be read as a whole and interpreted according to its spirit rather than its letter. It is clear from the Guide that appearances matter. In order to make paragraph 2.1.1 work, it is necessary to imply or read in "impression". Unless this is done chaos ensues.

The Tribunal's decision on Issue 5

[23] The Tribunal is unable to accept the submission on behalf of the Member that the Complaints Committee was not entitled to depart from a finding of fact made by the Investigating Committee. Despite the terms of its remit to the Investigating Committee, the ultimate responsibility for reaching a conclusion on these three issues, and whether the Member's conduct amounted to professional misconduct, rested with the Complaints Committee. It applied itself to that task in relation to Issue 5 at paragraphs [22] to [26] of its decision dated 20 May 2024. It was entitled to draw the inferences which it did. The Complaints Committee was careful to exclude from its consideration any material about which it was not satisfied beyond reasonable doubt had occurred during the relevant period (paragraph [21] of its decision dated 20 May 2024). It considered the terms of the email of

31 January 2015 and went on to apply its own experience of communications by counsel. It considered the surrounding circumstances including the conference call with the joint liquidator and the Member's attendance at Brighton County Court. In light of this, it concluded that the Member had seriously compromised his duty of independence narrated in paragraph 2.1.1 and the professional obligation of trust narrated in paragraph 2.2 of the Guide. The Complaints Committee reached its conclusion on Issue 5 on the basis of inferences which it was entitled to draw from the established facts, and we can find no error, in fact or in law, which would justify this Tribunal in interfering with its decision on Issue 5.

[24] We are not persuaded by the submission on behalf of the Member that the Complaints Committee erred in considering the "impression" or the "overall impression" to be drawn from the Member's conduct. It is correct that this word does not appear in the Guide, but the wording of the Introduction to the Guide is important - it must be read as a whole, and interpreted according to its spirit rather than its letter. The assessment of whether a Member has avoided any impairment of his independence is not subjective: it will not do for a Member to say that despite appearances of close business involvement or lack of independence he was in fact acting independently. The assessment is that of the impartial observer, aware of all the relevant facts and drawing an inference from those facts. The impression created by those facts is central to that assessment. Taking account of all of the Grounds of Appeal (to which we turn later) we cannot say that the Complaints Committee erred in its conclusion on Issue 5.

Issue 10

The Member on 18 May 2018 inappropriately accepted an instruction to appear in court for W and F despite having such a close personal involvement with W and F and their

intended business dealings that it would have created a conflict of interest and affected his ability to remain impartial and independent.

Submissions for the Member

[25] Many of the points raised in relation to Issue 5 applied in relation to Issue 10 as well. Senior counsel referred us to paragraphs 24-30 of his Note of Argument. The central paragraph of the Complaints Committee's decision on this issue were paragraphs [29] and [30]. In paragraph [29], three matters were mentioned - (1) the Member's introduction of Mr Grier to W and F, which must have occurred before 18 May 2018; (2) the Member spoke to the Complainer's trustee in bankruptcy about the background facts of the Complainer's bankruptcy and the Complainer's potential estate before 18 May 2018; and (3) the Member's introduction of his brother to W and F before 18 May 2018. In paragraph [30] the Complaints Committee was satisfied beyond reasonable doubt that, taken with the other proven facts, the introductions and discussion together demonstrated a level of interest that did indeed compromise the Member's independence from W and F. The Complaints Committee therefore determined that the Member had accepted instructions to appear in court for W and F despite having such a close involvement with them and their business dealings, which created a conflict of interest and affected his ability to remain impartial and independent and undermined his duty of independence, contrary to paragraph 2.1.1 of the Guide.

[26] Senior counsel submitted that the reasoning of the Complaints Committee on this matter was fundamentally flawed, because the Complaints Committee failed to recognise that each of the three matters raised in paragraph [29] did not occur when W and F were clients of the Member. This is clear from the last paragraph [164] of the Investigating

Committee's report - the last substantive step to progress action CA109/13 was the court's interlocutor of 12 March 2015, and the effective conclusion of action CA200/15 was the court's interlocutor dated 26 July 2017. The Investigating Committee found (at paragraph 158) as a matter of fact that thereafter the Member was not on a retainer from W and F after the conclusion of the Court of Session litigations. The Member was not instructed by W and F as counsel in Scotland in any cause at the time of his introduction of W and F to his brother or to Mr Grier. The Complaints Committee failed to have regard to the fact that the three matters listed at paragraph [29] occurred after W and F had ceased to be clients of the Member. The Complaints Committee also failed to have regard to the Investigating Committee's finding at paragraph 151 that the Member personally had gained no pecuniary advantage directly or indirectly through his involvement with the various applications to the IPO, nor does he expect to; his motivation for assisting W and F was not financial; and that his friendship with them is ongoing and unrelated to their ownership or otherwise of any dating apps. The Complaints Committee therefore erred in inferring any lack of independence by the Member in this regard. There was no finding by either the Investigating Committee or the Complaints Committee that his conduct in court on 18 May 2018 was improper (see paragraphs 118 and 152 of the Investigating Committee report). The Tribunal should therefore find that the Complaints Committee had no basis of fact for its conclusion on Issue 10. The Complaints Committee's errors of law on this issue were the same as those discussed above in relation to Issue 5.

Submissions for the Complainer

[27] It was not in dispute that the Member appeared in court on behalf of W and F on 18 May 2018, the question being whether it was appropriate for him to do so. In answering

this question, the Complaints Committee had regard to the whole history of the Member's conduct, including the email of 31 January 2015, his conference call with the Liquidator on 2 February 2015, attendance at Brighton County Court on 31 July 2015, and the three additional factors listed at paragraph [29] of the Complaints Committee's decision dated 20 May 2024. The Complaints Committee was entitled to have regard to all this conduct. It found that "taken together they demonstrated beyond reasonable doubt an ongoing close personal involvement in the affairs of W and F and their intended business dealings", and that

"taken with the other proven facts the committee was satisfied beyond reasonable doubt that the introduction and discussion together demonstrate a level of interest that did indeed compromise the Member's independence ... from W and F" (paragraph [30]).

These were findings the Complaints Committee was entitled to make, on the basis of the evidence before it, and for the reasons it gave.

The Tribunal's decision on Issue 10

[28] Whether or not W and F were clients of the Member at the time of the three matters raised in paragraph [29] is neither here nor there - it does not bear on the issue of whether the Member should have accepted instructions to appear in court on behalf of W and F on 18 May 2018. The three additional factors listed by the Complaints Committee at paragraph [29] are not suggested as being worthy of blame in themselves - they are further factors which, in addition to the conduct already found proved, point to the nature of the Member's involvement in the business affairs of W and F. It is immaterial that they occurred at a time when W and F were not clients of the Member. They form part of the factual context against which the question whether it was appropriate for the Member to

accept instructions to appear in court on behalf of W and F fell to be answered. The Complaints Committee was entitled to have regard to this, and was entitled to reach the conclusion it did on Issue 10. There is no merit in the appeal on Issue 10.

Issue 14

The Member was improperly in direct contact with the Complainer's Trustee in bankruptcy Ms Bell in, or around, May 2018 as confirmed by her email to the Complainer dated 31 May 2018.

Submissions for the Member

[29] The Complaints Committee found that the meeting between Ms Bell and the Member on a date in May 2018 was upon request, and not on the Member's own initiative. The Complaints Committee determined that the Member was acting as agent for his client in discussing matters with Ms Bell (paragraph [32]). There was no basis for this finding. The Investigating Committee found that the Member's retainer from W and F had concluded in July 2017. The only basis was the fact of a conversation which took place at the request of Ms Bell, not the Member, and which the Member attended as he was asked to do so (IC report paragraph 36). There is no specification as to the content of the conversation. There was no basis for the finding in the Complaints Committee report that the Member was acting as agent; there was no finding by the Investigating Committee of anything said or done by the Member which would support this; all litigation had ended by July 2017 at the latest, so W and F were no longer clients at the time of the meeting with Ms Bell in May 2018; and this was never put to the Member for his comment. If it had been, he would have explained that as an officer of the court in England and Wales he would have

considered that it was his professional duty to assist Ms Bell as the incoming Trustee with any queries which she wished to raise. Ms Bell was not at that stage formally appointed, but on formal appointment she would have had the power to compel such cooperation - Insolvency Act 1986 section 366. The appeal insofar as directed at Issue 14 should be allowed.

Submissions for the Complainer

[30] Senior counsel for the Complainer submitted that the Complaints Committee was entitled to reach the conclusion it did at paragraph [32] of its decision dated 20 May 2024, on the basis of the evidence before it, and for the reasons it gave.

The Tribunal's decision on Issue 14

[31] The Complaints Committee's treatment of Issue 14 was very short. It accepted that the meeting with Ms Bell was not at the Member's initiative. The meeting occurred at a time when W and F were no longer clients of the Member. There was no evidence of what was said at the meeting - the Investigating Committee found only that the discussion related to the Complainer's bankruptcy and the potential estate. In these very limited factual circumstances it is difficult to understand the Complaints Committee's statement that "the conversation was that which might be expected to be entered into by an agent (solicitor) for W and F". We can find no facts to support this assertion. Without supporting facts, the Complaints Committee was not entitled to determine that the Member's conduct was acting as agent for his client. We are persuaded by the submissions on behalf of the Member on Issue 14.

Grounds of Appeal

[32] We considered each of the Grounds of Appeal when reaching our determination on each of the three issues above. However, we now give brief comments on each ground.

Ground 1 - Errors of fact and application of the Investigating Committee report

[33] 1. As we have already indicated, we do not accept that the Complaints Committee was bound by the findings of the Investigating Committee. In any event, the Complaints Committee was engaged in drawing inferences and reaching conclusions. In relation to Issues 5 and 10 it was entitled to draw the inferences and reach the conclusions which it did.

2(a) The Complaints Committee gave the Member the benefit of any reasonable doubt, and it approached the issues of fact on that basis having regard to the documentary material before it and the findings of the Investigating Committee. We do not consider that the Complaints Committee erred at paragraph [22] of its decision. It gave a careful assessment of the facts relating to Issue 5 at paragraphs [22] to [25] of its decision, and it was entitled to reach the conclusion which it did at paragraph [26].

2(b) and (c). We do not consider that the Complaints Committee erred at paragraph [23] of its decision. It was entitled to use its own cumulative experience, and to consider the conference call with the joint liquidator on 2 February 2015 and the Member's attendance at Brighton County Court in light of its view of the email of 31 January 2015. The assessment carried out by the Complaints Committee at paragraphs [22] to [25], and its conclusion at paragraph [26], need to be considered as a whole.

2(d) and (e). For the same reasons, we do not consider that the Complaints Committee erred in its findings and conclusions at paragraphs [25]-[26] of its decision of 20 May 2024. The Complaints Committee was entitled to look to the whole material before it, to draw

inferences from it, and to reach conclusions on that basis. We find no error of fact which would justify setting aside the Complaints Committee's conclusions on Issue 5.

3(a). We disagree. The Complaints Committee was entitled to reach the conclusion which it did in relation to Issue 5, and it was entitled to take this into account when considering Issue 10.

3(b). It is immaterial that at the time of his contact with Mr Grier and the Member's brother, and his discussion with Ms Bell, the Member was no longer instructed by W and F in any litigation. These were factors to which the Complaints Committee was entitled to attach weight when assessing the extent of the Member's involvement with the business interests of W and F, which was central to the consideration of whether it was appropriate for the Member to accept instructions to appear in court for W and F on 18 May 2018. This conduct was relevant even when W and F were not clients of the Member.

3(c). The Member's conduct of the hearing is not in issue. The question for the Complaints Committee to decide was whether it was appropriate for the Member to accept an instruction to appear in court for W and F despite having such a close personal involvement with them and their intended business dealings that it would have created a conflict of interest and affected his ability to remain impartial and independent.

3(d). We see no error by the Complaints Committee in finding Issue 10 to be proved.

4. We agree.

Errors of law

[34] 5 (a) to (d). We see no error in the Complaints Committee's approach to these matters. We agree with senior counsel for the Complainer that although "impression" is not a word to be found in the Guide, it falls to be implied. The test is not a subjective one - the

Member cannot rely on his own assertion that he was independent and not swayed by any personal interests. In looking at the conduct of a member, the Complaints Committee required to consider what impression was created in the mind of the reasonable and properly informed observer in light of all the circumstances. It is clear from the Guide that not all conduct by a member involving family or friends is prohibited, nor all conduct involving matters in which a member has some degree of business interest (paragraphs 8.2.4 and 8.3.11 of the Guide). There is what might be described as a sliding scale of involvement, ranging from a close personal interest at one end, to a remote or contingent or very indirect personal interest at the other. It is for the Complaints Committee to assess where on this scale the Member's involvement lies, and in doing so it is entitled to have regard to the impression created by the Member's conduct. The Complaints Committee carried out this assessment, and we can find no error of law in the way in which it did so.

6. We have agreed with the submission for the Member that the Complaints Committee's decision on Issue 14 cannot stand. It is unnecessary for us to consider this Ground of Appeal further.

7 - Professional misconduct

[35] Senior counsel for the Member relied on paragraphs 53-57 of his Note of Argument in relation to this Ground of Appeal, and did not address us on it further. Reference was made in the Note of Argument to the test in *Sharp v Law Society of Scotland* (1984) SC 129 per Lord President Emslie at 134/5. The Complaints Committee found (at paragraph [37] of its decision dated 20 May 2024) that its findings, taken individually and together, demonstrated conduct which failed to have regard to fundamental obligations on the part of counsel. As such, it could only be described as a serious departure from the standards

of competent and responsible advocates and that would be regarded as serious and reprehensible. It was necessary to identify a breach which would be regarded as serious and reprehensible; to consider the whole circumstances; and to consider the question of “culpability”. It was submitted that the Complaints Committee appeared to have considered the first of these, but not to the second or (in particular) the third. The Complaints Committee did not find that the Member had at any stage acted dishonestly or made any representation to the court that was anything other than in accordance with his professional duties. It was found that the Complainer had suffered no loss, and the Complaints Committee observed in its July decision (at paragraph 17) that the Member had not acted in bad faith, his conduct had been well intended, and that the issue was rather a lack of understanding of professional boundaries.

[36] We are satisfied that the Complaints Committee did indeed consider the whole circumstances and the question of culpability. It referred to the absence of bad faith and dishonesty on the part of the Member, and that his conduct had been well intended. However, the Guide attaches considerable importance to the requirement for an Advocate to have absolute independence, free from all other influence, especially such as may arise from his personal interests or external pressure (see in particular 2.1.1 of the Guide). Having found that the Member had failed to maintain his independence, and after careful consideration of all the circumstances in paragraphs [35]-[37] we consider that the Complaints Committee was entitled to conclude that the Member’s conduct amounted to professional misconduct.

[37] We have considered the effect which our allowance of the appeal in relation to Issue 14 might have on a finding of professional misconduct. Issue 14 was referred to by the Complaints Committee as forming part of the circumstances to which it had regard.

However, we have concluded that the findings of the Complaints Committee regarding Issues 5 and 10 were sufficiently serious on their own to justify the conclusion that the Member's conduct in relation to these issues amounted to professional misconduct.

8 - Procedural fairness

[38] Senior counsel for the Member relied on paragraphs 58-75 of his Note of Argument in relation to this Ground of Appeal, which had three elements - fair notice of the complaint, procedural fairness, and delay.

(a) Fair notice of the complaint (paragraphs 59-63 of the Note of Argument). Natural justice required fair notice of a complaint to be given so that a person charged can properly present their own case: *O'Reilly v Mackman* [1983] 2 AC 237 at 276. Moreover, Article 6(3)(a) ECHR requires that a person "be informed promptly ... and in detail of the nature and cause of the accusation against him". This applies to disciplinary proceedings - *Albert and Le Compte v Belgium* (1983) 5 EHRR 533. It was submitted that the specification of the issues does not approach that requirement either at common law or in terms of Article 6(3). Through his agents, the Member made repeated requests that he be advised as to what the charge against him was, and what he was supposed to have done that was wrong: these remain unanswered.

(b) Procedural fairness (paragraphs 64-69 of the Note of Argument). The Complaints Committee's approach to a significant number of key facts was contrary to that taken by the Investigating Committee. The Member was not made aware that the Complaints Committee would base its decision on facts other than those found by the Investigating Committee, and his submissions to the Complaints Committee were directed at the findings by the Investigating Committee. This meant that certain key issues were not addressed at all. The

Complaints Committee also proceeded on a different legal basis from the Investigating Committee, namely that the test was one of impression rather than substance. The Member had no opportunity to make submissions on these matters of law.

(c) Delay (paragraphs 70-75) of the Note of Argument. Article 6(1) ECHR requires a hearing to be held within a reasonable time. Following proceedings in the Inner House of the Court of Session ([2022 CSIH 19]), Issues 5, 10 and 14 were referred to the Faculty of Advocates on 29 April 2020. The remit by the Complaints Committee to the Investigating Committee was made on 30 April 2021; the Investigating Committee did not report until 24 February 2023; the Complaints Committee's decision on the three issues was not issued until 20 May 2024; and the final disposal of the complaint, being the decision on penalty, was not issued until 19 July 2024. These proceedings involved allegations of the utmost professional seriousness hanging over the Member, and have caused him profound difficulty and anxiety.

[39] We have given careful consideration to each of the branches of this Ground of Appeal, but we have concluded that there is no merit in it. As to fair notice, both Issue 5 and Issue 10 make it clear that what is being complained of is that the Member accepted instructions to appear in court on behalf of W and F despite having a close involvement in their business affairs. We consider that there is adequate specification provided to enable the Member to answer these charges. We do not agree that there has been procedural unfairness in the proceedings before the Complaints Committee: the Member was given adequate opportunity to address the Complaints Committee on any factual or legal matters, and we have discussed above our view on the question of impression. With regard to delay, it is most regrettable that it took so long from the referral by the court on 29 April 2020 to the decision on penalty on 19 July 2024. However, on looking at the chronology of events, we cannot identify a period of apparent prolonged inactivity. The procedures under the rules

are perhaps unnecessarily complicated, but the amount of material which was presented to the Complaints Committee and the Investigating Committee was very considerable, and spanned a long period. Neither the Complaints Committee nor the Investigating Committee was idle, and it inevitably took time to ingather and collate the voluminous material, interview witnesses, arrange hearings, consider submissions and issue decisions. Moreover, the Covid pandemic intervened. We are unable to conclude that an unreasonable period of time elapsed before the hearing. We do not accept that the proceedings have been vitiated by procedural unfairness.

9 and 10 - Sanction

[40] Beyond adopting his Note of Argument, senior counsel for the Member did not address the question of sanction. The matter is touched on briefly at paragraphs 76 and 77 of his Note of Argument. As we have found no error by the Complaints Committee in finding breaches of the Guide to be established in relation to Issue 5 and 10, we are not persuaded by either of these Grounds.

Disposal

[41] For the reasons given above, we shall refuse the appeal in respect of Issues 5 and 10, and uphold the complaint on these issues. We shall allow the appeal in respect of Issue 14 and dismiss the complaint on this issue. With regard to Issues 5 and 10 we adhere to the disposal imposed by the Complaints Committee in paragraph [21] of its decision dated 19 July 2024. Our decision is unanimous.