



**The Registrar of La Chambre de Discipline v An Advocate**  
Royal Court  
11<sup>th</sup> May 2017

**JUDGMENT**  
**22/2017**

Appeal by the Registrar of a decision of La Chambre de Discipline to dismiss a case against the respondent.

**IN THE ROYAL COURT OF GUERNSEY**

**FULL COURT**

**Between: THE REGISTRAR OF LA CHAMBRE DE DISCIPLINE (“the Registrar”)**  
**and**  
**AN ADVOCATE (“the Respondent”)**

**Judgment handed down: 11 May 2017**

**Before: Sir Richard Collas, Bailiff and Jurats S E I Mowbray, B J Bartie, T G Snell, D P L  
Hodgetts LVO, N D McCathie, M A Spaargaren, D A Grut, S J Morris, D J Mortimer**

**Advocate for the Registrar: Advocate J E Roland**  
**Advocate for the Respondent: Advocate K M Le Cras**

**Introduction**

1. This is the first occasion on which a disciplinary matter concerning an Advocate has come before the Royal Court since the coming into force of The Guernsey Bar (Bailiwick of Guernsey) Law, 2007 (“the 2007 Law”). It has done so by way of an appeal by the Registrar from a decision of La Chambre de Discipline in which La Chambre, by a majority, dismissed a complaint against the Respondent.

**The Procedure for Dealing with Complaints**

2. The Royal Court has always had the authority and responsibility to discipline members of the Guernsey Bar. However a new procedure for handling complaints against Advocates was introduced in Part II of the 2007 Law. Section 17 provides that La Chambre de Discipline (“the Chambre”) shall *“hear any complaint concerning a member of the Bar in respect of professional misconduct and provided that for the purposes of hearing a complaint the Chambre shall consist of one member from each of three panels namely a lay person, an Advocate and a senior lawyer”*.

3. Section 18 provided for an Appointments Committee comprising the Bailiff, the Senior Jurat and the Bâtonnier to appoint a panel of five persons for each category of member of the Chambre. To be eligible as a member of the lay panel, a person shall be ordinarily resident in the Bailiwick, not a Jurat of the Royal Court of Guernsey or the Court of Alderney nor a member of any other tribunal in the Bailiwick and must not be or have been a member of the legal profession in any jurisdiction. In order to be eligible for the Advocates' panel, an Advocate must be of at least five years standing and not an officer of the Bar or a member of the Bar Council. The third category is comprised of practitioners or members of the judiciary in any jurisdiction in the British Isles of at least fifteen years standing who are not Advocates. Appointment to one of the three panels is for a period of five years only and a member is not eligible for re-appointment within a period of five years of the expiry of his previous term.
4. Section 19 provides for the Appointments Committee to appoint a President of the Chambre from the panel of lay persons. The president is appointed for a period not exceeding five years. He or she has a responsibility for (a) considering with the Bâtonnier whether a complaint should be referred to the Registrar; (b) selecting the members of the Chambre to hear a complaint; and (c) giving directions for the management of any complaint before the Chambre.
5. Section 20 created the post of Registrar of the Chambre, appointed by the Royal Court for a term not exceeding five years. The Registrar is responsible for
  - “(a) the collection and presentation of evidence in respect of a complaint made against a member of the Bar,*
  - (b) the organisation of hearings of the Chambre, and*
  - (c) the provision of advice and assistance to –*
    - i. the President (except in relation to the exercise of his powers under section 16 and 21) and*
    - ii. the Chambre.”*
6. Section 21 provides that a complaint shall first be considered by the President of the Chambre and the Bâtonnier who may first invite the Respondent to comment in writing on the complaint and then invite the complainant to respond in writing to any such comment. Unless they consider the complaint is vexatious, frivolous or not one of professional misconduct, the Bâtonnier is required to refer the complaint to the Registrar enclosing any comments from the Respondent or the complainant and at the same time informing the complainant, the Respondent and Her Majesty's Procureur of the referral.
7. Section 22 requires the Registrar to investigate the complaint. For the purpose of doing so he may take statements from any witness as to fact, gather any document or other evidence, instruct any expert witness and request any legal advice that he considers may bear upon the complaint. After completing his investigations, the Registrar must decide whether a prima facie case is disclosed. If there is a prima facie case, he refers the complaint to the Chambre; he informs the complainant, the Respondent, the President and Her Majesty's Procureur of the referral; and he sends a statement of facts to the Respondent, the President and the Chambre. If he decides that no prima facie case is disclosed he shall refuse to refer the complaint to the Chambre and shall inform the complainant and the Respondent accordingly.
8. Section 23 requires the President to select the members of the Chambre by choosing one member from each of the three panels.
9. Section 24 requires the President to give such directions as he sees fit to ensure the complaint is considered fairly and expeditiously.

10. Section 25 (1) provides that the Chambre shall hear any complaint in private. However, subsection 2 provides that *“the Chambre may hear any complaint in public at the request of the Respondent if it is satisfied that in all the circumstances it would be in the interests of justice to do so.”* The members of the Chambre are required to appoint a chairman from among their number. Any question shall be determined by a simple majority of the members of the Chambre. The standard of proof when determining if the Respondent is guilty of professional misconduct is the criminal standard of proof save in respect of a breach of the proceeds of crime regulations where it is the civil standard of proof that is to be applied. Both the Registrar and the Respondent have the right to be heard, to call evidence and to cross examine any witness. Subject to that the Chambre is master of its own procedure.
11. Section 26 empowers the President to require a person to attend and give evidence or produce documents.
12. Section 27 provides that the Chambre shall give a reasoned decision in writing as to its findings in respect of a complaint. The Chambre has the following methods of disposal: dismissal; private reprimand; public rebuke; a fine in a sum not exceeding level 3 on the uniform scale; an order that the Advocate completes such training as the Chambre shall direct; an order suspending the Advocate from practice as an Advocate for a period not exceeding 3 months; or it may refer the complaint to the Royal Court for consideration of a larger fine, a longer period of suspension or the disbaring of the Advocate. The Chambre has power to make a costs order against the Respondent. The reasoned decision of the Chambre is to be sent to the complainant, the Registrar, the Respondent and Her Majesty’s Procureur.
13. Section 28 contains a right of appeal to the Royal Court exercisable by the Registrar or the Respondent if it is instituted within twenty eight days of the sending of the reasoned decision. Section 28 (5) provides: *“when disposing of an appeal, the Royal Court –*
  - (a) shall give a reasoned decision in writing,*
  - (b) shall have the powers of the Chambre under Section 27 and its own powers under Section 29 to dispose of the complaint and make an order of costs, and*
  - (c) may make an order of costs in respect of the appeal proceedings as it sees fit.”*
14. Section 29 authorises the Chambre to refer a complaint to the Royal Court. Where it does so, the Court must consider the most appropriate disposal in all the circumstances.
15. Section 30 provides for a right of appeal from the Royal Court to the Court of Appeal exercisable by the Registrar or the Respondent on a point of law only.
16. Section 31 enables the Bâtonnier’s powers to be exercised by the Deputy Bâtonnier in certain circumstances.
17. Section 32 provides for any fine paid by a Respondent to be payable to Her Majesty’s Receiver General and recoverable as a civil debt.

## **The Facts**

18. The circumstances relating to the present complaint were set out by the Bailiff in a judgment dated 6 December 2016. It is sufficient to provide a short summary in this judgment.
19. There were two complainants. Their husbands were engaged in a business conducted through a company beneficially owned by the two husbands. The husbands wished to stand

as guarantors in respect of certain liabilities of their company. The guarantees were to be secured over their respective family homes. Each of the two family homes was jointly owned by one of the complainants and her husband. In order to obtain an effective charge, the lender required each complainant to consent to a bond to be registered against her family home securing her husband's liability under the guarantee. Neither of the complainants had any direct or financial interest in the husbands' company. In each case, their only involvement was as a joint owner of the family home against which the husband's liability under the guarantee was to be secured. It was a requirement of the lender that each of the complainants receive full and independent legal advice as to the meaning and effect of consenting to a bond.

20. The Respondent's firm were acting for the lender in the transaction, represented by a colleague of the Respondent. The Respondent's colleague wrote to one of the complainants advising her that the lender required written confirmation that each of the complainants "*will give informed consent to the bond and fully understands the implications of it.*"
21. The complainants were concerned about the costs that might be incurred if they were required to go to an independent firm for legal advice and were also concerned that there might be a delay in registering the bonds. Consequently they asked if the Respondent's firm could give them the required advice, to be delivered to the two of them both attending at the same time.
22. The Respondent's colleague replied stating that the choice of lawyer must be for the complainants but the requirement for independent legal advice did not preclude a partner in the firm advising the lender from giving advice.
23. Following the exchange of correspondence, the complainants attended with the Respondent and, after meeting with him, he provided the confirmatory letter required by the lender. The complainants consented to the bonds in favour of the lender and the bonds were registered against their respective properties.
24. The Chambre recorded in its decision that it had received conflicting accounts as to whether the advice given by the Respondent to the complainants was adequate. However, as directed by the Registrar, the Chambre were not required to decide on the adequacy or otherwise of the advice and it did not do so.
25. Rules 46 and 49 of The Rules of Professional Conduct ("the Rules") are engaged. They provide as follows:

*"Rule 46*

*Subject to Rule 49 an Advocate or firm of Advocates should not accept instructions to act for two or more clients where there is a conflict or a significant risk of a conflict between the interests of those clients.*

*Commentary*

*Where an Advocate already acts for one client and is asked to act for another client whose interests conflict or appear likely to conflict with those of the first client, the Advocate should generally refuse to act for the second client."*

*"Rule 49*

*An advocate may act for both seller and buyer on a transfer of land, or for both lessor and lessee, or for both lender and borrower, provided the Advocate obtains the informed consent of both parties to his or her acting.*

### *Commentary*

*“Informed consent” means consent given in the knowledge that there is a potential conflict between the parties and that, as a result, the Advocate might be disabled from acting if a conflict arises, or from disclosing to each party the full knowledge which he or she possesses about the transaction, or might be disabled from giving advice to one party which conflicted with the interests of the other, and if all parties are content to proceed on that basis, the Advocate can properly act for both: see Clark Boyce v Mouat (1993) 4 All ER (Privy Council).”*

26. In a reasoned decision delivered on 3 May 2016 the Chambre (Advocate Strappini, Mrs S Mason and A Moore) decided by a majority that Rule 46 was not applicable and therefore dismissed the complaint. In exercise of his right of appeal under section 28 of the 2005 Law, the Registrar appealed the decision to the Royal Court. Sitting alone, the Bailiff delivered a judgment on 6 December 2016 in which he held that Rule 46 was applicable and he allowed the appeal.
27. Rule 49 amounts to a caveat to Rule 46 allowing an Advocate to act for two parties where he has their informed consent to do so. At the hearing before the Chambre, the Respondent did not claim the benefit of the exception in Rule 49 as it was his case that there was no requirement to do so following his understanding that Rule 46 did not apply. Having dismissed the appeal, the Bailiff adjourned the matter to enable the parties to prepare further submissions for a hearing before Jurats to determine the appropriate sanction.
28. The hearing before the Jurats was held in private because one of the sanctions available to the Court is a private reprimand. The complainants were invited to attend but they had no right to address the Court. The Court reserved its decision. The Bailiff retired with the Jurats, he reminded them of the relevant facts, summarised counsels’ submissions and directed the Jurats on the law. The Bailiff’s directions are set out in full in this judgment.

### **The Principles**

29. At the Bailiff’s request, H M Procureur, as *amicus curiae*, had conducted research as to the imposition of sanctions in comparable jurisdictions in circumstances similar to the present. She identified a number of overriding issues. Her advice which was circulated to counsel for both the Registrar and the Respondent prior to the hearing before Jurats read:

#### **“Overriding issues**

##### **Uniformity of underlying principles**

In a number of jurisdictions<sup>1</sup>, the case of [\*Bolton v The Law Society\*](#) [1993] EWCA Civ 32 (06 December 1993) has been cited as authority when considering the purpose of sanctions, particularly the dicta of Bingham (Master of the Rolls) where he stated that –

*“...14. Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the Tribunal has almost invariably,..., ordered that he be struck off the Roll of*

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<sup>1</sup> i.e. Jersey, Isle of Man, Ireland and Scotland

*Solicitors. ... If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the Tribunal as an informed and expert body on all the facts of the case. Only in a very unusual and venial case of this kind would the Tribunal be likely to regard as appropriate any order less severe than one of suspension.*

*15. It is important that there should be full understanding of the reasons why the Tribunal makes orders which might otherwise seem harsh. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him again. In most cases the order of the Tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. .... The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth... A profession's most valuable asset is its collective reputation and the confidence which that inspires.*

*16. Because orders made by the Tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases.... The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price...."*

The Court may therefore wish to consider whether or not it also wishes to adopt these principles when considering what might be the appropriate sanction in this case. There are also other judgments to which it may wish to have regard, see further paragraph 2.2.

### **Relevance of the factual matrix**

It has not been possible to distil any set of principles from any jurisdiction in relation to this case, because it seems that the common practice in all jurisdictions is to consider the relevant factual matrix<sup>2</sup>. This seems to be a condition precedent for consideration of the appropriate sanction, as illustrated by the dicta of Mr Justice Popplewell in the matter of [Fuglers LLP & ors –v- the Solicitors Regulatory Authority](#) [2014] EWHC 179 (Admin) where he wrote as follows –

#### ***"Correct approach of a Solicitors' Disciplinary Tribunal to sanction***

*28. There are three stages to the approach which should be adopted by a Solicitors Disciplinary Tribunal in determining sanction. The first stage is to*

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<sup>2</sup> In the Jersey case of *AG v Begg* [2014] JRC 254 the then Bailiff stated that 'It is a perilous and unsatisfactory course to try and compare the detailed facts of one case with another in order to see whether the penalty should be higher or lower', thus emphasising the need to consider the facts of each.

*assess the seriousness of the misconduct. The second stage is to keep in mind the purpose for which sanctions are imposed by such a tribunal. The third stage is to choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question.*

*29. In assessing seriousness the most important factors will be (1) the culpability for the misconduct in question and (2) the harm caused by the misconduct. Such harm is not measured wholly, or even primarily, by financial loss caused to any individual or entity. A factor of the greatest importance is the impact of the misconduct upon the standing and reputation of the profession as a whole. Moreover the seriousness of the misconduct may lie in the risk of harm to which the misconduct gives rise, whether or not as things turn out the risk eventuates. The assessment of seriousness will also be informed by (3) aggravating factors (eg previous disciplinary matters) and (4) mitigating factors (eg admissions at an early stage or making good any loss). ...*

*30. At the second stage, the tribunal must have in mind that by far the most important purpose of imposing disciplinary sanctions is addressed to other members of the profession, the reputation of the profession as a whole, and the general public who use the services of the profession, rather than the particular solicitors whose misconduct is being sanctioned. In Bolton v The Law Society Sir Thomas Bingham MR stated the guiding principles as follows,....*

*31. Those statements were made in a case in which the solicitor had not been guilty of deliberate dishonesty or conscious impropriety, but had acted in a way which the tribunal characterised as naïve and foolish in disbursing the sums received on behalf of his client, as prospective purchaser of a property, to the vendor, in anticipation of completion which did not then take place. Once the shortage on the client account was discovered it was promptly made good by the solicitor.... The Court of Appeal held that his conduct merited the penalty imposed by the tribunal of suspension from practice for two years.*

*32. As this and other authorities make clear, although two elements of the sanction's purpose may be to punish the solicitor in question and to deter repetition of similar or other misconduct by him, these are not the main purposes. The primary purpose of the sanction is to deter others and uphold the reputation of the profession.... In determining sanction the tribunal will properly have in mind the message which the sanction will send to other solicitors for the purposes of promoting and maintaining the highest standards by members of the profession, and the high standing of the profession itself in its reputation with the public at large. This latter aspect engages not only the public's confidence in the standards maintained by practising solicitors, but also its confidence in the organs of a self regulating body to conduct effective and fair disciplinary regulation.*

*33. At the third stage, the tribunal will first consider which category of sanction is appropriate from the range which is available to it. ..."*

It seems from the above, that an essential part of assessing the appropriate sanction is the harm caused, which is not known in this case.

The results of this research are detailed in the comparative analysis below. However, this has revealed one issue which, subject to the views of the Court, may affect the Court's ability to determine a sanction at this stage. Namely, in respect of the other jurisdictions from which it has been possible to find and read

the disciplinary cases, all such cases appear to have been considered in light of the full relevant factual context. In this particular case, whilst the circumstances surrounding the complaint (that led to the finding of the breach) have been agreed, there is no agreement or finding as to the advice given, which formed the subject of the complaint, paragraph 12.13 of the Chambre's decision (as recorded in the judgment) stated that –

*"...Differing accounts have been given in evidence as to what was or was not said at the Meeting and as to whether the advice...was adequate. We repeat that we as the Chambre de Discipline are not concerned with determining the nature, extent or adequacy of the advice that was given..."*

It may be that if there is separately to be a full trial on the relevant facts it would be premature for the Chambre, or the Court to make a finding of fact (on the basis of *lis alibi pendens*). Nonetheless, the absence of such a finding now leaves the Court in the difficult position of having to consider what sanction should be imposed in respect of the breach, without knowing whether the breach arose in the context of full and proper advice being given or otherwise. It is clearly possible that in this case, at one end of the spectrum, full and proper advice, as required by *Etridge*, was given or, at the other end of the spectrum, inadequate advice was given. The nature and extent of the advice should inform consideration of the appropriate sanction, the professional misconduct identified by the Court might only relate to a technical breach of the rules or, it might correlate to conduct which has been described in other jurisdictions as 'serious professional misconduct'. This factual vacuum appears to make the Court's task even trickier."

30. Following receipt of H M Procureur's advice, counsel for the parties were invited to consider whether the sanctions hearing could go ahead as planned on 4<sup>th</sup> May or whether there should be a further adjournment to enable the nature and extent of the advice given by the Respondent to be established. Neither party wished there to be a further adjournment. The Registrar said that when he initially investigated the complaint, he was satisfied that there was no need for the Chambre to consider the adequacy of the advice given by the Respondent. The President of the Chambre and the Deputy Bâtonnier had reached the same conclusion before referring the complaint to him. He saw no need to alter his view following receipt of the Bailiff's judgment in the appeal. The question of the adequacy of the advice might be a matter for determination in separate proceedings in the civil courts but was not relevant to the present complaint. Advocate Roland, on behalf of the Registrar, said:

*"An advocate may be disciplined for failure to obtain informed consent in a case without there being any allegations of negligent advice being given. Conversely, informed consent may have been obtained, and the advice subsequently given may be negligent. In either case, there is no causal link between negligent advice and an advocate acting in conflict of interest."*

31. The Bailiff accepted that there was no causal link between the conflict of interest and the quality of the advice in the present case. After investigating the complaint, the Registrar had been satisfied there was no causal link between the two and had referred the matter to the Chambre on that basis. The Bailiff was therefore satisfied that there was no need for the Court to take the content of the advice into account when determining the sanction.
32. The Bailiff directed the Jurats that the principles to be adopted in this jurisdiction are those set out by Bingham MR in Bolton and that the approach to be adopted when determining the sanction is as set out by Popplewell J in Fugler, cited above.

### **Counsels' submissions – the Registrar**

33. Advocate Roland appearing on behalf of the Registrar set out the factual circumstances relevant to the Courts decision as to the sanction to be imposed. She submitted that the requirement for the complainants to obtain independent legal advice before consenting to bonds was in accordance with the common practice adopted by lenders following the House of Lords decision in Royal Bank of Scotland v Etridge (No. 2) H L [2002] 2 AC 773 where spouses (usually wives) whose husbands wish to secure business borrowings against the family home, require independent legal advice about the consequences of the taking of security over their home to secure these debts (known as the “Etridge guidelines”).
34. She submitted that the principal purpose of obtaining independent advice was to ensure that the complainants were acting of their own free will and without coercion from their husbands; and to ensure they had sufficient understanding of the nature and effect of the proposed transaction in order to reach their own independent decisions as to the wisdom of giving security over their family homes. The risk to the lender of the complainants not receiving independent legal advice was that the obligations entered into by the complainants could be set aside, in particular that the lender would not be able to rely on its security over the family homes and if necessary take the property. The scope of the advice envisaged under the Etridge guidelines was set out in the Bailiff’s judgment of the 6 December 2016 at paragraph 47. Those guidelines should have been in the mind of the Respondent when considering whether it was appropriate to act for the complainants. The Registrar submitted that it is not possible to speculate what might have happened if those issues had been fully considered by the Respondent, and the nature of the conflicts discussed with both the lender and the complainants (in order that an informed decision on conflicts could have been made). There could be no speculation as to whether either side of the transaction would have consented to the Respondent acting in circumstances where his firm were already instructed in the transaction for the lender. It is evident from the Bailiff’s judgment that it is incumbent upon the Advocate in the potential position of conflict to consider these issues rather than the client, particularly a lay client.
35. The Registrar invited the Court to take account of the Respondent’s position during the investigation conducted by the Respondent and subsequently. During the investigation, the Respondent indicated that in his view he had obtained informed consent from the complainants that is to say, he was relying on the caveat provided by Rule 49. Thus the focus of the Registrar’s referral to the Chambre was consideration of whether informed consent had properly been obtained in accordance with Rule 49. However, the Respondent’s position changed at the hearing before the Chambre and on appeal. The case presented by him was that there was a complete identity of interest between the lender and the complainants hence no conflict and therefore Rule 46 was not engaged. Furthermore, the Respondent said in his witness statement to the Chambre that on numerous occasions both before and since meeting with the complainants he had provided independent legal advice in similar circumstances (although he was not cross-examined on that paragraph of his statement).
36. It was not the function of the Registrar to recommend any particular sanction to the Court and he did not do so.

### **Counsels' submissions – the Respondent**

37. On behalf of the Respondent, Advocate Le Cras submitted that there had not been a change in his position between the investigation and the appearance before the Chambre. The Respondent had understood that he was required only to give advice on the nature and effect

of the Bonds to which the complainants were being asked to consent. Following receipt of the Bailiff's judgment, he has accepted that his view was mistaken. It was a genuine mistake not motivated by any malicious or inappropriate intention. The Respondent's original interpretation of what was required was that there existed a community of interest between the complainants and the lender; there was no conflict and on that basis he believed that all parties were consenting to him giving the narrow and uncontroversial advice that he understood was expected of him. His explanation, as set out in the decision of the Chambre (at paragraph 12.16.2) was that "*the interests of [the lender] and the complainants were in fact identical in every respect (i.e. they were not in conflict with each other), in that they both required the complainants to receive the fullest possible advice in the terms of the Retainer – [the lender] so that no impediments would arise should the Bonds ever need to be enforced; and the complainants so that they should know what exactly what they were being asked to undertake by way of obligation to [the lender] and that they should have the fullest opportunity to ask questions and to object to anything in the Bonds of which they did not fully approve.*"

38. The level of the Respondent's culpability was at the lower end of the spectrum. The Respondent was acting with honesty and sincerity. He had no improper motive and stood to receive no personal gain or advantage. Advocate Le Cras described the Respondent's mistake as a technical error.
39. When assessing whether any harm was caused by the Respondent's mistake, Advocate Le Cras submitted the Court should concentrate on identifying any harm that might have arisen from the act of professional misconduct and distinguishing it from any other harm that could have consequences under civil law. She reminded the Court that the referral to the Chambre was on the basis that the Chambre need not be concerned with the accuracy of the advice given by the Respondent. The complainants were well aware that the Respondent's firm were acting on both sides of the transaction. There was no evidence that any actual harm had resulted from the misconduct. There is every likelihood that if the Respondent had acted otherwise the complainants would have given their informed consent to the Respondent giving the advice and the complainants would still have proceeded to give their consent to the Bonds.
40. In terms of the harm suffered by the public and the reputation of the profession, this was a technical error of judgment. It has no ramifications to the reputation of the profession and should not undermine the confidence the public has in the profession. The Bailiff's published judgment will serve as a salutary reminder to the profession of its duties in similar circumstances and instil confidence in the public.
41. The Respondent may have resiled from the position initially taken in the investigation but prior to receipt of the Bailiff's judgment, he never altered his view that there was no actual conflict because there was a community of interest between all the parties.
42. In all the circumstances and in consistency with the case law and published decisions in other jurisdictions, the Respondent invited the Court to impose no sanction, or if minded that a sanction must be imposed, to impose a private reprimand.

### **Counsels' submissions – the Registrar in reply**

43. Advocate Roland dealt with two matters in reply. First of all, the position adopted by the Respondent made clear that he had not understood the full ambit of the advice required in accordance with the Etridge guidelines. He was looking at the matter too narrowly. It was therefore improper to speculate what would have happened had he considered it correctly.

44. Secondly, the statements from the complainants produced before the Chambre show that the basis of their complaint was that if the Respondent had correctly understood what was required and had approached them in a correct manner to seek their consent to him acting, they would now be in a different situation as things would have turned out differently.

### **The Sanctions**

45. The Bailiff directed the Jurats to have regard to the overriding principles set out by Her Majesty's Procureur in her advice quoted above, with one qualification in the present case namely to have no regard to the nature and quality of the advice given by the Respondent to the complainants.
46. In summary, the tribunal imposing a sanction (in this case the Royal Court) must understand the reasons why a sanction might seem harsh. There may be a punitive element and/or a deterrent element both in respect of the subject Advocate and other members of the profession who might be tempted to behave in the same way. The fundamental purpose is to maintain the reputation of the Advocates' profession as being one in which every member, of whatever standing, may be trusted to the ends of the earth. The Bar's most valuable asset is its collective reputation and the confidence which that inspires in the public.
47. There are three stages to be followed when deciding on the sanction. The first is to assess the seriousness of the misconduct. The second is to keep in mind the purpose for which sanctions are imposed. The third is to choose the sanction which most appropriately fills that purpose for the seriousness of the conduct in question.
48. In assessing seriousness the most important factors are:
- (1) the culpability for the misconduct in question;
  - (2) the harm caused by the misconduct, measured not wholly or even primarily by financial loss.
49. The Guidance Notes on Sanctions, 5<sup>th</sup> Edition dated December 2016 issued by the Solicitors Disciplinary Tribunal sets out factors to be considered in relation to aggravating and mitigating factors. They are:

#### ***“Aggravating Factors***

19. *Factors that aggravate the seriousness of the misconduct include (but are not limited to):*
- *dishonesty, where alleged and proved.*
  - *misconduct involving the commission of a criminal offence, not limited to dishonesty.*
  - *misconduct which was deliberate and calculated or repeated.*
  - *misconduct continuing over a period of time.*
  - *taking advantage of a vulnerable person.*
  - *concealment of wrongdoing.*
  - *misconduct where the respondent knew or ought reasonably to have known that the conduct complained of was in material breach of obligations to protect the public and the reputation of the legal profession.*
  - *previous disciplinary matter(s) before the Tribunal where allegations were found proved.*
  - *The extent of the impact on those affected by the misconduct.*

### ***Mitigating Factors***

20. *Factors that mitigate the seriousness of the misconduct itself include (but are not limited to):*
- *misconduct resulting from deception or otherwise by a third party (including the client).*
  - *the timing of and extent to which any loss arising from the misconduct is made good by the respondent.*
  - *whether the respondent voluntarily notified the regulator of the facts and circumstances giving rise to misconduct.*
  - *whether the misconduct was either a single episode, or one of very brief duration in a previously unblemished career.*
  - *genuine insight, assessed by the Tribunal on the basis of facts found proved and the respondent's evidence.*
  - *open and frank admissions at an early stage and/or degree of cooperation with the investigating body."*
50. The Court accepts the need for consistency in imposing sanctions not least because that assists with the transparency of the proceedings as emphasised in Hazlehurst and others v SRA [2011] EWHC 462 (Admin). However, as Moses, LJ stated in Law Society (Solicitors Regulation Authority) v Emeana and others [2013] EWHC 2103 (Admin) uniformity is not possible. Individual sentencing decisions are not precedents, each decision turns on its own facts. Care must be taken when drawing comparisons between different decisions. Consistency with other jurisdictions can be obtained by applying the guiding principle. However, the factors that determine the appropriate sentence may carry different weight in different jurisdictions.
51. Having been directed in accordance with the above by the Bailiff and having carefully considered counsel's submissions and all the statements and documents produced to the Royal Court, the Jurats deliberated in the absence of the Bailiff.

### **Decision**

52. The decision of the Jurats and their reasons for the decision were reached unanimously. The Jurats began by considering the seriousness of the misconduct on the part of the Respondent. They accepted that it was at the lower end of the spectrum of culpability, as had been submitted by Advocate Le Cras.
53. Following the directive given by the Registrar to the Chambre that they were not to consider the nature and effect of the advice given to the complainants by the Respondent, it was not possible for the Jurats to assess whether any harm might have been occasioned by the misconduct, or the extent of any such harm. Similarly, they were not in a position to assess whether any loss had been caused to the complainants.
54. Notwithstanding that the Respondent had admitted that he had given similar advice to other clients on other occasions, the complaint referred to the Chambre related to advice given on a single occasion. The Jurats therefore had to treat it as a single incident, not a course of conduct, on the Respondent's part. In the circumstances, there were no aggravating factors that could bear upon the sanction to be imposed.
55. In terms of mitigation, the Jurats noted that the Respondent had not previously been found to have committed any misconduct. The most significant mitigating factor is the length of time that it has taken to conclude the investigation into the complaint, to hear the matter before the

Chambre, and to hear the Appeal and the sanctions hearing. There have been a number of reasons for those delays, not least the untimely and sudden death of the former Registrar. However, none of the delays were the responsibility either of the Respondent, or of the complainants. The fact that the Respondent has had this complaint hanging over him since October 2013 is a significant mitigating factor.

56. With regard to the purpose of sanctions, the delay in concluding the complaint has had a punitive effect. The publication of the Bailiff's judgment following the appeal and of this decision to members of the Bar should be sufficient to ensure that all Advocates familiarise themselves properly with Rules 46 and 49 and, more importantly, with the Etridge guidelines in order to minimise any risk of a recurrence of the misconduct either on the part of the Respondent or any other Advocate.
57. The changes to the procedures for dealing with complaints introduced by the 2007 Law together with publication of the Bailiff's judgment and of this decision should be sufficient to maintain the reputation of the Bar as one in which every Advocate may be trusted by members of the public.
58. Taking all of the above factors into consideration and having regard to the sanctions that can be imposed, the Jurats are unanimously of the opinion that the matter is too serious to make no order. The appropriate and proportionate sanction is a private reprimand and the Royal Court so orders.
59. The Jurats wish to take this opportunity to remind members of the Bar of the importance of taking adequate attendance notes in order to record the advice given by them to their clients. Additionally, the Jurats request that consideration be given to ensuring that any future complaints of misconduct, on the part of members of the Bar, are investigated and dealt with more expeditiously.