Appeal against the decision of La Chambre de Discipline, in respect of findings of professional misconduct regarding the taking of instructions, drafting and signing of wills of realty and personalty for a Client whose mental capacity was dwindling.

[2020]GRC081

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between: **An Advocate** **Appellant**

and

REGISTRAR OF LA CHAMBRE DE DISCIPLINE **Respondent**

Judgment handed down: 13 January 2020

Before: Sir Richard Collas, Bailiff and Jurats T J MARK, T G Snell, D A Grut, D J Mortimer, J M Wyatt, P F Gill, D J Robilliard, S M Crisp, and T J Le Poidevin

Advocate for the Appellant: **Advocate G S K Dawes**
Advocate for the Respondent: **Advocate G K Bell**

Cases, Texts and Materials referred to in Judgment:

IFS Investments Ltd v Manor Park (Guernsey) Ltd [2003-2004] GLR 77
The Registrar of La Chambre de Discipline v An Advocate [GRC 31/2018]
Registrar of La Chambre de Discipline v An Advocate [2016] GLR 261
The Human Rights (Bailiwick of Guernsey) Law, 2000
Court of Appeal (Civil Division) (Guernsey) Rules, 1964
Martel v Wilkinson (Guernsey Court of Appeal, Unreported, 4 April, 1991)
Whitehouse v Jordan and Another (1981) 1 All ER 267
Guille v Mackay (Guernsey Court of Appeal, Unreported, 14 June, 1967)
Mersey Docks and Harbour Board v Procter [1923] AC 253 at 258-259
Bartlett v. Cole (1963) 188 Estates Gazette 397
Assicurazioni Generali SpA v Arab Insurance Group [2003] 1 WLR 577
Central Bank of Ecuador v Conticorp SA [2015] UKPC 11
Meadow v General Medical Council [2007] QB 462
Howd v Bar Standards Board [2017] EWHC 210
Walker v Bar Standards Board PC 2011/0219
Sharp v Law Society of Scotland (1984) SC 129 at 134/5:
Banks v Goodfellow (1870) SQB 549
Simon v Byford [2014] EWCA Civ280 (2/B/24/407
Sharp v Adams [2006] EWCA Civ449
Scott v Cousins (2001) 37 ETR (2d) 113
Feltham v Freer Bouskell [2013] EWHC 1952 (Ch)
Knox v Till [2000] Lloyds RE PN 49
Mental Capacity Act 2005
Capacity and Self Determination (Jersey) Law 2016
United Nations Convention on the Rights of Persons with Disability signed by the United Kingdom in 2007

Tristram and Coote's Probate Practice (online edition), paragraphs 34.47 and 34.48

Introduction

1. The Appellant has appealed a finding of La Chambre de Discipline ("Chambre") that he was guilty of professional misconduct in the taking of instructions, drafting and signing wills of realty and personalty (the "Realty Will", the "Personalty Will" and together, the "Wills") for a client ("the Client") whose mental capacity was dwindling. The events occurred over a 4 day period from 28 September to 1 October, 2004. The complaint proceedings were initiated by the Client's four children to whom we refer as "the Complainants". The Chambre was told that at the time the Wills were prepared there was family discord between the Complainants and the Client's second wife (in this judgment referred to as the "Client's Wife") with whom the Client was living and who he had married after the death of the mother of the Complainants, his first wife. The Chambre found proved beyond reasonable doubt the two principal allegations (i) that the Appellant saw the Client to take his instructions in the presence of the Client's Wife when she might have brought undue influence or undue pressure to him and (ii) that the Advocate failed in his duty to take appropriate precautions to assess the testamentary capacity of the Client.

2. The Chambre comprised Advocate S J Young, (Advocate of the Royal Court of Jersey), Advocate L Le R Strappini (Advocate of the Royal Court of Guernsey) and Patricia de Carteret (a Lay Member). In a judgment dated 29 March 2019, the Chambre found that the Complaint was proved and following a second hearing, in a judgment dated 28 June 2019, the Chambre determined that the appropriate sanction was a public rebuke. The appeal is pursuant to Section 28 (2) of The Guernsey Bar (Bailiwick of Guernsey) Law, 2007 ("the Bar Law").

3. At the hearing of the appeal, the Appellant was represented by Advocate G S K Dawes and the Respondent by Advocate G K Bell. At the hearing before the Chambre, the Appellant was represented by Advocate J M Wessels and Advocate C A Barrett and the Registrar by Charles Bourne QC and Paul Greatorex, both members of the Bar of England and Wales and members of 11 KBW Chambers in London. The Registrar at that time, Advocate Allez, had had to recuse himself from dealing with the matter and so appointed Mr Bourne in his place. At the date of the appeal hearing, Advocate Allez had retired as Registrar and was replaced by Advocate William Simpson who was present in Court throughout the appeal hearing, as were Mr Bourne and Mr Greatorex.

4. Following two preliminary applications, the Bailiff ordered (i) that the hearing of the appeal be held in private with the judgment to be made public and redacted as may be necessary and (ii) that the appeal be by way of re-hearing. His reasoned decisions in respect of those two preliminary matters are incorporated into this judgment.

5. In this judgment, matters of law and procedure are decided by the Bailiff. Questions of fact are decisions of the Jurats on which they are unanimous except where we say otherwise.

6. The structure of this judgment is:

Our references to the four files of the Appeal Bundle are in the form (File number/Section/tab/Page).

The Legal Framework

7. The procedures for disciplining advocates are set out in the Bar Law which was enacted to provide, for the first time, a statutory regime for regulation of the Guernsey Bar. The Bar Law incorporated the Guernsey Bar as a statutory body with power to take action in its own name, with specified objects including upholding the rule of law and the maintenance of professional standards. It provided a statutory foundation for the Guernsey Bar Rules which have to be approved by special resolution at a general meeting of the Bar. The Bar Rules are referred to in this judgment both as "the Bar Rules" and the "Rules of Professional Conduct" and "RPC".

8. The Bar Law provides for the election of a Bâtonnier, a Bar Secretary and Members of the Bar Council.

9. The disciplinary procedures and powers are in Part II of the Bar Law. It replaced the earlier Chambre, established by customary law, with a three person tribunal formed of one person selected from each of three panels comprising: practising Advocates of not less than 15 years

call; qualified lawyers from elsewhere in the British Isles with not less than 15 years call; and persons who have never been a lawyer. Members are appointed to the panels by an Appointments Committee comprising the Bailiff, the senior Jurat and the Bâtonnier. The Appointments Committee appoints one member of the lay panel to be President of the Chambre.

10. Complaints of misconduct by Advocates are received by the President and the Bâtonnier. If they are satisfied that the complaint is properly brought and is not vexatious or frivolous and that it relates to professional misconduct, they refer it to the Registrar of the Chambre who is a legal practitioner appointed by the Royal Court for a five year term. The Registrar is required to investigate the complaint and if satisfied it discloses a prima facie case, he refers it to the Chambre.

11. Section 17(4) states that the proceedings of the Chambre shall be inquisitorial in nature.

12. Section 25 of the Bar Law provides that complaints shall be heard by the Chambre in private except that, at the request of the Respondent, the Chambre may hear the complaint in public if it is satisfied that in all the circumstances it would be in the interests of justice to do so. There is no provision for a complainant, or for the Registrar, to request a public hearing and no power for the Chambre to order a public hearing of its own motion.

13. The members of the Chambre hearing a complaint decide which of them is to be Chairman (Section 25(7)). In the present matter they appointed Advocate Young of the Jersey Bar as Chairman.

14. The standard of proof for determining if the Respondent is guilty of professional misconduct is the criminal standard, that is beyond reasonable doubt (other than in allegations of breaching the Proceeds of Crime Regulations where the civil standard is applied) (Section 25(9)).

15. Section 25 (10) states that the Chambre is master of its own procedure and that, in any event, it shall afford an opportunity for the Registrar and the Respondent to be heard, to call evidence and to cross examine any witness. The complainant does not have the right to be present at the hearing or to be heard, other than as a witness if called to give evidence. It would be a matter for the Chambre to decide whether to give a complainant the opportunity to be present or to be heard if he or she were not called as a witness.

16. Section 26 provides for the Chambre to take evidence, to require the attendance of witnesses, the production of documents and to administer an oath or affirmation.

17. Section 27 of the Bar Law sets out a range of sanctions available to the Chambre varying in severity from a private reprimand or a public rebuke to a fine not exceeding level 3 on the uniform scale and to a period of suspension not exceeding three months. The Chambre may refer the matter to the Royal Court to consider a greater fine, a longer suspension or disbarring the respondent. The Chambre must send a copy of its reasoned decision to the complainant (section 27(3)).

18. The Registrar and the respondent both have a right of appeal against a decision of the Chambre to the Royal Court (Section 28(1)). The complainant has no right of appeal. A notice of appeal must be lodged within 28 days of the decision (Section 28(2)) but the Royal Court may extend that period in the interests of justice (Section 28(3)). Any appeal to the Royal Court must be presented to the Royal Court by an Advocate instructed on behalf of the Registrar. The Court is required to give a reasoned decision. The Court has the same powers of disposal as the Chambre and may award costs (Section 28(4)). Section 29 applies where the Chambre has referred a complaint to the Royal Court; it requires the Registrar to instruct

an Advocate to present the facts as found by the Chambre and states that the respondent must be afforded the opportunity to be heard.

19. In Section 28 (Appeals against decisions of the Chambre) and in Section 29 (Reference by the Chambre to the Royal Court), there is no provision entitling the complainant to be heard or to be present and there is no provision requiring the decision of the Court to be notified to the complainant.

20. Section 30 gives a right of appeal to the Court of Appeal, with leave of the Royal Court or Court of Appeal, but the right is only exercisable by the Registrar or the respondent. The right of appeal to the Court of Appeal is limited to a point of law only whereas the right of appeal to the Royal Court under Section 28 is not so limited.

21. Section 31 states, for the avoidance of doubt, that any function of the Bâtonnier may be exercised by the Deputy Bâtonnier in certain circumstances.

22. The Bar Law was enacted on the recommendation of the then Policy Council of the States of Guernsey to give effect to proposals from H M Procureur who in turn had received a report from a Committee of the Bar, the whole as described in a policy letter to the States of Deliberation (Billet d'État XIX of 2007, page 1543). Paragraph 4.2 stated that the reasons for the reforms were to provide *"a more modern, transparent and effective investigatory and disciplinary regime".*

23. The two preliminary issues the Bailiff was asked to determine were (i) whether the Royal Court should sit in public and (ii) the nature of the appeal and, more specifically, the rôle of the Jurats.

Whether the Court should Sit in Public

24. In advance of the hearing, one of the Complainants, supported by the other Complainants, applied to have the appeal heard in public. In order to give a decision in advance of the appeal hearing, the Bailiff considered the application without an oral hearing having received written submissions from the Complainants and from Advocate Dawes on behalf of the Appellant. The Registrar adopted a neutral position although prior to reading the Complainants' submissions he had indicated that he supported a hearing in private.

25. Previous appeals against decisions of the Chambre have been held in private. In each instance the reasoned decision of the Royal Court has been published with redactions to preserve anonymity where it was appropriate to do so. In the present matter, Advocate Dawes resisted the application for a public hearing on grounds that the hearing before the Chambre was in private and that if the Royal Court were to allow the appeal in full it would be wrong for the details to be published when the Bar Law envisages privacy. Alternatively, if the Royal Court were to reduce the sanction to a private reprimand administered, the Appellant's privacy would have been rendered nugatory if the appeal had been heard in public.

The Complainants' Submissions in favour of a Public Hearing

26. The thrust of the Complainants' submissions was that the Bar Law reforms did not go far enough and failed to achieve *"a more modern, transparent and effective investigatory and disciplinary regime"*. Their first submission was that all matters of professional misconduct should be heard in public. They wrote in their skeleton argument:

> *"At the root of the public court is Plato's seminal text on justice, Republic (2:359a-2:360d) and his discussion on the Ring of Gyges, a magical ring that makes the*

wearer invisible. Would an intelligent person be just if they did not have to fear any bad reputation if they committed injustice?"

Similar disciplinary proceedings in France and in respect of English solicitors are, they said, held in public unless the disciplinary body directs otherwise whereas in Guernsey, they said:

"The private nature of the Guernsey Bar disciplinary framework presents itself as a ring that affords the wearer a cloak of invisibility from their acts of injustice."

The Complainants submitted that the Court has a duty to uphold the principle of justice and to be seen to uphold justice. They included a quotation attributed to Cicero on Conscience [from Abbé d'Olivet, (1750)]:

"Should he meet a single man in a lonely and deserted place with a large sum of money about him and altogether unable to defend himself from being robbed, how would he behave?"

27. The Complainants supported their submissions by noting that the Bar Law does not state that an appeal shall be heard in private. They said that in Guernsey, as in England and France, any disciplinary investigation should be conducted in an ethical way. By reference to Article 6 of the Human Rights Act 1998, they said that must include a requirement that a hearing is *"open to the public (although the press and public can be excluded for highly sensitive cases)".*

28. The Complainants compared the appeal with other court proceedings and said the normal principles should apply. Justice could only be served if the proceedings were conducted publicly unless there were special circumstances per the decision in *IFS Investments Ltd v Manor Park (Guernsey) Ltd [2003-2004] GLR 77* in which Day LB also held that in a civil action, a professional person should not be placed in a separate category from those who are not in such a privileged position.

29. The Complainants submitted that the public interest began when a complaint is made by a member of the public, not at a later stage and that is so notwithstanding that the Chambre has available the sanction of a private reprimand for the respondent. Indeed they questioned how private is the reprimand when it is recorded in a register to which, they said, the public has access.

Discussion re a Public Hearing

30. The Complainants made a strong argument in favour of greater openness and transparency in the Bar's disciplinary process and in doing so criticised the framework enacted by the Bar Law. However, the Bailiff's duty is to interpret and apply the Bar Law. It was enacted by the States of Deliberation on the recommendation of the then Policy Council in accordance with advice received from H M Procureur. They all had had the opportunity to consider comparable regimes in other jurisdictions before prescribing what they decided was best for Guernsey. It is not the purpose of this appeal to impose a legal framework different from that which the States has chosen and for which it has legislated.

31. Previous appeals have been heard by the Royal Court in private but with publication of the Court's reasoned decision, anonymised as appropriate. In The Registrar of La Chambre de Discipline v An Advocate [GRC 31/2018], the Deputy Bailiff stated:

"I have followed the approach taken by the Bailiff in Registrar of La Chambre de Discipline v An Advocate [2016] GLR 261 and decided that it is appropriate to publish this judgment. However, the hearing of the appeal took place in private, so I have written this judgment without including details from which the Advocate

Complained Against, or others, can be identified. The appeal hearing took place in private because the hearing before the Chambre had been held in private in accordance with section 25(1) of the 2007 Law and one of the powers available if a complaint is found proved on an appeal is to administer a private reprimand to the Advocate in question pursuant to section 29(3)(b).

32. Of course, the Royal Court is not bound by its own decisions. The Bailiff is not bound by his earlier decisions and he is not bound by the Deputy Bailiff's judgment cited above. He therefore reconsidered the issue afresh, taking account of the submissions made by the Complainants.

33. The provision in Section 25(1) to the effect that the Chambre will normally sit in private is not reproduced in Section 28 dealing with appeals to the Royal Court. Section 28(4) says that the Royal Court shall have the powers of the Chambre under Section 27 in respect of the disposal of the complaint but does not state that the Royal Court has the power of the Chambre under section 25(2) to conduct the hearing in public if requested by the respondent and if satisfied it is in the interests of justice to do so.

34. In the absence of a statutory direction, the Bailiff inferred that the Royal Court has the power to decide whether to sit in public or in private. Interpreting the Bar Law, he had regard to the framework it provides for hearings before the Chambre normally to be in private and for the possibility that if a complaint is upheld, the sanction against the respondent may be a private reprimand. In other words there should be no publicity if the complaint is dismissed or if it is upheld but the misconduct is of such a nature that it does not merit a public sanction such as a public rebuke or other penalty. As the Complainants explained, that is different from other jurisdictions but it is what the legislature has chosen for Guernsey.

35. Day LB's decision in *IFS Investments Ltd v Manor Park (Guernsey) Ltd* has been followed as the leading decision in this jurisdiction. The late Mr Day held:

> *"In Guernsey, the principle of open justice has not yet found statutory expression. In my view, that is unnecessary, as it is and always has been a fundamental principle of our administration of justice. Apart from one or two statutory provisions which require proceedings to be held in private for example, criminal committal proceedings before the Magistrate – there are a number of matters in which the Royal Court, in the exercise of its inherent jurisdiction, conducts hearings in private: for example, cases concerning children or incapables, matrimonial or trust matters and ex parte injunction applications.*
>
> *Apart from such well-founded and accepted exceptions, the fundamental principle is unfailingly applied".*

36. At paragraph 24, Day LB said *"I expressed the view, with which counsel concurred that, in simple terms, legal principle required that justice must be done in public, but that where justice itself would be thus frustrated, privacy should prevail, but only to the extent necessary."*

37. His judgment resulted from an application by an Advocate who was concerned that her professional reputation might suffer irreparable damage if allegations in the case were heard in public. Hence Mr Day made the observation (cited by the Complainants in their skeleton argument and quoted above) that professional persons are not to be placed in a special category. In a number of respects *IFS Investments Ltd v Manor Park (Guernsey) Ltd* is distinguishable from the present case. For instance, in *IFS*, the Advocate was a party to the proceedings. The case was a 'normal' civil action; it was not a disciplinary action. It is clear

from the judgment that the Advocate would have been treated no differently if she had been a member of any other profession.

38. The reason why the present matter is before the Court is because it is a disciplinary procedure against an Advocate and the Royal Court has ultimate authority over members of the Bar as officers of the Court e.g. to disbar an Advocate. The Complainants are not party to the proceedings; the Bar Law has given them no rôle and no rights in the appeal. The appeal is between the Registrar and the Appellant. The legislation has made it an internal matter for the Bar. That may offend against the Complainants' perceptions of openness and transparency but it is what has been enacted.

39. The legal framework provides for privacy, protecting the Advocate from publicity if the complaint were to be dismissed and also if it were to be upheld and considered to be insufficiently serious to merit a public sanction. Whilst openness and transparency were motivating factors in the reforms that led to the enactment of the Bar Law, the Court has to have regard to the fact that the legislature expressly limited the extent to which the proceedings are open and transparent.

40. The Complainants sought to invoke Article 6 of the Human Rights Act. The relevant statute in Guernsey is *The Human Rights (Bailiwick of Guernsey) Law, 2000 ("the 2000 Law")*. As the Complainants are not party to the appeal, the Bailiff held that they are not entitled to rely upon any protections that the 2000 Law would offer if they were a party.

Conclusion re Public Hearing

41. In conclusion on this preliminary issue, the Bailiff was not persuaded to depart from the approach taken both by him and by the Deputy Bailiff in earlier appeals. He directed that the appeal hearing be conducted in private but held that the reasoned decision would be published with such redactions, if any, as would be appropriate.

42. The Bailiff gave permission for the Complainants to be present if they wanted to observe the hearing. One of the Complainants sat through the whole of the two days of the hearing on 28 and 29 November and was joined by his brother on the second day.

The Nature of the Appeal

43. A second issue for preliminary determination was the nature of the appeal from the Chambre to the Royal Court and, ancillary to that, whether Jurats were required and, if so, their rôle. Advocate Dawes filed a written skeleton argument dated 22 October. The Bailiff heard oral submissions on 24 October from Advocate Dawes and, briefly, from Advocate Bell who was in broad agreement with Advocate Dawes and with certain views that the Bailiff had expressed during the hearing. One of the Complainants was in Court but he was not invited to address the Court. At the conclusion of the hearing, there was broad agreement that Jurats were required and that the hearing before the Royal Court was a rehearing or review but the rôle of the Jurats remained an issue on which the parties were never in full agreement and on which the Bailiff later directed the Jurats in the manner explained later in this judgment.

44. The right of appeal from the Chambre is to the Royal Court which is defined in Section 41(1) of the Bar Law as the Royal Court siting as a Full Court (i.e. with a quorum of seven Jurats). As we said above, the appeal is not limited to a point of law, unlike the further right of appeal to the Court of Appeal. Any question of so-called Wednesbury unreasonableness or irrationality would be a matter for the Bailiff alone; that is where the Chambre has reached a decision which no Chambre, properly directed, could reasonably have concluded or which is otherwise absurd or perverse.

45. The lack of restriction in the right of appeal leads to the conclusion that an appeal to the Royal Court can be on factual grounds with a rôle for the Jurats. To understand the nature of their rôle, Advocate Dawes drew assistance from the Court of Appeal (Civil Division) (Guernsey) Rules, 1964 ("the 1964 Rules") including:

> Rule 2(1): *"An appeal to the Court shall be by way of rehearing, except in the case where the appellant is seeking an order for a new trial or to set aside a verdict, finding or judgment…"* and
>
> Rule 12(3): *"The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require."*

46. The Bailiff agreed that, in the absence of anything to the contrary in the Bar Law, an appeal from the Chambre is similar. The Court of Appeal Rules borrowed heavily from the Rules of the Supreme Court. Rule 2(1) is similar to RSC O.59 r.3 and Rule 12(3) is identical to RSC O.59 r. 10(3) and hence English case law on the interpretation of those Rules can be persuasive.

47. The Guernsey Court of Appeal looked to English law for guidance when considering Rule 12(3) in Martel v Wilkinson (Guernsey Court of Appeal, Unreported, 4 April, 1991) where the judgment of the Court was delivered by Kentridge JA who referred to the House of Lords decision in Whitehouse v Jordan and Another (1981) 1 All ER 267 before holding that:

> *"where there is no dispute of primary facts but what was in issue was not credibility but the question of what inference was to be drawn, an Appellate Court was often just as well placed as a Trial Court to determine the proper inference to be drawn".*

He continued:

> *"where the appeal is an appeal from in England a jury's verdict, and in Guernsey the verdict of Jurats, it is not open to the Court on appeal to ask itself simply what inference it would have drawn if it had been the Court of first instance."*

He cited part of the headnote in Guille v Mackay (Guernsey Court of Appeal, Unreported, 14 June, 1967):

> *"It is proper for the Court of Appeal to approach the Jurats' findings on a question of fact in the same way as the Court of Appeal in England would approach the findings of a Jury in an Appeal in a Civil Case which had been tried by a Judge and Jury, i.e. that the Court would not interfere with the findings of fact made by the Jurats unless it was satisfied that there was no evidence before them upon which they could reasonably have arrived at those findings or that for any other reasons the findings of fact of the Jurats were perverse."*

48. Having compared an appeal from the verdict of the Jurats to an appeal in England from a judge and jury, Kentridge JA referred to the judgment of Viscount Cave, LC in Mersey Docks and Harbour Board v Procter [1923] AC 253 at 258-259:

> *"The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly. In the present case there is no question of the credibility of witnesses. The material facts, so far as*

they are known, are undisputed; and the Court of Appeal was at liberty, and indeed was bound, to draw its own inference from them."

49. Martel v Wilkinson was a claim by an estate agent for commission in circumstances where two different agencies had been involved in the sale of a property. The Court had to decide which agent was the 'effective cause' of the completed sale. The approach taken by the Court of Appeal to the findings of the Royal Court is helpful. Kentridge JA said:

> *"Now the proper inference to be drawn in any case in relation to effective cause may be a very nicely balanced and difficult question. The views of reasonable triers of fact may differ in the selection of effective cause. A case to which we were referred by Mr. Perrot, Bartlett v. Cole (1963) 188 Estates Gazette 397, was a case where the decision on effective cause was described as a nicely balanced one and in my view the present case is another such case.*
>
> *What we have to ask ourselves is whether it can be said that there was no evidence on which reasonable Jurats could find otherwise than that the Appellants were the effective cause. Put another way, can it be said that the finding of the Jurats was so at odds with the evidence as to be perverse. I do not think that this can be said.*
>
> *The Jurats were entitled to take the view of the case which they did. There was evidence before them which provided material for the view which they in fact took."*

50. That approach helps to illustrate what 'by way of rehearing' means in Rule 2(1) of the Court of Appeal Rules. The meaning of a rehearing was also discussed at paragraph 59/3/2 of the Supreme Court Practice 1999:

> *"the Court considers (so far as may be relevant) the whole of the evidence given in the court below and the whole course of the trial. It is, as a rule, a rehearing on the documents (including the official transcript of the evidence…) but it is a rehearing."*

51. Where a lower court has made decisions of primary fact which depended on its assessment of the credibility or reliability of witnesses who have given oral evidence, and of the weight to be attached to their evidence, an appeal court will not interfere unless it is satisfied the court's decision lay outside the bounds within which reasonable disagreement is possible (per Clarke LJ in Assicurazioni Generali SpA v Arab Insurance Group [2003] 1 WLR 577, cited with approval by the Privy Council in Central Bank of Ecuador v Conticorp SA [2015] UKPC 11.

52. The English Court of Appeal has adopted a similar approach to appeals from professional disciplinary tribunals. An example is Meadow v General Medical Council [2007] QB 462 where a doctor was an eminent physician who had given expert evidence on behalf of the Crown in a criminal trial. It later transpired that the evidence was seriously flawed. The doctor subsequently appeared before the General Medical Council's fitness to practise panel. The panel erased the doctor's name from the register. On appeal to a High Court Judge, the Judge quashed the order for erasure and the General Medical Council appealed to the Court of Appeal. The Court's decision is summarised in the headnote of the Law Report:

> *"an appeal to the High Court under section 40 of the Medical Act 1983 from a decision of a fitness to practise panel was not limited to a review of the panel's decision and might take the form of a rehearing; that, whether the appeal was by way of a review or a rehearing, the court would not interfere with the panel's decision unless persuaded that its finding of misconduct or its imposition of a sanction was wrong; that "serious professional misconduct" was incapable of definition but it had to be serious, and although it was linked to the practice of medicine it need not relate to clinical practice and could include misconduct in other contexts including the*

giving of medical evidence in court; that bad faith or moral turpitude were not requirements but serious professional misconduct could encompass incompetence or negligence to a high degree; that, by giving evidence of statistics which he had misunderstood and by failing to make clear that he was not an expert in statistics, the doctor was guilty of professional misconduct in his preparation for and presentation of evidence at the murder trial; but that his eminence as a paediatrician did not render his misconduct more serious than it otherwise would have been and (Sir Anthony Clarke MR dissenting) in the circumstances it was not sufficiently serious to justify a finding of serious professional misconduct."

53. In the judgment, Thorpe LJ explained the approach that a court must take to the findings of a professional disciplinary panel. He held that:

> *"where the charge before a professional panel relates to clinical work the appellate court must accord due deference to the evaluation of a panel substantially composed of doctors, but where the only charge relates to the doctor's evidence given in legal proceedings, it is judges who are best placed to evaluate whether and to what extent an expert witness has fallen below the standards they require of experts appearing before them."*

54. The Bailiff adopted a similar approach and directed the Jurats to accord due deference to the evaluation of the Chambre where its decision relates to matters which the members of the Chambre are best placed to determine. In so directing them, he was mindful that the legislature had established a Chambre with three panels, including a lawyer not qualified in this jurisdiction and a member of the public where previously such matters were determined by members of the Guernsey Bar, or in more serious cases, by the Royal Court.

The Bailiff's Directions on the Nature of the Appeal and the Rôle of the Jurats

55. Having regard to what is set out above, the present appeal is by way of a rehearing. It is not a fresh hearing so the Jurats are not free to disregard the findings and conclusion of the Chambre. The Advocates for both parties agree that the primary facts are not in dispute. What are challenged are the conclusions drawn by the Chambre from the primary facts. The Court is not to interfere with the Chambre's conclusions unless satisfied that they are wrong.

56. The Jurats must ask themselves whether it can be said that there was no evidence on which a reasonable Chambre could find otherwise than it did. Put another way, can it be said that the finding of the Chambre was so at odds with the facts as to be perverse. In doing so the Jurats must accord the Chambre with an appropriate measure of respect, placing weight on the expertise brought to bear by the members of the Chambre in evaluating how best the needs of the public and the Guernsey Bar should be protected. If the Jurats decide it is appropriate and necessary to interfere with any inference or conclusion drawn by the Tribunal, they may substitute their own views.

Professional Misconduct

57. The first issue for the Chambre to determine was whether it was satisfied beyond reasonable doubt that the Appellant was guilty of professional misconduct (Section 25(9) of the Bar Law). 'Professional Misconduct' is not defined in the Bar Law.

58. In the Chambre's judgment handed down on 29 March 2019, it correctly recognised that infringement of the Bar Rules does not automatically constitute professional misconduct (strict liability). The Registrar contended for a definition of *"any culpable conduct which is sufficiently serious that it would lead the Chambre to make a disciplinary order or finding".* The panel chose to look to other jurisdictions for a definition, citing Howd v Bar Standards Board [2017] EWHC 210 where Lang J quoted Sir Anthony May in Walker v Bar Standards

Board PC 2011/0219 before deciding to adopt the words of Lord President Emslie in Sharp v Law Society of Scotland (1984) SC 129 at 134/5:

> *"There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct."*

59. Applying that definition, the Chambre (paragraph 23) adopted a definition that:
> *"only a finding that a practitioner's conduct is serious **and** reprehensible, as would be entertained by reasonably competent practitioners in this or comparable jurisdictions, will constitute professional misconduct."*

60. The Bailiff cautioned against the danger of adopting definitions from another jurisdiction without knowing the full context. An unusual feature of the sanctions available to the Chambre under the Bar Law is that it can impose a private reprimand. There is no equivalent sanction available in Scotland, or at least not currently, according to counsel. It would only be in unusual circumstances that a Guernsey Advocate whose conduct has been found to be both serious and reprehensible could be adequately dealt with by way of a private reprimand. It therefore appears that the Chambre set the hurdle too high. The Bailiff directed the Jurats to apply the Registrar's definition quoted above that professional misconduct is any culpable conduct which is sufficiently serious that it would lead the Chambre to make a disciplinary order or finding.

61. It is a somewhat circuitous definition but it recognises that a minor breach of the Rules of Professional Conduct does not lead to a finding of professional misconduct. The breach has to be reprehensible. The English Court of Appeal said in Meadow v General Medical Council (quoted above) that *""serious professional misconduct" was incapable of definition".* The same is true of professional misconduct which is not 'serious'. The task of the Chambre, and now the Royal Court, is to determine whether any given set of facts amount to reprehensible conduct.

The Present Appeal

62. After those preliminary matters, we turn to the present appeal. A substantial amount of material was placed before the Court and we were given an extensive reading list prior to the hearing. The Jurats have taken into consideration all the documents and submissions laid before them. The Bailiff reminded them that in focussing on the allegations of professional misconduct they are to concentrate on the duties of an Advocate when faced with a client who wishes to make a will in circumstances such as those in the present case. Did the Appellant discharge his duties or would reasonably competent practitioners find that his conduct was culpable and sufficiently serious that it would lead the Chambre to make a disciplinary order or finding? It is important to look at the issue from the point of view of the Appellant and what he knew at the material times, not what has become known later and which he could not have known or suspected.

Complaint

63. The Details of the Complaint as formulated on behalf of the Registrar for the purpose of the Chambre hearing are as follows:

> 1. By accepting instructions regarding [the Client's] wills, when these came from Advocate X acting on behalf of [the Client's Wife] and when he had notice of the Guardianship proceedings, [the Client's] lack of capacity and the conflict between the Complainants and [the Client's Wife], and without taking precautions such as seeing his client alone and/or satisfying himself that his client

had a free choice of advocate, [the Appellant] was in breach of his professional duty:

(a) under Rule 1 (e) of the Rules of Professional Conduct of the Guernsey Advocate ("the RPC"), not to do anything in the course of practising as an Advocate which breaches, compromises or impairs (or is likely to breach, compromise or impair) his duty to act in the best interests of his client;

(b) under Rule 10 of the RPC, to remain able to give impartial and frank advice to the client, free from external or adverse pressures or interests which would destroy or weaken his professional independence or the fiduciary relationship with the client; and/or

(c) under Rule 18 of the RPC, not to accept instructions where he or she suspects that those instructions have been given by a client under duress or undue influence.

Complaint paragraphs 19.1-19.3

2. By failing to investigate or advise on the terms and effect of the pre-nuptial agreement which was in apparent conflict with the terms of the Wills, [the Appellant] was in breach of his professional duty:

(a) under Rule 1 (e) of the Rules of Professional Conduct of the Guernsey Advocate ("the RPC"), not to do anything in the course of practising as an Advocate which breaches, compromises or impairs (or is likely to breach, compromise or impair) his duty to act in the best interests of his client; and/or

(b) under Rule 55 of the RPC, to carry out the terms of a retainer with care and skill, proper diligence and promptness and to keep the client properly informed.

Complaint paragraph 19.4

3. By facilitating execution of the Wills with knowledge of the circumstances including [the Client's] lack of understanding and the influence of [the Client's Wife], [the Appellant] was in breach of his professional duty under Rule 1 (e) of the Rules of Professional Conduct of the Guernsey Advocate ("the RPC"), not to do anything in the course of practising as an Advocate which breaches, compromises or impairs (or is likely to breach, compromise or impair) his duty to act in the best interests of his client.

Complaint paragraph 19.5(i)-(iii)

4. In the manner of his participation in Dr Liddell's interview with [the Client] on 1 October 2004, [the Appellant] was in breach of his professional duty:

(a) under Rule 1 (e) of the Rules of Professional Conduct of the Guernsey Advocate ("the RPC"), not to do anything in the course of practising as an Advocate which breaches, compromises or impairs (or is likely to breach, compromise or impair) his duty to act in the best interests of his client; and/or

(b) under Rule 55 of the RPC, to carry out the terms of a retainer with care and skill, proper diligence and promptness and to keep the client properly informed.

Complaint paragraph 19.5(iv)-(vi)

5. By failing to obtain a second medical opinion on [the Client's] capacity after 1 October 2004, [the Advocate] was in breach of his professional duty:

   (a) under Rule 1 (e) of the Rules of Professional Conduct of the Guernsey Advocate ("the RPC"), not to do anything in the course of practising as an Advocate which breaches, compromises or impairs (or is likely to breach, compromise or impair) his duty to act in the best interests of his client; and/or

   (b) under rule 55 of the RPC, to carry out the terms of a retainer with care and skill, proper diligence and promptness and to keep the client properly informed.

Complaint paragraph 19.6

The Applicable Rules of Professional Conduct of the Guernsey Advocate ("RPC")

64. Rule 1 (e) provides that *"An Advocate shall not do anything in the course of practising as an Advocate, or permit another person to do anything on his or her behalf, which breaches, compromises or impairs or is likely to breach, compromise or impair any of the following: … (e) the Advocate's duty to act in the best interests of the client."*

    The commentary states that *"Rule 1, apart from the Oath and Articles, comprises those ethical duties imposed on solicitors by the common law. The words should be given a common sense interpretation. Advocates should always refer to Rule 1 if they have an ethical problem."*

65. Rule 10 provides that *"an Advocate must be able to give impartial and frank advice to the client, free from any external or adverse pressures or interests which would destroy or weaken the Advocate's professional independence or the fiduciary relationship with the client."*

    The commentary states:-

    "1. A potential client who has been improperly influenced in his or her choice of Advocate cannot be said to have had free choice. Improper influence can come from the Advocate or from a third party. Where an Advocate has reason to suspect that there may have been improper influence, the Advocate must satisfy himself or herself that the client's freedom of choice has not been restricted.

    2. An Advocate must avoid being placed in a position where the Advocate's interests, or the interests of a third party to whom the Advocate may owe a duty, conflict with the interests of the client.

    3. An Advocate must not allow clients to override the Advocate's professional judgment, for example by insisting on the Advocate acting in a way which is contrary to law or to a rule or a principle of professional conduct."

66. Rule 18 provides that:

    "An Advocate must not accept instructions when he or she suspects that those instructions have been given by a client under duress or undue influence."

The commentary provides: *"If an Advocate suspects that the client's instructions infringe this Rule, either the client must be seen alone in order that the Advocate can be satisfied that the instructions were freely given, or the Advocate must refuse to act. Particular care may need to be taken where clients are elderly or otherwise vulnerable to pressure from others."*

67. Rule 55 states *"An Advocate is under a duty to carry out the terms of a retainer with care and skill, with proper diligence and promptness and to keep the client properly informed."*

    The commentary states:

    "*1. An Advocate should not accept instructions if he or she has insufficient time to devote to a matter, or insufficient experience or skill to deal with it competently.*

    2. Similarly, an Advocate's duties in conduct cannot be excluded or limited by contract. An Advocate cannot exclude or restrict the right of the client or of any other person to make a complaint in respect of professional misconduct."

68. The Chambre found each of the grounds of the complaint were satisfied. In paragraph 166 of its decision, the Chambre stated *"La Chambre is unanimously satisfied beyond reasonable doubt that [the Appellant's] conduct with respect to the Matter and his failure to observe the duties identified by Rules 1 (e), 10, 18 and 55 amounts to professional misconduct."*

The Notice of Appeal

69. The grounds of appeal pleaded by the Appellant are that *"the Appellant appeals the Chambre's judgment to the Royal Court on the grounds that:*

    (i) the Chambre fell into error in proceeding to hear the complaint at all;

    (ii) the Chambre made errors of law and fact, in particular the Chambre's findings are wrong as to the nature of the duty owed by the advocate to his client in the material circumstances and/or the manner by which that duty, however defined, may be discharged;

    (iii) the Chambre fell into error in its approach to the five "counts" comprising the Complaint."

70. In the event that the appeal against the finding of misconduct is upheld, the Appellant also appeals the sanction imposed saying that *"no sanction greater than a private reprimand was appropriate in all the circumstances of the case."*

The Chronology

71. The Bailiff reminded the Jurats of the key facts as they were known to the Appellant at the material times. The events covered a number of separate stages:

    1. 28 September 2004, at about 1042, Advocate X contacted the Appellant.

    2. 28 September 2004 between 1630 and 1650, the Appellant and his assistant ("the Assistant") met with Advocate X at the Appellant's office.

    3. 28 September 2004 between 1650 and 1900, the Appellant and the Assistant met with the Client, the Client's Wife and Advocate X at the Appellant's office.

4. 1 October 2004 between 1415 and 1500, the Appellant and the Assistant met with the Client and the Client's Wife at the Appellant's office.

5. 1 October 2004 between 1500 and 1600, the Appellant and the Assistant met with the Client at Joy's studios in the presence of Jurats D C Lowe and D M Le Page with Dr Liddell attending by video link.

6. Relevant events subsequent to 1 October 2004.

The Appellant

72. The Appellant is a member of the Guernsey Bar. His other professional qualifications are set out in an Agreed Statement of Facts (1/A/6/60). There have been no other Chambre proceedings against him in his career.

28 September 2004 at about 1042

73. On the morning of 28 September 2004, Advocate X telephoned the Appellant to say that he had with him in his office the Client and the Client's Wife. He told the Appellant that the Client wanted to make a will. The Appellant invited Advocate X to come round to his office so that they could talk about it. The precise time of "1042" refers to an email sent by Advocate X to the Appellant (3/D/63/406). The email forwarded an email from Dr Malcolm Liddell dated 27 September at 2054 to which Dr Liddell said he had attached a report on the client's financial and testamentary capacity. He wrote *"I do not think it contains much of comfort to [the Client's Wife]. The whole business is a veritable can of worms, and, I suppose will only be sorted out in the courts.*

    Well I do hope my report clarifies some of the issues. If I can be of any further help please get back to me. Hard copy in the post."

74. The Appellant knew the Client who had held a prominent position in the Island from which he had retired some 5 years earlier and the Appellant knew that his retirement might have been connected to health issues. He was also aware that Advocate X and the Client knew each other well because of their shared leisure interests. In his evidence (2/C/3/113A) he said he did not understand why Advocate X had telephoned him rather than any other member of the Guernsey Bar except that the two of them had been together in a case in Switzerland involving issues of capacity which, he said, might explain why he had been contacted but he did not know. Dr Liddell said in his report (3/D/25/228) that he was a consultant psychiatrist with over 10 years' experience in the diagnosis, management, and treatment of dementia, including Alzheimer's disease. He frequently dealt with the problem of assessing financial and testamentary capacity. He had interviewed the Client on 23 September 2004 at his consulting rooms in Cardiff in the presence of the Client's Wife. The referral had come to him as a consequence of a neurological assessment by Dr Hew Morris who had suggested that the Client's capacity to make over an enduring Power of Attorney be assessed by a psychiatrist experienced in dealing with patients with early cognitive impairment. Dr Morris referred the client to a Dr Jenkins who relayed the referral on to Dr Liddell because he had the requisite experience.

75. Dr Liddell wrote *"From telephone conversations with [the Client's Wife] before the interview, and, also, during the interview itself, I understand that [the Client's] memory has been deteriorating over the past 3 years and that now, very unfortunately, [the Client's] children from his first marriage are attempting to wrest control of his financial affairs on the grounds that he is now unable to manage them himself. There appears to be ill feeling between [the Client's] children and the current [the Client's Wife] in as much as they cannot reach some amicable compromise about helping [the Client] with his affairs. ..... I am of the*

opinion that I have really received my instructions from [the Client's Wife] in this regard." (3/D/25/230).

76. At page 232, he wrote: *"It is my opinion that [the Client] no longer has the capacity to manage his affairs. Not only is his memory dysfunction severe enough to impair this ability, but, also, I suspect that his insight and judgment are no longer sufficient to allow him to make decisions concerning the day to day management of his finances."* At page 233 he wrote: *"I believe [the Client] still has testamentary capacity. However, if [the Client] wishes to make a will, it would be prudent for [the Client's] testamentary capacity to be assessed again as close to the time that the will is made as is reasonably possible."*

77. His concluding recommendation was *"Currently [the Client] still has sufficient insight to instruct [the Client's Wife], or another close and, hopefully, well-disposed family member to act on his behalf and to go on doing so when he no longer has the capacity to do so. However, the window of opportunity is not great and, so, I advise [the Client] and [the Client's Wife] not to tarry in making the necessary arrangements."* The copy of the report in the appeal bundle is dated 2 October 2004 but it is accepted that it is a true copy of the report seen by the Appellant on 28 September.

28 September 2004 between 1630 and 1650

78. The Appellant and the Assistant met with Advocate X at the Appellant's office for 20 minutes at 1630 the same day. A file note of the meeting (3/D/64/408) records that the Appellant telephoned Dr Liddell to establish whether he would be willing to assess the Client by video link on the day that he intended to sign his wills. Dr Liddell explained that he was extremely busy but might be able to do it in about a month's time. The Appellant said that due to the circumstances it would be necessary to conduct the interview sooner rather than later. Dr Liddell said that he would establish how the video link could be set up and would contact the Appellant again without delay.

28 September 2004 from 1650 to 1900

79. The Appellant and the Assistant met with the Client, the Client's Wife and Advocate X at the Appellant's office at 1650 on 28 September 2004. A detailed file note of the meeting was prepared by the Assistant (3/D/64/408). Advocate X opened the meeting by explaining that he was there in the capacity of legal advisor to the Client's Wife only and that he thought it was prudent for the Client to instruct his own Advocate. The Appellant read aloud a letter addressed to him handwritten by the Client (3/D/61/398). The Complainants later found a similar letter handwritten by the Client's Wife which they allege the Client copied. The existence of the second copy of the letter was not known to the Appellant at the material time.

80. In the opening paragraph, the Client wrote that he was writing to the Appellant as he was anxious *"to clarify my position re my legal capacity regarding a possible guardianship application".* He stated that he did not wish to take further advice from Advocate [Y]. He referred to the examination conducted by Dr Liddell the week before to test his legal capacity to conduct his own affairs and said he hoped that the Appellant had received and read reports from both Dr Liddell and Mr Martin. He wrote: *"It appears that I have a window of only a few weeks to sort my affairs legally. Dr Liddell has advised me I do so notwithstanding that I am aware that my wife and I signed a pre-nuptial agreement in August 1998 and now wish to include her in my will and give her joint ownership of [the Client's address] which at present is in my sole name."*

81. He continued: *"I cannot over emphasise that I have been very unhappy the way my children have treated me over this guardianship application. I do not consider that I need a guardian, but if I do in the future I would appoint my wife … whom I trust absolutely and not my son …."* He also referred to a boat that he wanted to sell to a named purchaser but had been

directed by the Complainants' advocates not to negotiate the deal until after the guardianship application. The letter concluded *"Can you advise me as to the best action I could take?"*

82. Advocate X also handed to the Appellant a copy of a guardianship application (3/D/60/372). It had been prepared by the Complainants' advocate and applied for the appointment of the Client's eldest child as his guardian with the family council being his other children and the Client's Wife. The application was supported by three medical affidavits. The first from the Client's GP revealed that he was suffering from *"dementia, probably Alzheimer's disease as characterised by atrophy on brain scan and reduction in cognitive function especially short term memory."* Dr Philip Kennedy, a neurologist, stated that the Client was suffering from cerebral atrophy. He exhibited a letter dated 15 April 2004 to the Client's GP stating that he had reviewed the Client in the presence of one of his daughters and he recommended a psychometric assessment by Professor Thompson which would be the *"definitive comment as to whether he is able to be in total control of his affairs. However on the information in front of me right now I am certainly prepared to state that I do not deem him as being able to take an informed judgment on his affairs. That view should pertain until we have the definitive view from Professor Thompson but I strongly suspect he will agree with that (3/D/60/377)."* The third medical affidavit was from Professor Simon Thompson: *"Such examinations and other tests that have been carried out by me reveal that the Patient is suffering from the following symptoms:-*

    a) *He appears to have difficulty in the following areas of cognitive functioning: short term auditory memory, visual memory and information processing capacity as demonstrated by his performance on the neuropsychological tests.*

    b) *His current IQ is much lower than his estimated IQ with significance in comparison with the normal population in performance IQ, verbal IQ and full scale IQ.*

    c) *In my opinion, (a) and (b) above are highly likely to be a consequence of the apparent brain atrophy detected by brain imaging.*

    d) *It is my opinion that his impairments stated at (a) and (b) above are long-lasting and probably irreversible. However, it is my opinion that he may possibly have some short-term benefits and possible remission of symptoms of immediate memory with an acetylcholine esterase inhibitor. This assumes that the atrophy is of an Alzheimer's type condition."*

    All three doctors concluded that the Client required a guardian to be appointed for him.

83. Pages 409 and 411 of the attendance note of the meeting relate to the guardianship application and to correspondence between: the Complainants' advocates; Advocate [Y] whom the Client no longer wished to instruct; and Advocate X acting on behalf of the Client's Wife. In the course of the discussion (at page 410) the Client said that he did not wish to give a Power of Attorney yet but when necessary it should be to his eldest child. The Appellant said there was a presumption that the Wife would manage her husband's affairs not a son especially when the son lives in England. He did not ask the Client why he had said his attorney should be his eldest son even though, in the handwritten letter he had read earlier, the Client said that he would wish to appoint the Client's Wife.

84. At the foot of page 410 and the top of page 411 there is a reference to a file note prepared by Advocate [Y] stating that the Power of Attorney issue would not survive the incapacity argument. The Assistant recorded that he then left the room for four minutes to copy a document which Advocate X gave to the Appellant. The attendance note does not record what the document was. At the appeal hearing, Advocate Bell suggested that it might have been Advocate [Y]'s file note but that cannot be verified.

85. At page 412 Advocate X commented on the medical reports saying that Dr Thompson had based his conclusions on flawed documents and Dr Kennedy had examined the Client in the absence of the Client's Wife which he said was not usual practice. Advocate X identified that there needed to be a further expert report to distinguish between guardianship and testamentary capacity and under the BMA assessment, the burden of proof is on the person who assesses the fact. The assessment also needed to include the instructions that a solicitor should give to a medical expert. He said the next expert report should contain reference to the following areas: the Client's capacity to manage his own affairs; capacity to create a Power of Attorney; and capacity to make a testamentary gift. He advised that the Complainants had asked their expert to examine the Client's capacity to manage his own affairs which was the wrong question but Dr Liddell had examined the testamentary capacity which was correct. The Appellant said it would be necessary to instruct another expert. Advocate X replied that *"his neck was not on the block and it was [the Appellant's] matter from then on."* The Appellant then referred to the telephone conversation he had had with Dr Liddell about setting up a video interview. Advocate X then said it would not be appropriate for him to remain in the room while the Client gave instructions to the Appellant. The Appellant asked the Client's Wife and the Client whether they had any objections; they said they did not, so he asked Advocate X to remain as he, the Appellant, said he did not have the detailed background knowledge of the case. The Appellant explained his concerns about the window of opportunity and the need to proceed without delay in getting the will signed and evidenced during the video link. He said he would also arrange a second opinion straight after and if it did not confirm the first opinion they could get a third opinion. He also said an additional advantage of the video link was that Dr Liddell could see who was present when he was testing the Client.

86. The Bailiff directed the Jurats to consider carefully pages 413 to 416 of the attendance note recording the instructions given by the Client to the Appellant to prepare the Realty Will and Personalty Will.

87. The Appellant asked whether a will of realty and a will of personalty would be required and the Client's Wife replied that both would be needed. In relation to realty, the Appellant asked what it comprised and the Client replied "his house". The Appellant explained the options available to the Client before asking how he wanted to leave his property and to whom. The Client said he wished to give the Client's Wife a life interest. The note records that the Client's Wife *"then made a comment to the effect of "oh""* following which the Client said he wanted the house vested solely in the Client's Wife. The Appellant asked if he meant after his death to which the Client replied *"yes, I want this"*. He was asked whether that was his considered view and replied *"yes"*.

88. The Appellant explained that the children would not then benefit from the house and the Client said the children *"may or may not benefit, that is up to [the Client's Wife] to decide"*. After further discussion the Appellant asked the Client who he would like to have the property if the Client's Wife died before him. The Client replied *"there is enough property to split between them. Two portions to"* but did not complete the sentence. He continued with *"come forward with some sort of equitable result not being too hard on anyone, so they can't quibble"*. The Appellant asked if he meant equal between all the children and he replied *"yes"*. The Client's Wife said that this was very generous of him. The Appellant asked for clarification as to whether he meant both his own children and his step-children. The Client replied it was only those from his first marriage.

89. The file note records, at page 415, that the discussion moved on to the Personalty Will. The Appellant asked what the personalty comprised and by reference to a document before him (presumably the guardianship application), said it was a deposit account, current account, a yacht and stocks and shares. He explained the Guernsey law position of one third of the

estate passing to the children, one third to the wife and the remaining one third being disposable. The Client said he did not want it to go to someone outside the family. The Appellant asked if he wanted the disposable third to be split equally between the Client's Wife and the children so that they would receive one fifth of the disposable portion each. With some uncertainty, the Client replied *"yes"*.

90. The note records that the Client's Wife then asked about the pre-nuptial agreement which the Appellant said he had not read. The Client's Wife explained, correctly, that it roughly said 'what is mine is mine and what is the Client's is his'. Advocate X then said that since the couple had been married for six years, the pre-nuptial agreement would have little effect. There was no further discussion about the pre-nuptial agreement. Instead, the discussion appears to have moved on to the attestation of the wills, with Advocate X saying that once the wills were drafted it was not a done deed, the Client would have to be tested by Dr Liddell. The Client's Wife said she did not want the matter to come to court and asked if it could be kept out of court. The Appellant said the children were on a crusade and it may be difficult. There was discussion as to whether the guardianship application could be heard *in camera*. The Appellant said that the court could say that the will was made with undue haste and that the parties should mediate the will. He said the court is the last resort. The final note is that the Appellant said that by requesting a second opinion it would show the court that they were trying to be fair although the second report may not be favourable and that was a chance they would have to take.

91. The Client, the Client's Wife and Advocate X left at 1900. The note records a conversation that followed between the Appellant and the Assistant in which the Appellant asked the Assistant how it had gone and he replied it had gone well although he was concerned whether the Client had capacity. The Assistant said although the Client knew what realty he owned he did not know what his personalty comprised of. The Assistant did not understand whether the Client wished the Client's Wife to be left a life enjoyment of the matrimonial home or for the whole of the house to be vested in her absolutely or even if the Client knew what both terms actually meant. As to the personalty, the disposable one third was to be left on an equitable basis. The Appellant said he agreed with the Assistant's view on the personalty point but did not necessarily agree with what he had said about the realty. The Appellant said that the Client's capacity was a matter for the experts and he would follow their findings. He asked the Assistant to prepare a list of detailed questions to be put before the Client in the video interview in order to ascertain what he actually understands by his instructions. The Appellant said that the Assistant should accompany the Client, the Client's Wife and the Appellant to Cambridge to see the expert. Finally, the Appellant said he would seek advice on how to proceed with the case from H M Procureur.

1 October 2004 from 1415 to 1500

92. The Appellant and the Assistant met with the Client and the Client's Wife at the Appellant's office for 45 minutes at 1415 on Friday 1st October. A file note of the meeting is at 3/D/67/428. It records that the Appellant gave the Client a letter explaining Guernsey law, the options available to the Client and sought confirmation of the instructions given by him the previous Tuesday. The letter is to be found at 3/D/66/424.

93. The advice on Guernsey law made no reference to the pre-nuptial agreement. A copy of that agreement is at 3/D/26/254. It states that it was signed in consideration of the intended marriage between the parties. Paragraph 4 states: *"the survivor of the said parties shall have no claim whatsoever whether arising by operation of law, custom or otherwise on or against any real or personal property whatsoever and wheresoever situate, which shall belong to the first deceased of the said parties at his or her death, except as may be provided:-*

> *4.1 by will or settlement made and executed by such first deceased or*

4.2 in the deed of conveyance of such real property."

94. At the hearing before the Chambre the Appellant was asked why he had not given advice on the effect of the pre-nuptial agreement. For example, at 2/C/4/172A, Advocate Strappini asked *"... but you said, "a surviving spouse automatically has right of enjoyment" which she did not, did she?"*. The Appellant replied *"well, I am not ... well, I say I think it's a debateable point but I think she would always have that right."* He then went on to say that notwithstanding provisions of the pre-nuptial agreement, the Client wanted to make a will.

95. Returning to the letter of advice of 1 October 2004, at paragraph 1.3 of the letter (3/D/66/426), the Appellant stated that the Client had instructed him on 28 September to draft a Realty Will vesting his real property solely in the Client's Wife with the proviso that should she die before him it would vest equally in his four children. At paragraph 2.4 the instructions were that on his death the Client's Wife and the Client's four children would receive a one fifth share of the disposable portion each. In section four of the letter he referred to the concerns over capacity stating it would be necessary to have a video conference on the signing of the Wills which would be subject to a second opinion from a distinguished neurologist from Cambridge University. In relation to the video conference he said they would be following the procedure set out in Banks v Goodfellow (1870) SQB 549. The file note, at page 428, records that the Assistant said that in fact two Realty Wills had been prepared: the first stating that the house was to be left solely to the Client (which must be an error and should read the Client's Wife); and the second that the Client's Wife would have a life interest and subject to that it would be divided equally between the Client's Wife and the Client's four children. Two Personalty Wills had also been drafted: the first giving the Client's Wife and the Client's four children one fifth of the disposable portion each and the other giving the Client's four children an equal share of the disposable portion. The Assistant read the Wills to the Client and the note states that the Assistant and the Appellant explained what they meant in great detail.

96. The Appellant asked the maximum share of his personal estate that could be given to the Client's Wife. The Appellant replied it was two-thirds. The Client asked for the Personalty Will to be re-drafted in order to give his wife the two-thirds share. The Appellant made the amendments and the Will was re-printed. In relation to the Realty Will the Client said he wanted his wife to have a life enjoyment of the matrimonial home and for each of his wife and four children to receive a one-fifth undivided share but should his wife predecease the property was to be divided between the Client's four children equally.

97. The file note records that at no time during the meeting, the explanation and taking instructions did the Client's Wife make any comments. The Client did not seek the Client's Wife's advice and spoke entirely of his own free will.

1 October 2004 from 1500 to 1600

98. After the meeting at the Appellant's offices, they moved to Joy's Productions Limited for the video conference. A file note is at 3/D/68/430. The Court had the benefit of watching a video recording. The image shown was as seen by those who were present in Guernsey when it was filmed, that is to say there was a full screen image of Dr Liddell and a smaller insert showing four persons seated at a table from left to right, Jurat Le Page, Jurat Lowe, the Client and the Appellant. The Assistant was seated further to the right and only his hands could be seen. The Bailiff advised the Jurats that the video could be watched again if they wanted to do so after they had retired. A transcript is at 3/D/70/442, prepared by the Complainants' Advocates. Both parties agreed that, apart from a few minor discrepancies, it was a true and fair record of the conference call. The transcript records (2/C/4/175B) that the Appellant travelled to the studios with the Assistant, separately from the Client and the Client's Wife. They met at the studios and the Appellant saw the Client alone which was the first time he

had done so since being instructed. The Appellant explained that he sought to put the Client at ease because it would be quite harrowing. He spoke to him about the evacuation in 1940, stating that his mother was evacuated at the same time as the Client. In his evidence, he confirmed that although the Client had an opportunity to speak to him privately, the Client had said nothing to suggest that he did not wish to proceed with the Wills (page 175G).

99. The Client's Wife was not present in the room during the interview with Dr Liddell nor at the time that the Wills were signed. Only the Appellant, the Assistant, the Client and the two Jurats were present.

100. Dr Liddell examined the Client by asking a number of questions. At the conclusion, Dr Liddell said that the Client's condition was more borderline than when he had seen him the previous week (page 452) but he concluded *"I personally feel satisfied that [the Client] has been helped to make perfect choices and these are his choices now that they have been put to him and I am prepared to see the will signed unless other people here have objection."* The two Jurats confirmed that they had no objection and in their evidence before the Chambre they said that they saw their function as being to satisfy themselves that a testator had testamentary capacity and understood the wills whenever they were asked to witness the signing of wills. Jurat Lowe asked the Client to read the Wills. The Client said he would read the Personalty Will first. He picked up a document and immediately said that it was the Realty Will (a fact relied upon by Advocate Dawes as evidence of the Client's comprehension at the time). The Client then read the two Wills before they were signed by him and witnessed by the two Jurats (page 455). At the conclusion, the Appellant confirmed that they would be going to Cambridge for a second opinion.

Events subsequent to 1 October 2004

101. Dr Liddell faxed a report of the interview to the Appellant on 5 October 2004 (4/D/74/466) in which he recorded his opinion that the Client had been capable and that he based his opinion on the following grounds:

> *"1. knows why he wants to make the will*
> *2. can name the beneficiaries – and choices appear sensible;*
> *3. knows in broad terms extent of his estate and assets;*
> *4. apportioning of estate and assets is understood by him and is reasonable and in accord with Channel Island law;*
> *5. he was in clear consciousness and although forgetful was not delirious and, therefore, capable of making his wishes and intentions known."*

102. The second opinion was never obtained. A file note at 4/D/77/474 in the Assistant's hand writing recorded that in a telephone call the Client's Wife had informed him that she and the Client had just been to Cambridge but the GP had failed to send the medical report to the expert so the appointment with an expert had had to be postponed. A further note at 4/D/79/478 records a letter and telephone call on 5 October 2004 in which the Client's Wife advised that the Client was exhausted and could not travel to England.

103. The Complaint is not the first complaint made by the Complainants in respect of the Appellant. A complaint, the details of which are not relevant, was sent on 3 June 2007 to H M Procureur and not notified to the Appellant. No action appears to have been taken in respect of that letter. A second letter of complaint dated 19 December 2009 was sent by the Complainants following the procedure laid down under the Bar Law which had by then been enacted. The President of the Chambre referred it to the Registrar. On 28 July 2011, Advocate Nick Le Poidevin, the then Registrar, declined to refer the matter to the Chambre (4/D/90/5428). The reasons for his decision were set out in an attached document in which, at paragraphs 24 – 26, he set out his conclusions. He considered that a prima facie case had not

been disclosed and that it was not in the public interest or that of the Bar to spend resources investigating the matters further in the hope of finding evidence sufficient to show beyond reasonable doubt that there had been professional misconduct. He suggested that the Wills could be challenged in Court after the death of the Client and at that time there could be an investigation as to whether or not the Appellant took proper steps to preserve the Client's assets in the context of adversarial civil proceedings. The Claimant's remedy would, if the case were proven, be in damages.

104. Following the death of the Client in 2015, the Complainants initiated proceedings against the Client's Wife inter alia seeking declarations that the pre-nuptial agreement was enforceable and that the Client did not have the testamentary capacity to execute the Wills. They also sent a further letter of complaint dated 22 December 2015 which the then Bâtonnier referred to the Registrar on 25 April 2016. On 14 March 2017, the then Registrar, Advocate Allez wrote to the Appellant advising that he had referred the matter to Mr Charles Bourne QC who had investigated and recommended that the complaint be referred to the Chambre. Mr Bourne was instructed because of a perception of a risk of conflict of interest arising from dealings that Advocate Allez had had with the Client during his lifetime.

105. The proceedings between the Complainants and the Client's Wife were settled following a mediation in terms set out in a settlement agreement dated 24 February 2016. Following that agreement, the Will of Realty was registered with the Royal Court, according to the Complainants, in order to give effect to the provisions of the settlement agreement.

106. Having set out the chronology, we turn to the submissions of the parties.

Issues of delay

107. There has been considerable delay between the events giving rise to the Complaint namely the four day period between 28 September 2004 and 1 October 2004. Advocate Dawes raised two aspects of delay. First, the delay from 2004 to 22 December 2015 when the Complainants wrote their letter of complaint. Second, the delay from 22 December 2015 to 14 March 2017 when the Complaint was referred by the Registrar to the Chambre. There has been further delay, the Registrar's Details of Complaint were not finalised until 27 June 2017. The matter was listed before the Chambre in June 2018 but because of the unavailability of Jurat Le Page, it was re-listed for November 2018. The first judgment of the Chambre was issued on 29 March 2019 and the second judgment, imposing a public rebuke was dated 28 June 2019. The Notice of Appeal was issued 25 July 2019.

108. In correspondence prior to the Chambre hearing, the Appellant had asserted that the Complaint was long out of time and ought not to have been permitted to proceed but he did not raise the issue before the Chambre. However, the Chambre observed at paragraph 6 of the judgment that: *"neither party made any application either before or during the hearing citing prejudice, unfairness or any other reason as to why the hearing should not proceed".* The Bailiff directed that having failed to raise the issue before the Chambre, there is no decision of the Chambre which could be subject to appeal and therefore it would not be open to the Royal Court to allow the appeal on the grounds of delay even if it were persuaded either that the Appellant had thereby been prejudiced or was otherwise unable to have a fair hearing as a result of delay.

109. Advocate Dawes invited the Court to hold that the Chambre should have refused to hear the Complaint but the Bar Law does not contain any provision for challenging the President's decision to refer a complaint to the Registrar. Upon receipt of a complaint, the Registrar is obliged to investigate it (Section 22 of the Bar law) and if he decides to refer it to the Chambre, Section 25 provides that the Chambre shall hear the complaint. In remarks which are obiter dictum, the Deputy Bailiff said in The Registrar of La Chambre de Discipline v an

Advocate (Royal Court 26 July 2018) at paragraph 89 that if an Advocate wished to challenge a complaint that had been made after the six month deadline had expired or was aggrieved by the decision of the President to grant an extension of time, he would probably have standing to challenge the decision by judicial review. Alternatively, he suggested it might be possible to invite the Chambre to consider whether what had happened amounted to some form of abuse of process although he said that might be less satisfactory because the task of the Chambre is to determine the actual complaint rather than to review any procedural decision prior to its referral.

110. The Bailiff respectfully agrees with the Deputy Bailiff's obiter comments. In the present matter, as the Appellant did not seek leave to move for judicial review of the President's decision and as there was no application before the Chambre for the proceedings to be struck out (even if such an application could be made which is questionable) the matter cannot be entertained on appeal to the Royal Court.

111. As for the delay in prosecuting the Complaint, the Bailiff referred to the Deputy Bailiff's judgment where he was concerned with a delay from complaint to hearing that was in excess of 18 months. He emphasised the importance of progressing complaints without delay in view of the significance of the matter for the Advocate against whom the complaint is made, as summarised in the old maxim that "*justice delayed is justice denied"*. In the present matter, the primary facts are not in dispute, they are recorded in the extensive and careful file notes prepared by the Assistant and in the video of the interview with Dr Liddell and the signing of the Wills. In those circumstances it is not surprising that the Appellant's advocate did not see fit to raise the question of fairness (or unfairness) before the Chambre.

112. The Bailiff directed the Jurats that in the event of a finding of professional misconduct, the delay and the length of time for which the Complaint has been hanging over the Appellant is a factor that the Jurats could take into consideration when considering the sanction to be imposed.

Testamentary Capacity

113. It is not disputed that the Appellant's intention in assessing the Client's testamentary capacity was to apply the tests set out in Banks v Goodfellow. What is challenged is whether he in fact did so. The essence of the test (which is the general common law test for testamentary capacity) was set out by the English Court of Appeal in Simon v Byford [2014] EWCA Civ280 (2/B/24/407) quoting from Sharp v Adams [2006] EWCA Civ449:

> *"It is essential to the exercise of a power of disposition by will that a testator:*
> *(a) shall understand the nature of the act and its effects;*
> *(b) shall understand the extent of the property of which he is disposing;*
> *(c) shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object*
> *(d) no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties".*

114. Advocate Dawes emphasised a passage in paragraph 40 of the judgment in Simon v Byford: *"In other words, capacity depends on the potential to understand. It is not to be equated with the test of memory".* Further, at paragraph 47: *"When we move on to knowledge and approval what we are looking for is actual knowledge and approval of the contents of the will. But it is important to bear in mind that it is knowledge and approval of the actual will that count: not knowledge and approval of other potential dispositions. Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made. That*

is why knowledge and approval can be found even in a case in which the testator lacks testamentary capacity at the date when the will is executed."

115. Although Advocate Dawes relied upon this passage, it has little application in the present case. The evidence is that when the Client attended the Appellant's offices at 1415 on 1 October 2004, he was presented with a choice of Wills. His choice, including a change to his earlier instructions, was made at that time less than an hour before the video interview commenced. In the absence of any evidence to the contrary, the presumption must be that the Client's testamentary capacity when he met with the Appellant was no different from his capacity when interviewed by Dr Liddell shortly thereafter.

116. The Bar Rules do not expressly state how an Advocate should act when taking instructions from someone who may lack testamentary capacity. Count 3 of the Complaint alleges it to be a breach of the Advocate's duty under Rule 1 (e) which breaches, compromises or impairs (or is likely to breach, compromise or impair) his duty to act in the best interests of his client. Advocate Bell's submission was that it is not in the interests of a client who lacks testamentary capacity for an advocate to take instructions and execute wills when the client does not have the capacity to know what he is doing.

117. Advocate Dawes quoted an extract from Testamentary Capacity, Law, Practice, and Medicine by Martyn Frost, Stephen Lawson and Robin Jacoby who compared a number of English and Canadian cases with a New Zealand case. The former started from the implied position that the draftsman has a duty to satisfy himself of his client's capacity where the circumstances of the client require it. For example, the Canadian case of Scott v Cousins (2001) 37 ETR (2d) 113 held that *"the obligations of solicitors when taking instructions for wills have been repeatedly emphasised in cases of this nature. At the very least, the solicitor must make a serious attempt to determine whether the testator … has capacity and if there is any possible doubt – or any other reason to suspect that the will may be challenged …"*. The authors wrote *"in Feltham v Freer Bouskell the court made the clearer statement yet that the English court regards there as being a requirement that the draftsman must satisfy himself of his client's capacity".* They considered whether a draftsman should refuse to prepare a will where he is not satisfied the client has capacity and concluded it would be an unusual position both ethically and practically if a draftsman proceeded with will instructions if he believed the testator lacked capacity. However, in the New Zealand case of Knox v Till [2000] Lloyds RE PN 49, the court found there was no duty to refuse to prepare a will where the client lacked capacity. The conclusion is that New Zealand is out of step with the English and Canadian authorities (2/B/13/229). Advocate Dawes also relied upon the Mental Capacity Act 2005 and the Capacity and Self Determination (Jersey) Law 2016 which had not yet been replicated in Guernsey. The legislation sets out a presumption of mental capacity and provide that the fact a person is able to retain information for a short period only is not be regarded as unable to make a decision. Advocate Dawes also sought to garner support from the United Nations Convention on the Rights of Persons with Disability signed by the United Kingdom in 2007 which has not been extended to Guernsey. By reference to cases determined in the European Court of Human Rights, he submitted that the principles are applicable and that where a person has been assessed by an expert as having capacity there is a positive obligation to respect the individual's right to exercise autonomy and hence, in the present case, there was no lawful obstruction or ground to prevent the Client making the Wills when he had been assessed by Dr Liddell as possessing the capacity to do so.

118. The Court is not deciding whether the Client had testamentary capacity but whether the Appellant took the precautionary steps required of an Advocate. The Bailiff directed the Jurats that the legal test in Guernsey is as set out in Banks v Goodfellow, summarised above. The Appellant was required to satisfy himself that the Client had testamentary capacity. The Appellant was entitled to rely upon the expert opinion of Dr Liddell if he was competent to

assess testamentary capacity, if he had been properly instructed and if he had been able to carry out a proper consultation.

Undue influence

119. Advocate Dawes explained the legal test for undue influence by reference to Tristram and Coote's Probate Practice (online edition), paragraphs 34.47 and 34.48 (2/B/25/423) saying, in summary: "*to be undue influence there must be coercion; the testator may be led but not driven; his will must be the offspring of his own volition and not the record of someone else's." "Appeals to affection, ties of kindred, gratitude for past services, or pity for future destitution are legitimate; but not pressure if so exerted as to overpower the volition without convincing the judgment".*

120. The Bailiff reminded the Jurats that in this appeal they are not asked to decide whether the Client was acting under undue influence. The issue is whether the Appellant discharged the duty owed by an Advocate to his client. Counts 1 and 3 are directly relevant. They allege a failure to comply with Rule 1 (e) (the general obligation of an Advocate set out above) as well as Rules 10 and 18. Rule 10 relates to the giving of impartial and frank advice by the Advocate to the Client whereas Rule 18 says that an Advocate must not accept instructions when he suspects those instructions may have been given by a client under duress or under undue influence.

Appellant's Submissions

121. The Bailiff reminded the Jurats that the Appellant's contentions are set out in detail in the Notice of Appeal (1/A/1/1), the Appellant's Skeleton Argument in Support of Notice of Appeal (1/A/2/17), the Supplemental Skeleton Argument of the Appellant (1/A/4/55) and the Chronology from the Appellant's Perspective (1/A97/71) as well as in the oral submissions of Advocate Dawes. The Appellant alleges that there are a number of errors of law and fact in the judgment of the Chambre. A separate submission is that the decisions taken by the Appellant which are being scrutinised were matters of professional judgement for which he cannot be held liable in disciplinary proceedings.

122. He claimed one significant factual error undermines the judgment in that the Chambre found that the Appellant was given a copy of a file note made by Advocate [Y] dated 17 November 2003 (the "[Y] File Note") at his first meeting with the Client on 28 September (paragraph 48 of the judgment at 2/C/1/14). Whereas, the Appellant was shown the [Y] File Note during his cross-examination and said that to the best of his recollection he had not seen the [Y] File Note before (2/C/4/201D-F) although, in the Appellant's Skeleton argument, at paragraph 36, it is said that the [Y] File Note was provided to the Appellant's Advocates on 25 October 2016 and he saw it at that time.

123. In its judgment, the Chambre said that Advocate [Y] was refusing to continue to act for the Client. Also, in a number of places, the Chambre said that the fact an elderly client was being taken to a lawyer other than his habitual Advocate should have been a 'red flag' for the Appellant.

124. The file note of the meeting with the Client and the Client's Wife on 28 September (3/D/64/409) records that Advocate Xtold the Appellant that the Client did not wish to instruct Advocate [Y] anymore. He also told the Appellant that the [Y] File Note said the Client had been seen by Dr Shetty who had concluded that the Client did not have legal incapacity. Advocate Dawes' submission was that the Appellant should be entitled to rely upon Advocate X's statements especially because Advocate X was a friend and colleague he felt he could trust and in those circumstances there was nothing to alert the Appellant.

125. From the Appellant's perspective, he was told that the Client had capacity; Dr Liddell had so concluded in the report forwarded to the Appellant on the morning of 28 September, quoted above: *"[the Client] still has testamentary capacity…it would be prudent for [the Client's] testamentary capacity to be assessed again, as close to the time that the Will is made as is reasonably possible…I advised [the Client] and [the Client's Wife] not to tarry in making the necessary arrangements."*.

126. The Appellant was also entitled to rely upon Dr Liddell's examination of the Client by video link at the time of signing the Wills during which he alleged that all the elements of the Banks v Goodfellow test were put to the Client. In addition, there were the views of the two experienced Jurats who had said their duty was to assess capacity and they were satisfied. The answers given by the Appellant to Dr Liddell during the course of the interview were justified because he was helping to explain to Dr Liddell the Client's testamentary powers under Guernsey law; he did not hijack the interview. The Jurats could have intervened but did not and Dr Liddell did not object.

127. Advocate Dawes alleged a procedural defect in the Chambre proceedings in that the case presented changed from an allegation of lack of capacity and actual undue influence to one of process namely whether the Appellant adopted the correct procedures when taking instructions from the Client.

128. Regarding undue influence, Advocate Dawes drew a distinction between the Rule 18 and the Commentary thereon. It is the Commentary, not the Rule, which says that a client should be seen alone if the Advocate suspects the client is acting under duress or undue influence. It was normal to see a husband and wife together when taking instructions for a will. The Appellant was alert to the possibility of undue influence but asked the Client's Wife to remain in the room at the first meeting so that he could observe the dynamic between them. He also asked Advocate X to remain because of his greater knowledge of the case. The letter of instruction to him was in the hand of the Client and he had no knowledge of the draft discovered later in the hand of the Client's Wife. He was concerned about the "oh" moment in the meeting when the Client's Wife expressed surprise at the suggestion that he would give her a life interest in the house and then immediately changed it to vesting the property in her sole name. The instructions changed at the meeting on 1 October when the Client said he wanted to leave a life interest to the Client's Wife and subject to that to leave it to the Client's children to share the property with her. He saw that as a key moment indicating independence of mind. The provisions of the Wills were equitable and were as a judge might be expected to provide. The Assistant's note of the meeting recorded that the Client's Wife made no comments during the course of the meeting. Furthermore, the Client's Wife was not present when the Appellant spoke to the Client at Joy's prior to the video interview and she was not present during the course of the video interview and the signing of the Wills.

129. Advocate Dawes was highly critical of the Chambre's finding that the Wills were a departure from the provisions of the pre-nuptial agreement and in conflict with it. That was not so because the pre-nuptial agreement expressly provided for the parties to make wills in favour of one another.

130. Regarding the complaint that the Appellant did not obtain a second opinion when he had said he would do so, the correspondence shows that he did all he could.

131. Advocate Dawes was very critical of the approach taken by the Chambre in its judgment for not addressing each of the Counts and instead focussing on the Rules and then reaching a conclusion that was based on different allegations; he submitted that the Counts must be interpreted strictly as would be so with charges in criminal proceedings.

Registrar's Submissions

132. Advocate Bell submitted that at the Chambre hearing and in this appeal, the Appellant has demonstrated that he had no proper understanding of the duties of an Advocate when taking instructions from a vulnerable testator. His sustained insistence that there were no shortcomings in his conduct is a remarkable position for him to adopt. The Royal Court is not being asked to assess the Client's testamentary capacity nor whether he was actually acting under undue influence. The Court is concerned with the duties of an Advocate in such circumstances and whether the Appellant complied with the duties.

133. Extra care needs to be taken when acting for a vulnerable client. In order to discharge the duty to act in the best interests of the client, the Advocate must establish: 1) whether he is properly instructed by the client himself; 2) whether the client's instructions are genuinely his and 3) whether the instructions really are in the client's best interests. By comparison, when acting for a capable client, the Advocate must accept that the client can instruct an Advocate in any way that he wants.

134. The two most important failings on the part of the Appellant were: 1) not seeing the Client on his own when taking instructions, which might have taken no more than ten minutes; and 2) hijacking the video interview. It was insufficient to say that he saw the Client in the absence of the Client's Wife at Joy's prior to the video interview when they only talked about the evacuation. During the video interview, it would have been satisfactory to give a brief explanation of Guernsey law but the Appellant's interruptions went way beyond what was acceptable. He also failed to provide Dr Liddell and the Jurats with sufficient information of the context in which the Wills were being made to enable them properly to give an informed and instructed opinion. The Banks v Goodfellow issues were not properly addressed and the Appellant failed to use the questions that had been carefully drafted beforehand.

135. Any mistake the Chambre might have made about the [Y] File Note does not alter its conclusion. The judgment at paragraphs 138 and 162(5) records that even if the Appellant had received the [Y] File Note he may not have read it at the time. Furthermore, Advocate Bell submitted that, in any event, having been referred to the [Y] File Note by Advocate X, he should have asked for a copy and he should have read it for himself. Aside from that note, there were other warning signs such as the pending, contested guardianship application; Dr Liddell painting a picture of the Client's mixed abilities; Dr Liddell's comment that it was all a can of worms that would end up in Court; and his mention of family discord. He should not have discussed with Dr Liddell the arrangements for the video interview before meeting the Client. Having done so, he put himself under pressure to 'get the Wills over the line' and that tainted his subsequent decisions and actions.

136. The Appellant should have put to the Client the inconsistencies in the instructions he was giving, preferably in the absence of the Client's Wife. He should have given meaningful advice on the effect of the pre-nuptial agreement. He should have been placed on inquiry by the provisions of the Wills being a significant departure from the pre-nuptial agreement, increasing considerably the Client's Wife's interests at the expense of the Client's children. He said that the Wills fell at the first hurdle when challenged in mediation of court proceedings in which the Client's Wife settled for substantially less than the Wills gave her.

137. During the video interview, the Appellant interrupted Dr Liddell's questions, he purported to clarify the Client's answers and he finished the Client's answers for him. A word count shows that the Appellant spoke more than 1,000 words compared with 359 by the Client. The Appellant focussed on explaining Guernsey law to Dr Liddell rather than ensuring that the right questions were asked of the Client to test his testamentary capacity.

138. The Appellant could have done more to obtain a second opinion. For example, he did not contact the Client's GP.

The Chambre's Judgment

139. The Chambre's discussion and analysis of the evidence begins at paragraph 119 of its first judgment (2/C/1/30). The Bailiff directed the Jurats to read it with care and with a critical eye in order to help them decide whether and, if so, why they consider that the conclusions of the Chambre are wrong. He directed them to take account of all the matters that had been raised and suggested the Jurats focus on the principal issues identified by counsel in their submissions namely whether the Appellant should have seen the Client on his own and whether the video interview was properly conducted to which there are three main aspects namely whether Dr Liddell was competent to assess testamentary capacity when he had never done so before, whether he was adequately and fully instructed and whether the Appellant interrupted on too many occasions.

140. In paragraph 131, the Chambre questioned whether the Appellant had asked sufficient questions of Dr Liddell when instructing him to assess whether he had the competence to give an opinion on testamentary capacity and whether he had provided him with sufficient information to assess the Client's testamentary. The Chambre addressed the issue of Dr Liddell's insufficient experience in paragraph 141.

141. In paragraph 132, the Chambre described the first 'red flag' which was that any lawyer who is asked to act for an elderly client facing a guardianship application who has chosen to instruct a new law firm should be very vigilant before accepting instructions. The Appellant did not adequately enquire of the Client as to why that was so.

142. In paragraph 133 the Appellant is criticised for not having read the relevant material before taking the Client on board, in circumstances where he had been alerted to the capacity issue. Thereafter, he simply followed instructions (paragraph 134). In paragraph 135, the Chambre referred to the information provided to the Appellant including the [Y] File Note which he had not in fact been given as we said earlier in the judgment.

143. In paragraph 137, they note that the issue of vulnerability was sufficiently clear from sources other than the [Y] File Note. In paragraph 138, the Chambre criticised the Appellant for not speaking to the Client alone, not to Advocate [Y] and not to the Client's children. In paragraph 139, they comment on Advocate X's warnings and his observation that it would be the Appellant's neck on the block. In paragraph 140, they considered that even after all this time, by refusing to acknowledge that he would have done anything differently, the Appellant is in denial of his duties.

144. In paragraph 142, they note that the Appellant gave no evidence of his observations of the group dynamic even though he had said that was the reason for allowing the Client's Wife to be present during the interview in his office. In paragraph 143, they state that the contents of the [Y] File Note taken together with the other red flags should have put the Appellant on inquiry of the need to exercise due care and skill. Instead he put himself under pressure to get the Wills over the line and sought to gather the evidence to meet a legal challenge later rather than address the issues required by the RPC. He failed to study the RPC when he should have been engaging fully with the Rules (paragraph 145).

145. It was of note that the Appellant asked the Assistant to draw up a list of questions based on the guidance in Banks v Goodfellow but could not answer a question as to when the questions were put to the Client and that he missed the opportunity to do so during the video conference.

146. The Chambre criticised the Appellant's handling of the second interview with the Client, in the presence of the Client's Wife, when he put two versions of each Will to the Client who even then changed his instructions. The Appellant failed to investigate the instructions but satisfied himself that it was what he thought a judge would do (paragraphs 147 and 148).

147. Finally, in paragraphs 149 and 150, the Chambre criticised the Appellant's handling of the video conference and his many interruptions.

148. The Chambre's Conclusions start at paragraph 151. They begin with a number of findings including dismissing Advocate Wessels' submission that the case had shifted during the hearing. They reject the submission that the Appellant could rely upon the 'Golden Rule'. The test has two important limbs, capacity and understanding on the part of the testator, but the Appellant did not give sufficient background information to Dr Liddell in respect of the latter. The Chambre identified that they were not concerned with an assessment of whether the Client lacked testamentary capacity or was acting under undue influence; their task was to decide upon any infringement by the Appellant of the RPC.

149. In paragraph 157 they record that they were satisfied each of the Counts had been proved beyond reasonable doubt. There were only two evidential points that had not been proved: the allegation in Count 1 that the Client's instructions *"came from Advocate X acting for [the Client's Wife]";* and, in Count 3, that the Client's Wife brought undue influence to bear even though they found she was a source of influence. They also said in paragraph 159 that the Appellant's acts and omission were not simply the result of an error of professional judgement but they were serious and reprehensible and would be regarded as so by reputable practitioners.

150. In the final paragraphs, they addressed each of the Rules of the RPC named in the Counts to explain why they were satisfied that the Complaint had been proved.

The Jurats' Conclusions

Meeting with the Client

151. The Jurats unanimously agreed that the Chambre were right to conclude that the Appellant should have met with the Client on his own. The Appellant's observation that it is normal to see a husband and wife together when taking instructions to draft wills is not satisfactory in circumstances where the Appellant was told by the Advocate acting for the Client's Wife that the Client needed to instruct his own Advocate separate from hers. The first telephone call from Advocate X should have put the Appellant on notice that he needed to act differently.

152. The report of Dr Liddell referred to in the email sent to the Appellant at 1042 on 28 September disclosed the family dispute as to who should manage the Client's affairs, whether it be the children or the Client's Wife and warned that the whole matter may end up in Court. Although Dr Liddell concluded that the Client still had testamentary capacity, he warned that the window of opportunity was not great. That information should have alerted the Appellant to the Client's vulnerability and the need to take extra care to establish his true wishes.

153. At the meeting held from 1650 to 1900, the Appellant was given further information about the family dispute, the contested guardianship and the questions surrounding testamentary capacity. He was given a copy of the guardianship application and the three medical affidavits attached to it each of which concluded that the Client lacked the capacity to manage his affairs and required a guardian to be appointed. The Jurats recognise that that is a separate question to testamentary capacity but the focus of the Appellant at this stage should have been to ascertain whether he could accept the Client's instructions.

154. The Jurats agree with the Chambre that there were many questions the Appellant should have asked the Client. He should have explored why the Client no longer wanted to instruct Advocate [Y]. He believed it was because Advocate [Y] was conflicted but was that how the Client saw it? Why had he chosen to instruct the Appellant? In seeking to make new wills, was he revoking existing wills and, if so, how different would the new wills be to the old wills; did he understand the options he had under Guernsey law; was he aware of the implications and was he able to make a choice?

155. Rule 1(e) which underpins all of the Counts in the Complaint required the Appellant to act in the best interests of the Client. Having been made aware of the circumstances, the Appellant should have met with the Client either before or after or during the meeting that started at 1650 on 28 September and was held in the presence of the Client's Wife and her Advocate.

156. There were many questions he should have been asking and issues he should have thought about at the outset but instead the Appellant telephoned Dr Liddell at 1630 on 28 September to discuss the arrangements for witnessing the Wills before he had met with the Client. It suggests his focus was on getting the job done, "getting the Wills over the line" rather than the duties owed to an elderly, vulnerable client with declining mental capacity who was caught in the midst of a family dispute over the management of his affairs.

157. The Jurats were unanimous in supporting the Chambre's conclusion that the Appellant failed in his duties by not seeing the Client alone - Jurats Grut and Gill were in a minority in finding that it was not reprehensible because the Client was not deliberately seeking to do the wrong thing. The minority view was that he had been given a difficult task and although he should have been more sceptical, he considered his responsibility to be to ensure that his Client made new Wills and, in those difficult circumstances, he thought he was doing his best for the Client.

Interview by Video on 1 October 2004

158. The Jurats were unanimous in their criticism of the Appellant for his arrangements and conduct of the video interview with Dr Liddell on 1 October 2004. The preparation and organisation were poor. Although the Assistant had prepared a list of questions to be asked, they were not fully covered during the interview. There are other steps which could and should have been taken to ensure that Dr Liddell could conduct a thorough examination that were not considered.

159. The Appellant could and should have briefed both Dr Liddell and the two Jurats beforehand. He should have explained the circumstances in which the Wills were being made. The Banks v Goodfellow test includes a requirement that the testator *"shall be able to comprehend and appreciate the claims to which he ought to give effect"*. Before the video interview started, the Appellant could and should have explained to Dr Liddell the competing claims the Client was facing from his children and from the Client's Wife which would have included informing them that there was an outstanding, disputed guardianship application. The explanation would have included a statement as to the status quo which was either that under the terms of the pre-nuptial agreement, the Client's Wife would receive nothing if the Client predeceased her, or that there were existing wills, if that were the case. The testamentary options available to the Client under Guernsey law, at that time, should have also been explained in the briefing. The Appellant should have asked Dr Liddell to give his name, his qualifications and his role at the outset of the interview for the benefit of Jurats Lowe and Le Page, rather than leaving it for one of them to have to ask later.

160. In short, the Jurats unanimously agree that although the Appellant had prepared some questions, he had not briefed Dr Liddell and the two Jurats as fully as was necessary, he did

not follow the plan he had prepared, the interview was badly executed and the Appellant lost track of what it was intended to achieve.

Obtaining a Second Opinion

161. The Appellant had said several times that he would obtain a second opinion after the video interview. Although that never actually happened, the view of the Jurats is that the Appellant was not to blame for circumstances outside his control. They are critical of the fact that he did not keep Jurats Lowe and Le Page informed when he had told them there would be a second opinion but that failure was not serious enough to amount to professional misconduct.

Conclusions re Professional Misconduct

162. Advocate Dawes' criticism of the Chambre for failing to consider each of the Counts in turn in its conclusions is not justified. It is clear from the judgment that the Chambre did consider each of the Counts and each of the Rules of Professional Conduct which the Appellant was alleged to have broken. The Chambre's reasoning and its conclusions can be clearly understood.

Count 1

163. Advocate Dawes submitted that because the Registrar had failed to prove that the instructions for the Client's Wills had come from Advocate X and had also failed to establish that the Client lacked testamentary capacity, Count 1 should have been dismissed. The Jurats consider that was too strict an interpretation of the Count. The detailed instructions for the Wills did not come from Advocate X but it was he who suggested that the Client should instruct the Appellant to prepare Wills and the Appellant failed to make sufficient enquiry of the Client to ascertain why he had been chosen and to ensure he had a free choice of Advocate. Advocate Dawes interpreted the reference to *"lack of capacity"* as a reference to *"lack of testamentary capacity"* but that was not justified and in relation to capacity in the broader sense, the Client's capacity was lacking and was declining.

164. The other factual elements of Count 1 were established. The Appellant had notice of the guardianship proceedings and the conflict between the Complainants and the Client's Wife. He did not take precautions to see the Client alone. The only times he was alone with him without being accompanied by the Client's Wife was prior to the video interview when they spoke about the wartime evacuation, during the video interview and during the signing of the Wills. At those times the focus was on attempting to test the Client's testamentary capacity, rather than advising on the testamentary options, exploring the Client's wishes and taking instructions.

165. The Jurats are unanimously agreed that the Chambre was correct in finding that the Appellant's conduct breached his duties under Rules 1(e), 10 and 18, as alleged in Count 1. A minority of two Jurats (Jurats Grut and Gill) disagree with the Chambre and consider that the conduct was not sufficiently serious to amount to professional misconduct.

166. The majority of the Jurats agree with the Chambre's conclusion that Count 1 was made out.

Count 2

167. At paragraph 165(2) of the judgment, the Chambre held that *"failing to make enquiry of why [the Client] was moving away from the provisions of the pre-nuptial agreement that had stood for 6 years was a failure to exercise care and skill under [Rule 55]".* That conclusion is correct.

168. In paragraph 162(2), the Chambre found that the failure to properly investigate and understand why the Client was moving away from the terms of the pre-nuptial agreement was a breach of the duty to act in his best interests and contrary to Rule 1(e). A majority of the Jurats agree with the Chambre's findings with Jurats Grut and Gill dissenting for the reasons given above.

Count 3

169. Count 3 duplicates aspects of Count 1. At paragraph 163(3), the Chambre said in relation to this Count that the Appellant failed properly to investigate the Client's capacity issues, vulnerabilities, conflicts and abandoning of his long retained lawyer. Advocate Dawes suggested that Advocate [Y] was not his long retained lawyer as the Client had consulted others in the past but that is not material to the allegation that he failed to discharge the duty owed under Rule 1(e).

170. Once again, a majority of the Jurats agree with the Chambre's findings in relation to Count 3 with Jurats Grut and Gill dissenting for the reasons given above.

Count 4

171. On this Count, the Jurats are unanimous in agreeing the conclusions of the Chambre that the assessment by video was conducted inappropriately for the reasons stated above. The Jurats agree unanimously that the Appellant's conduct in relation to the assessment was in breach of Rules 1(e) and 55 and that it amounted to professional misconduct.

Count 5

172. The Jurats respectfully disagree with the Chambre's finding that the failure to obtain a second opinion amounted to professional misconduct. As we said above, they consider that the failure was due to factors beyond the Appellant's control. However, they are critical of him for failing to keep Jurats Lowe and Le Page informed as he said he would.

The Sanction Appeal

173. The Chambre's judgment in relation to sanction was dated 28 June 2019 (2/C/2/51). The only mitigating factor found by the Chambre was that the Appellant had no previous disciplinary history and was of unblemished character. It dismissed delay as a mitigating factor on several grounds. One was that the Appellant had been able to continue his career for fourteen and a half years without the blemish of a sanction against his name. The Chambre noted that the parties had accepted the Registrar's decision to pursue the Complaint notwithstanding the delay although Advocate Dawes sought to reopen that issue on appeal as we explained above. Unlike the Chambre, the Jurats had sympathy for the Appellant having to face a Complaint so many years after the events to which it relates. The Court's judgment is that the delay did not render the proceedings invalid but it was a mitigating factor.

174. The Chambre explained that, by a majority, it considered that the seriousness of the misconduct and the Appellant's failure to accept that he was at fault justified a public rebuke. The judgment does not say which member of the panel was in the minority nor what sanction that person would have recommended although it implies that the other person would have recommended a private reprimand.

175. The Jurats agree unanimously with the decision of the majority. The misconduct was serious and the fact that the Appellant does not accept the findings of the Chambre and continues to maintain that he was not at fault indicates that he still does not understand the extent of the duties he owed to the Client.

Decision

176. For the reasons given in this judgment, the appeals against the decisions of the Chambre are both dismissed.