Appeal seeking to overturn the decision of the Royal Court, in respect of findings of professional misconduct made against the Appellant by La Chambre de Discipline and against the disposal of the complaint by the Chambre.

[2020]GCA082

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO: 541

Before:	**James McNeill, QC** **Jonathan Crow, QC** **David Perry, QC**	
Between:	**An Advocate**	**Appellant**
	-and-	
	REGISTRAR OF LA CHAMBRE DE DISCIPLINE	**Respondent**

Advocate G Dawes for the Appellant
Advocate G K Bell for the Respondent

Decision handed down: 5th November 2020

Crow JA

This is the judgment of the court to which all members have contributed.

Introduction

1. The Appellant is seeking to overturn a judgment of the Royal Court dated 13 January 2020 (the "**Royal Court judgment**") by which the Royal Court dismissed the Appellant's appeal against (i) four of the five findings of professional misconduct which had been made against him by La Chambre de Discipline du Barreau de Guernsey (the "**Chambre**") in a judgment dated 29 March 2019, and (ii) the consequential disposal of the complaint by the Chambre made in a judgment dated 28 June 2019 (together, the "**Chambre judgments**"). Leave to appeal was granted pursuant to s. 30(3) of the Guernsey Bar (Bailiwick of Guernsey) Law 2007 ("**the 2007 Law**") by the single judge on 4 April 2020.
2. The Appellant sought a direction at the outset that the hearing of this appeal should be conducted in private and that the court file should be sealed pending the outcome. We acceded to that application when it was made, and we indicated at the time that our reasons would be given in this judgment. In summary, we considered that a hearing in private was appropriate because (i) it was consistent with the legislative regime, under which proceedings before the Chambre are generally held in private, as required by s. 25(1) of the 2007 Law, (ii) that was the practice adopted in this case, (iii) it also reflected

the fact that the Royal Court decided to hear the appeal from the Chambre judgments in private as well (see §24–42 of its judgment), (iv) furthermore, it was consistent with previous practice on appeals from the Chambre in other cases, (v) it was required in the interests of fairness to the Appellant in circumstances where, if the finding of misconduct were to be set aside, publication of the fact of the proceedings would cause significant and unjustified professional damage to him, (vi) there was no prejudice to the Respondent or to any other party resulting from a hearing in private, and (vii) in all the circumstances, the general public interest in open justice did not outweigh the arguments in favour of a private hearing.

3. In short summary, the underlying issue in these proceedings arises from events which took place over a period of four days, some sixteen years ago. On 28 September 2004, the Appellant was introduced to a new client (the "**Client**") for whom he had not previously acted. He then drafted wills dealing with the Client's real and personal property (the "**Wills**") which were signed by the Client on 1 October 2004. It is common ground that in late 2004 the Client's mental capacity was deteriorating and that there was family discord between the children of his first marriage (on the one hand) and his second wife (on the other). The broad issue before the Chambre was whether the Appellant had done enough to satisfy himself that he should accept instructions from the Client, that those instructions truly reflected the free will of the Client, and that the Client had testamentary capacity.

4. With that very short introduction, it is necessary for the purpose of this appeal to review both the facts and also the judgments of the Chambre and the Royal Court in considerably more detail.

The factual background in outline

5. The Appellant is a member of the Guernsey Bar. Apart from the complaint in this case, there have been no other proceedings against him before the Chambre, nor any equivalent proceedings against him in any other jurisdictions.

6. The Client was born in 1932. He died in 2015, predeceased by his first wife. He had remarried and was survived by his second wife (the **"Wife"**), and also by the children of his first marriage.

7. Before the second marriage there was a pre-nuptial agreement under which the Client and the Wife agreed to renounce all claims on each other's sole property, save that express provision was made in clause 4.1 which recognised that each party could make provision for the other in their respective wills.

8. During 2001 to 2003, a number of draft wills were prepared for the Client by lawyers other than the Appellant, the terms of which were inconsistent with each other and with the Wills which were ultimately signed on 1 October 2004. Eventually, Advocate Y, who had been advising the Client for a number of years (after previous advisers had been replaced), called a meeting on 14 November 2003 which was attended by the children and by Advocate X for the Wife. Advocate Y wrote a detailed attendance note of the meeting in which he recorded having stated his then opinion that the Client had testamentary capacity. However, the file note also expressed a concern that the Client "*could very easily be the subject of undue influence*" and that Advocate Y's dealings with the Client over the preceding 18 months "*had led [Advocate Y] to suppose that [the Client] was inclined to instruct [Advocate Y] in accordance with whatever had been the last important conversation which he had had with a family member*" and that as a result the Client's position was "*very vulnerable*". He added that his concerns had been

expressed to the Client, who had said that "*he did not anticipate a difficulty, simply because he had no proposals to do anything which would effect* [sic] *his estate*".

9. Also, in the same period from 2001 to 2003, the Client was examined by a number of different medical practitioners who expressed varying levels of concern regarding his cognitive function. Eventually, in June 2004, lawyers representing the children notified the Wife that their father's ability to manage his own affairs had deteriorated so badly that they were applying to the court for the appointment of a guardian. The application was eventually issued on 15 September 2004.

10. Shortly after that, the Client was examined by Dr Liddell, a consultant psychiatrist in old age psychiatry, for the purpose of assessing his ability to make an enduring power of attorney, his testamentary capacity, and more generally his mental state and ability to manage his affairs. Dr Liddell's report dated 24 September 2004 stated that his 'Instructor' was the Wife and that the Client was the 'Subject' of the report (*i.e.* he was not the person from whom Dr Liddell was taking his instructions). It also disclosed that there had been telephone conversations between Dr Liddell and the Wife before the assessment was conducted, from which Dr Liddell gathered that the children of the Client's first marriage were "*very unfortunately ... attempting to wrest control of his financial affairs*". The report diagnosed the Client as suffering from the early stages of Alzheimer's. It expressed the view that the Client "*no longer has the capacity to manage his affairs*" and that he probably did not even have the capacity to nominate a suitable attorney. Nevertheless, he considered that the Client "*still has testamentary capacity*" but added that if he wished to make a will it would be prudent for that capacity to be assessed again, as close as reasonably possible to the making of the will. Finally, he said that "*the window of opportunity*" for someone to be appointed to act on the Client's behalf was not great and he advised the Client and his Wife "*not to tarry in making the necessary arrangements*".

11. Four days later, on 28 September 2004, Advocate X (the Wife's lawyer) telephoned the Appellant saying that he had the Client and the Wife with him, and that the Client wished to make a will. Advocate X emailed to the Appellant a copy of Dr Liddell's report under cover of an email from Dr Liddell which said "*The whole business is a veritable can of worms, and, I suppose, will only be sorted out in the courts*". The Appellant together with an assistant met with the Client, the Wife and Advocate X later that day. On 1 October there was a further meeting between them, this time without Advocate X. Later that day, Dr Liddell conducted a further assessment of the Client by video. The Client was accompanied in person by the Appellant. Two Jurats were also present, but not the Wife. The Wills were then signed later that day. Through them the Client gave the Wife a life interest in all realty, and subject thereto divided the property in equal one-fifth shares between her and the children. Personalty was divided as to two-thirds to the Wife and as to one-third in equal shares between each of the children.

12. The children made complaints to the Registrar by letters dated 3 June 2007 and 9 December 2009 (Chambre judgment, §37). Their first letter appears to not have been received, but the second was considered by the Registrar. By letter dated 28 July 2011 enclosing a written decision regarding the complaint, the Registrar declined to refer it to the Chambre primarily on the ground that no *prime facie* case was disclosed. Importantly for present purposes, however, the Registrar also said this in §25 of his decision:

> *"When the sad day arrives to wind up their Father's estate, the validity of his Wills can be questioned. The opportunity to challenge Wills* [sic] *on the grounds of*

testamentary capacity will arise then rather than in the course of disciplinary proceedings before the Chambre. That also will be the time to determine whether [the Appellant] took instructions from their step-mother in the matter of their Father's wills and the relevance of any pre-nuptial contract. Again, that will be the time to investigate whether or not [the Appellant] took proper steps to preserve their Father's assets. All this can be done in the context of adversarial proceedings and with civil standard of proof [sic]. *Any adverse findings can then give rise to damages, something that cannot happen in proceedings before the Chambre"* (emphasis added).

13. The Client died in June 2015. Proceedings were then launched by the children challenging the Wills, but in the event they were settled by agreement in February 2016. As a result, and contrary to the Registrar's expectations, the opportunity for testing the validity of the Wills in court and for a judicial determination of whether the Appellant had misconducted himself did not arise.

14. The children accordingly renewed their complaint to the Chambre by letter dated 22 December 2015. Their principal complaints were that (i) the Appellant should not have accepted instructions from the Client, (ii) he failed properly to investigate the pre-nuptial agreement, (iii) he failed to ensure that his instructions were truly those of the Client, (iv) he failed to ensure that Dr Liddell was properly instructed with all relevant information, and (iv) he conducted himself improperly during the video assessment by Dr Liddell, both by interrupting and by answering for the Client.

15. Under ss. 20(5) and 22(9) of the 2007 Law, the matter was referred by the Registrar to an English silk, Charles Bourne QC, who conducted an investigation and made a report to the Registrar dated 10 February 2017 (the "**Bourne Report**") recommending that the complaint be referred to the Chambre. The Registrar duly wrote to the Appellant on 14 March 2017 informing him that the complaint had been referred to the Chambre. The Registrar's Details of Complaint were in due course finalised on 27 June 2017 ("**the Complaint**").

The Complaint

16. The Complaint contains five 'Counts':

"1. By accepting instructions regarding [the Client's] Wills ("the instructions"), when these came from Advocate X acting on behalf of [the Wife] and when he had notice of the Guardianship proceedings, [the Client's] lack of capacity and the conflict between the complainants and [the 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 any 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.

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 [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.

3. By facilitating execution of the Wills with knowledge of the circumstances including [the Client's] lack of understanding and the influence of [the Wife], [the Appellant] was in breach of his professional duty under rule 1(e) of 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.

4. By 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 [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.

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

(a) under rule 1(e) of 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."

The legislative framework

17. Under s. 21(1) of the 2007 Law, any complaint of misconduct against an Advocate is made to the President of the Chambre 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, the Bâtonnier must refer it to the Registrar of the Chambre under s. 21(5). The Registrar is then required to investigate the complaint under s. 22(1)

and, if he is satisfied it discloses a *prima facie* case, he must refer it to the Chambre under s. 22(6).

18. Under s. 17(3) of the 2007 Law, the Chambre is composed of one lay person, one Guernsey advocate and one 'senior lawyer' who is not a Guernsey advocate. Pursuant to s. 17(4), proceedings in the Chambre are inquisitorial. Under s. 25, the proceedings are heard in private (subject to an exception which does not apply here). Under s. 25(9)(b), the applicable standard of proof in this case was "*the criminal standard*".

The Rules of Professional Conduct

19. Rule 1 of the Rules of Professional Conduct issued by the Guernsey Bar Council ("**the Rules**") provides in relevant part as follows:

> *"An Advocate shall not do anything in the course of practising as an Advocate … which breaches, compromises or impairs or is likely to breach compromise or impair …*
>
> *(e) the Advocate's duty to act in the best interests of the client".*

20. The Commentary to that Rule says this:

> *"Rule 1 … 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."*

21. Rule 10 of the Rules provides as follows:

> *"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 weaken or destroy the Advocate's professional independence or the fiduciary relationship with the client."*

22. The Commentary to that Rule includes this passage:

> *"1. A potential client who has been improperly influenced in his or her choice of Advocate cannot be said to have had a 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."*

23. There are accordingly two significant differences between Rule 10 and the Commentary in §1:

    (i) First, while Rule 10 itself is focused on the absence of external or adverse pressures or interests in relation to the position of the advocate, §1 of the Commentary focuses on the position of the client, in particular in relation to his/her free choice of advocate.

    (ii) Second, whilst Rule 10 is concerned with a question of fact (can the advocate give impartial and frank advice?), §1 of the Commentary asks whether the advocate "*has reason to <u>suspect</u> that there <u>may</u> have been improper influence*".

24. Rule 15 of the Rules provides as follows:

> *"An Advocate must not act or, where relevant, must cease acting further where the instructions would involve the Advocate in a breach of the law or a breach of the*

principle of professional conduct, unless the client is prepared to change his or her instructions appropriately."

25. Rule 18 provides as follows:

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

26. The Commentary to that Rule says this:

> *"If an Advocate suspects that the client's instructions infringe the 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."*

27. In the context of this appeal, it is important to say something about the content and meaning of Rule 18. A breach occurs not because an advocate has accepted instructions which are in fact tainted by duress or undue influence, nor because the advocate has accepted instructions believing that there has been duress or undue influence, let alone because the advocate has accepted instructions knowing that there has been duress or undue influence. Rather, a breach occurs where an advocate accepts instructions where s/he suspects that those instructions have been given under duress or undue influence. The corollary is that a breach cannot be avoided simply by demonstrating that there was not in fact any duress or undue influence: that is not the issue.

28. Rule 55 provides as follows:

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

29. The Commentary to that Rule includes this passage:

> *"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."*

30. The observations outlined above in relation to Rules 10 and 18 reflect the nature of the Rules more generally. It is stating the obvious to say that the Rules relate to the standards of a lawyer's professional conduct, and as such they prescribe how lawyers should behave. They do not constitute a code of civil liability, and as such their operation does not turn on the question whether a client (or, for that matter, any third party) has in fact been prejudiced. A lawyer may act disgracefully and may be properly sanctioned, without in fact causing any financial loss to his client or to anyone else. Liability for loss is the concern of the civil law. Standards of professional conduct are the concern of the Rules. This point was well recognised in the Chambre judgment when dealing with an argument on behalf of the Appellant that there was no evidence that a different result would have followed if the Appellant had acted differently. The Chambre said in §154 of its judgment that this argument misses the point, and continued as follows:

> *"It is not sufficient to say it would not have mattered what [the Appellant] did or didn't do because the result would not have been any different. First, there is simply no evidence to support such a finding and second that is not the purpose of the Rules. They exist to provide a framework to ensure that Advocates properly and appropriately conduct themselves in the circumstances in which they find themselves,*

and are not to be ignored simply because an Advocate does not think the result will be any different no matter what he does."

31. In our judgment, the Chambre was entirely correct in this regard and the Appellant did not seek to persuade us otherwise in this appeal.

The proceedings in the Chambre

32. The Chambre heard the Complaint over three days in November 2018. In its judgment dated 29 March 2019 , the Chambre found that all five 'Counts' set out in the Complaint were proved to the necessary standard, and decided that a sanction of public rebuke should be imposed (judgment, §205). It also made an adverse costs order against the Appellant (judgment, §206–209).

33. In reaching its conclusion, the Chambre expressly recognised that the onus was on the Registrar (judgment, §157) and that the standard of proof was "*beyond reasonable doubt*" (judgment, §13 & §157).

34. The threshold test it applied for determining whether there had been professional misconduct was that "*culpability is the key ingredient*" and it observed that both parties sought to move the Chambre away from applying a test of 'strict liability' – *i.e.* that professional misconduct would automatically follow from any finding that there had been a breach of the Rules (Chambre judgment, §14). It applied analogous UK case-law (*Sharp v. Law Society of Scotland* [1984] SC 129, *Howd v. Bar Standard Board* [2017] EWHC 210 and *Walker v. Bar Standards Board* PC 2011/2019) to the effect that trivial breaches of the Rules do not constitute professional misconduct (Chambre judgment, §16–17). It held that the breach must be sufficiently serious, reprehensible, morally culpable or disgraceful (Chambre judgment, §17).

35. The Chambre judgment also recorded the fact that it was common ground between the parties that, in a case where the impugned conduct involves the exercise of professional judgment, "*it is unlikely to involve professional misconduct unless no reasonably competent advocate could have come to the same decision*" (§14).

36. In conclusion, the Chambre held that "***only serious infringements*** *of codes of conduct* ***that warrant censure*** *are to be treated as professional misconduct*" (Chambre judgment, §18, emphasis in the original), and that "*only a finding that a practitioner's conduct is serious* ***and*** *reprehensible, as would be entertained by reasonably competent and reputable practitioners in this or comparable jurisdictions, will constitute professional misconduct*" (Chambre judgment, §23, emphasis in the original).

37. In making its assessment whether there had been professional misconduct, the Chambre considered that it should have regard to (i) the factual matrix in which the conduct was undertaken, (ii) the course of conduct followed by the practitioner, (iii) whether that course was deficient by reference to the Rules, and (iv) what effect (if any) the course followed by the practitioner had (Chambre judgment, §24).

38. It will be apparent from what follows that one of the Grounds of Appeal is based on a complaint about how the Royal Court handled an error of fact on the part of the Chambre. In order to put that allegation in context, and also to provide the relevant factual background to the appeal, it is convenient to set out certain passages in the Chambre judgment at length, starting with their summary of the Appellant's own oral evidence before them:

*"43. [The Appellant] started by telling the Panel that on the morning of 28 September 2004 [**Adv X**] had rung him to say that he had [the Client and his Wife] with him and that [the Client] would like to make a will of real estate. [The Appellant] replied by saying that they had better come around and by fax from [Adv X] he received a report of a Dr Malcolm Liddell (**Dr Liddell**) **[53]**. The fax was dated 28 September 2004 at 10:42 (am) and provided a copy of an e-mail from Dr Liddell to [Adv X] that included the following:*

> *"Please find attached report on [the Client's] financial and testamentary capacity. I do not think it contains much comfort to [the Wife]. **The whole business is a veritable can of worms, and, I suppose, will only be sorted out in the courts.**" Panel's emphasis.*

44. [The Appellant] went on to tell the Panel that the call was no cause for concern as [Adv X] knew [the Appellant] well and at that time he ([the Appellant]) didn't have a clue as to what [Adv X] was talking about. By way of background [the Appellant] said that in January to March of that year he had been involved in a 'trust' case with [Adv X] in Geneva that had involved issues of capacity and he thought that this was the reason [Adv X] had contacted him.

*45. [The Appellant] was taken to Dr Liddell's report **[15/115]**. Dr Liddell was a Consultant Psychiatrist in Old Age Psychiatry practising out of St Tydfil's Hospital, Merthyr Tydfil, Wales. He states in his report prepared the day after seeing [the Client] in Cardiff on 23 September 2004:*

> *"From telephone conversations with [the Wife] before his interview, and, also, during the interview itself, I understand that [the Client's] memory has been deteriorating over the past three 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 Wife] inasmuch as they cannot reach some amicable compromise about helping [the Client] with his affairs**. **From my perspective the situation is rendered more complicated because Guernsey law does not provide for "Enduring Power of Attorney"**. Nevertheless, I said I would be prepared to provide an assessment of [the Client's] mental state and competency to manage his affairs. I also agreed to estimate [the Client's] testamentary capacity. For his part, [the Client] did not fully understand why he had been driven half way across the country to a consulting room in the middle of Cardiff. He easily accepted that he had a memory problem, but did not think it was severe enough to severely compromise his ability to manage his affairs. Although he agreed that I could assess his capacity to manage his affairs, **I am of the opinion that I have really received my instructions from [the Wife] in this regard**." Panel's emphasis.*

*46. [The Appellant] was taken by Adv Wessels to a file note of a meeting held at his offices at 4.30pm on 28 September 2004 **[54]** when he and his assistant, [ ], met with [Adv X], during which [the Appellant] telephoned Dr Liddell (**Call**) in order to "establish whether Dr Liddle [sic] would be willing to assess [the Client] by video link on the day that [the Client] intends to sign his wills." Dr Liddell stated that he could attend to this in a month or so but [the Appellant] said: "due to the circumstances it would be necessary that the interview took place sooner rather than*

later." It was recorded that Dr Liddell would investigate and revert. The Call is recorded as having lasted 20 minutes.

*47. Immediately following the Call [the Appellant] met with [the Client and the Wife]. The file note of that meeting is also at **[54]**. It is recorded, and [the Appellant] confirmed, that he and [his assistant] met with [the Client, the Wife] and [Adv X] from 4.50pm to 7.00pm (**First Meeting**). [The Appellant] confirmed during his evidence that [his assistant] would take contemporaneous manuscript notes of the meetings that were then typed up. It was not suggested that the notes were inaccurate or could not be relied upon.*

*48. [The Appellant's] memory of the First Meeting did not appear to be very good. It also appeared to the Panel that he was not familiar with content of the note. He stated he remembered a lot more about the issue of [the Client's] will rather than the guardianship issue that he thought of as a family squabble. In explaining why [Adv X] and [the Wife] were allowed to be present with [the Client], [the Appellant] stated that he wished to observe the "group dynamic" and how the parties were interacting; a theme to which he would often return while giving his evidence. The reason for the meeting, given to [the Appellant] by [Adv X], was that [the Client] should be engaging a new lawyer, independent of that engaged by [the Wife], because [the Client's] long time lawyer, [**Adv Y**] was refusing to continue to act for [the Client], citing mistrust by [the Wife]. [Adv Y] had provided a comprehensive file note of the situation dated 17 November 2003 **[24]** (a copy of which was given to [the Appellant] at the First Meeting)."*

39. We pause there to record the fact that the Royal Court later held (in §142 of its judgment) that the evidence did not support the Chambre finding that the file note prepared by Advocate Y ("**the Y file note**") was actually given to the Appellant at that meeting, or at any time before the Wills were signed. The Royal Court's handling of that error on the part of the Chambre forms one of the grounds of appeal before this Court. Continuing with the Chambre judgment:

"49. When asked why he thought it was not appropriate for [Adv Y] to continue, [the Appellant] thought that [Adv Y] was too close to the family overall and that he was conflicted because he knew both [the Wife] and the children of [the Client] and his first wife.

50. [The Appellant] stated that he was interested to see the interaction of husband and wife at the first interview.

51. Interested in how often [the Appellant] would draft wills, the Panel asked [the Appellant] how many wills he would draft during a week, month or year. [the Appellant], after stating that his instructions to draft wills would vary depending on the circumstances of what he was doing for the client, for example tax work; volunteered "about two or three a month". When asked if he had a standard way of dealing with these instructions, was there for example a standard letter he sent out? He said no. He did state that he had written a piece on wills for the Guernsey Press. The following day, during cross-examination, [the Appellant] stated that he had answered this question appallingly and, in fact, he did not know how many wills he drafted. What was clear from [the Appellant]'s evidence was that this was the first time he had ever had instructions to draft a will where testamentary capacity was at issue.

52. [the Appellant] stated that it was usual, when couples came in to draft wills, that the matter was discussed generally, that they would often change their minds after discussion and telephone him the next day.

53. In relation to the First Meeting, [the Appellant] stated that he was concerned about [the Client] leaving the house to [the Wife] without the children being involved, "it didn't seem like him"; but during the meeting ***[54/250]*** *[the Client] had said that there should be "some sort of equitable result not being too hard on anyone, so they can't quibble."*

54. At the First Meeting [the Appellant] was handed a letter dated 28 September 2004 addressed to him by [the Client], that he read aloud. The letter was comprehensive and mentioned first, that he did not wish to take further advice from [Adv Y], second 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 house] which at present is in my sole name." Third, that he was very unhappy with the way his children had treated him over the guardianship application and that if he was to have a guardian it would be his wife and not [a named child]."

55. [The named child's] evidence was that this letter was copied from a draft written by [the Wife] that was contained in the bundle.

56. By reference to the file note of the First Meeting, it was clear that [the Appellant] was made aware of and/or given, the following information by [Adv X]:

(1) the fact that [Adv X] was acting for [the Wife] only and thought it prudent for [the Client] to instruct to his own advocate;

(2) the fact that a Guardianship application had been brought by [an identified child] who had been managing [the Client's] financial affairs for some time;

(3) a copy of the Guardianship application ***[54A]****;*

(4) the fact that [the Client] had been examined by a Dr Thomas;

(5) a comprehensive file note and letter from [the Client's] long time lawyer, [Adv Y];

(6) the fact that the children wanted to see their father alone;

(7) the fact that the Guardianship application did not deal with the reasons why [the Wife] was not being proposed as Guardian;

(8) the fact that Drs Thompson and Evans and Professor Kennedy had all examined [the Client] and that Dr Kennedy had examined [the Client] in the absence of his wife which was not usual practice;

(9) the fact that once the will was signed [the Client's] children may drop out of the Guardianship application;

(10) that Dr Evans had referred [the Client] to Dr Liddell;

(11) that neurologists Professor Kennedy and Dr Thompson both said that [the Client] should see someone who tests capacity;

(12) that according to the BMA (British Medical Association) Assessment criteria, the burden of proof is on the person who asserts the fact, which

assessment also includes the instructions that the solicitors should give to medical experts;

(13) that in [Adv X's] opinion Dr Liddell had examined the correct areas; and

(14) that Dr Liddell considered that he had been instructed by [the Wife]; had characterised the guardianship application as the children of [the Client] trying to wrest control of his financial affairs from him, and that the whole situation was a can of worms that in his view was only going to be sorted out in the courts.

*57. One of [the Appellant]'s first statements during the First Meeting was that "it would be necessary to instruct another expert in order to answer the possible question, why he had accepted what [Adv X] has researched and not undertaken independent enquiries". To this statement [Adv X] responded "**that [Adv X's] neck was not on the block and it was [the Appellant's] matter from then on.**"* [Emphasis in the original.]

*58. Notwithstanding this statement, [the Appellant] went on to inform those present that before the First Meeting he and [Adv X] had spoken with Dr Liddell about evidencing [the Client's] capacity by video link. [the Appellant] stated that he, [the Client] and [the Wife] would be present "The advantage of this is that it would be obvious from the video that [the Wife] was not exercising **undue influence**." Panel's emphasis.*

*59. At that point [Adv X] stated that he did not think it appropriate for him to remain in the room while [the Client] gave instructions to [the Appellant]. Notwithstanding this comment, [the Appellant] asked [the Client] and [the Wife] if they had any objections to [Adv X] staying because "**[the Appellant] did not have the detailed background knowledge of the case**" and then went on to state (in the absence of such knowledge) that given Dr Liddell's comments about the window of opportunity they should not delay in getting the wills signed and evidenced by video link. It would then be necessary, [the Appellant] said, "to arrange the second medical opinion straight after. The problem was that it may not confirm the first opinion. If this was the case, they could get a third opinion."*

*60. When questioned by the Panel about this approach, **[the Appellant] stated that he was concerned to get as much evidence for the Court and that he himself had insufficient experience in this area and that he would place reliance on the expert as he was unable to determine testamentary capacity, although he accepted that it was the practitioner's duty to satisfy himself as to capacity**. [The Appellant] thought that the second opinion would provide a degree of comfort **because he thought there would be litigation***. [Emphasis added.]

*66. In relation to his house, [identified], [the Appellant] explained the different options to [the Client] as to how he might devise the House**. When asked what he wanted to do he said he wished to leave [the Wife] a life interest. To this [the Wife] made a comment to the effect of "Oh" in response to which [the Client] said he wanted the House vested solely in [the Wife]**. As to whether his children should have any benefit he said that this was up to [the Wife]. [The Wife] thought the House worth about £1.5 million.* [Emphasis added. This incident was referred to later in

the Chambre judgment as "the 'Oh' point" – see the passage quoted from §102 below.]

67. Moving onto the will of personal estate, [the Client] was asked what that part of his estate comprised. [the Appellant] then looked at a document in front of him and listed: deposit account, current account, yacht and stocks and shares.

68. [the Appellant] advised [the Client] that under Guernsey law a wife was entitled to one-third of the personal estate, the children one-third [between them] and the remaining one-third was freely disposable. The Panel wishes to observe that, although this advice would have been correct in the absence of the pre-nuptial agreement, it was clearly erroneous and misleading in the case under consideration, as, by the agreement [the Wife] had surrendered any claim to share in [the Client's] estate of personalty in the event of his predecease. The effect of the agreement was that, in the absence of a valid will in [the Wife's] favour, [the Client's] entire estate of personalty would pass to his children. This, in the Panel's view, was the advice [the Client] should have been given, and the fact that it was not given can only have served to confuse rather than assist him.

69. [The Client] stated that he did not wish the estate to go to someone outside of the family and [the Appellant] said that this would mean that as to the disposable third, his wife would get a fifth of a third share and his children would receive a fifth of a third share each and asked whether this was how [the Client] wanted the personal estate split. It is recorded that [the Client] said Yes "but with a degree of uncertainty". [The Wife] then asked about the pre-nuptial agreement. ***[The Appellant] said that he had not read it****. [Emphasis added.] [Adv X] said that since they had been married for six years the agreement would have little effect. The Panel would wish to record the fact that they respectfully disagree with this last remark in the context of Guernsey's law of inheritance, though it may have some merit in the context of divorce law. He also stated that once the wills were drafted this was not a done deed and that [the Client] would have to be tested by Dr Liddell.*

70. Following the First Meeting [the Appellant's assistant] expressed his concern to [the Appellant] as to whether [the Client] had sufficient capacity.

98. Mr Bourne put to [the Appellant] that at the First Meeting he was also made aware of the pre-nuptial agreement, and knew that [the Client] did not want [Adv Y] (whom the Panel know to be one of the more senior advocates at the Bar at that time) acting for him anymore. He asked [the Appellant] whether he had formed a view as to the vulnerability of [the Client], like [Adv Y] had as evidenced in his file note ***[24/150]****? [the Appellant] answered no, and as to Mr Bourne's point of undue influence, [the Appellant] said that it was "truer to say there might be some challenge."*

99. Dealing with the relevant passage in [Adv Y's] file note ***[24/150]*** *it states: "I still had a concern, however, and that was that* ***[the Client] could very easily be the subject of undue influence****. Although I could not possibly profess to be an expert, my dealings with him over the last 18 months had let* (sic) *me to suppose that* ***he was inclined to instruct me in accordance with whatever had been the last important conversation which he had had with a family member****. That,* ***combined with a very defective memory, made his position very vulnerable*** *in my view." (Panel's emphasis).*

100. [the Appellant] was asked whether he was seriously suggesting there was no risk of undue influence. [the Appellant]'s response was that he thought [the Wife] was on the back foot because of an interchange with [the Client]. Mr Bourne then pointed out that the Children wished to see [the Client] on his own and yet did he still not suspect undue influence? [the Appellant] said "No." but in a follow up question said "he saw that others might see undue influence, it was on the radar."

101. When asked by Mr Bourne what [the Appellant] did to ascertain the facts, having regard to why it was thought necessary for [the Client] to instruct a lawyer independent of that lawyer advising [the Wife], [the Appellant] stated that: "[he] thought someone will show their colours soon." When asked in relation to Rule 18 whether there was a duty to see the client alone, [the Appellant]'s response was that duty depended on the facts and circumstances. When asked whether he accepted that he should have tried to see his client alone he responded that he did so outside of Joy's before the Video Conference. ***Mr Bourne went back to the First Meeting and put it to [the Appellant] that [Adv X] was there saying: "you need to have a private discussion with [the Client]", that [Adv X] was reminding him of his duty, but that [the Appellant] passed up the opportunity. All [the Appellant] could say in response was: "I don't know."*** [Emphasis added.]

102. It was then put to [the Appellant] that his emphasis was more concerned with getting the Wills 'over the line' than obtaining proper instructions. [the Appellant] said that this was not the correct interpretation. The example of the interchange between [the Wife] and [the Client] at paragraph 66 above was put to [the Appellant] who said that he was alive to a potential problem. Mr Bourne challenged [the Appellant] and said that he never did anything about it, that [the Appellant] was 'starstruck' and felt unable to challenge [the Client]. To these points [the Appellant] responded that in relation to the "Oh" point he did do something about it, being the opportunity for [the Client] to say something shortly before the Video Conference at Joy's, when he and [the Appellant] were discussing the fact that in the 1940 evacuation from Guernsey, [the Client] and [the Appellant]'s mother would probably have been leaving at the same time. [the Appellant] stated that he was not 'starstruck'.

103. After this exchange [the Appellant] stated: "That he was trying to help everyone, being cautious, acting independently and in line with his overriding duty to the court." Following this statement Mr Bourne put [the Appellant] the file note of the Second Meeting in preparation for which meeting [the Appellant] had drafted two versions of the Wills both of Realty and Personalty, the reason being so said [the Appellant], was that he was "not clear, but [he] thought [they reflected] what I understood to be instructions, not totally clear."

104. [the Appellant] said that this change of instruction was not another warning sign but evidence that [the Client] had thought about the matter and thought this a more equitable result. [The Appellant] felt more comfortable with this instruction because it covered everyone. [The Appellant] disagreed with Mr Bourne that there was a missed opportunity before the Video Conference to have time with [the Client] alone. [the Appellant]'s response was that if [the Client] had not changed his instruction in the Second Meeting he might have requested a private meeting but he thought these changed instructions reflected what a judge would want and dealt with the Children, and that Mr Bourne's views were "too pessimistic about the effect of dementia"."

40. Having heard the evidence and considered the documents and the legal submissions, the Chambre then expressed its conclusions on the facts in these terms:

> *"130. On the morning of 28 September 2004 [the Appellant] received a telephone call from [Adv X], a lawyer retained by [the Wife], stating that he had [the Client] and [the Wife] with him and [the Client] would like to make a will relating to his real property. [the Client] was not a client of [the Appellant]'s …At 10.42 [Adv X] sent to [the Appellant] a fax that contained the e-mail from Dr Liddell cited at paragraph 43 above.*
>
> *131. [The Appellant] arranged for [Adv X] and [the Client] and [the Wife] to attend at his offices at about 16.50 that day. Notwithstanding the red flag in relation to the 'veritable can of worms' and [the Appellant]'s 'not having a clue' as to what [Adv X] was talking about, at 16.30 he telephoned Dr Liddell, in the presence of [Adv X], to arrange for Dr Liddell to assess [the Client] by video link on the day that he intended to sign the Wills. There was no discussion about the veritable can of worms or, faced with the impending issue of assessing [the Client]'s testamentary capacity, what experience Dr Liddell has in assessing testamentary capacity by video link or otherwise. Relevant questions might have been: how long had Dr Liddell been assessing testamentary capacity?; how long had Dr Liddell known [the Client]?; what medical and family history was he aware of?; had he spoken with [the Client]'s GP or any other medics involved with [the Client]?; was he familiar with the BMA Assessment Criteria for assessing Testamentary Capacity?; was he familiar with the guidance in Banks v Goodfellow?; and was he agreeable to undertake the task in circumstances where [the Appellant] had no experience of the assessing testamentary capacity? None of these questions or issues were asked or explored with Dr Liddell. Given that [the Appellant] volunteered that he had never had to deal with testamentary capacity issues, notwithstanding his apparently regularly preparing wills, these questions appear to the Panel to be mandatory, not simply those that might have been asked with the benefit of hindsight. As [the Appellant] said to the Panel, he was going to rely on Dr Liddell because he himself was unable to assess testamentary capacity, see paragraph 60 above.*
>
> *132. The file note of the First Meeting raises a significant number of issues and provides some context for the 'urgent' instruction. [The Appellant's assistant] records in the file note of the First Meeting **[54/243]** that [Adv X] "explained that he was at the meeting in the capacity of legal adviser to [the Wife] only and he thought that it was prudent for [the Client] to instruct his own advocate." Relevant questions of [Adv X] in those circumstances might have included the question, Why? and also covered similar questions that could have been addressed to Dr Liddell. There was no evidence that [the Appellant] asked [Adv X] any relevant questions as to what was going on and why could [Adv X] not act for [the Client] and what had gone on with [Adv Y]? The first 'red flag' was that an aged man facing a Guardianship application, whose Wife had retained her own lawyer, was now coming to a new law firm in order for her husband to make a new will. In the Panel's view this is a clear example of a situation where lawyers ought to be very vigilant before accepting instructions. [the Appellant] did not ask any of the questions that the circumstances required but simply started a meeting in the late afternoon by reading aloud a letter of instruction addressed to him and purportedly written by [the Client]. It recited the fact of the Guardianship application and a Will relating to his house and an offer on his boat **[52]**. That letter further states "I do not wish to take further advice from Advocate Y." Given [Adv Y's] seniority (which the Panel takes judicial notice of)*

and the fact that he had long been the family lawyer, the question why? would and should have loomed large before any advocate faced with these circumstances. Again, [the Appellant] asked no relevant questions of [the Client] or anyone else at the First Meeting and made no subsequent enquiry as to the situation.

133. Pausing there for a moment, it was apparent that there was a significant relevant history, readily discernible from copy documents and information provided to [the Appellant] at the First Meeting that [the Appellant], or any reasonably competent practitioner, should have familiarised themselves with prior to considering whether to take on board, and thereafter to advise, the potential client. It was clear from the evidence that [the Appellant] had not read the material provided to him at the First Meeting. [the Appellant] also admitted that he had insufficient experience to be able to determine testamentary capacity. [Adv X], [the Wife]'s advocate, alerted [the Appellant] to the BMA Assessment requirements at the First Meeting. [The Appellant's assistant] had already expressed and recorded his concern to [the Appellant]as to whether [the Client] had sufficient capacity. That can only have been a reference either to capacity generally or to testamentary capacity or both. On any view such an observation, by anyone, and especially in circumstances where [the Appellant] already knew that he had insufficient experience to assess testamentary capacity, would and should have put any reasonably competent practitioner on notice of the requirement to make proper investigation of the situation and take proper and appropriate steps to act in the best interests of [the Client] and to ensure that his proper interests were protected so far as possible. Those interests did not simply start and stop at generating wills that exhibited formal validity but also included consideration of whether [the Appellant] was competent to act and [the Client] was competent to provide instruction.

134. Notwithstanding the information provided to and/or available to [the Appellant] at the First Meeting as set out at paragraph 56 above, [the Appellant] simply made no or no adequate enquiry of the background facts prior to taking instructions from [the Client] in relation to the Wills. Did [the Appellant] simply follow the instructions because he had not before consciously had to deal with the issue of testamentary capacity, or was it because he was 'starstruck', as suggested by Mr Bourne? It is difficult to reach any conclusion on this point but the Panel does not need to. The fact is that [the Appellant] simply followed instructions without making any or any proper enquiries of anyone as to what was going on and whether (1) the instructions in fact came from [the Client] himself and were reflective of his wishes not vitiated by the influence of others; (2) what had caused [the Client] to be assessed for testamentary capacity in Merthyr Tydfil by Dr Liddell who stated that he considered that his instructions came from [the Wife], in circumstances where [the Appellant] had himself stated that he was going to have to engage another independent professional; and (3) why did [the Client] did not want to take further advice from [Adv Y]? In short, in complying with the Rules did [the Appellant] need to ensure that various safeguards were in place before and/or after accepting instructions?

135. The need to establish the relevant factual matrix in relation to taking instructions from an elderly potential client coming to a new lawyer are highly relevant especially in circumstances where the long standing family lawyer refused to continue to act. [the Appellant] was provided with a comprehensive file note from [Adv Y]. In addition there was (1) a pending guardianship application; (2) a request for [the Client]'s children to see him alone, away from [the Wife], and (3) even [the

Wife]'s lawyer had suggested that [the Appellant] see [the Client] alone. The Panel refers to paragraph 56 above in relation to the facts of which [the Appellant] was aware at the time of his purported instruction by [the Client].

136. The briefest of reads of [Adv Y's] file note dated 17 November 2003 ***[24]*** *immediately reveals that*

> *(1) [the Client] had memory problems such that he could often not remember what he had previously said to Adv Y or that he had come to see him at all;*
>
> *(2) That* ***[the Client] could easily be the subject of undue influence on the basis that over the last 18 months or so he was inclined to instruct Adv Y in line with the last important conversation he had had with a family member and this, with a very defective memory, made his position very vulnerable*** *in Adv Y's view;*
>
> *(3) Adv Y had suggested a way of dealing with the possibility of undue influence;*
>
> *(4) That there was a high level of distrust of him by [the Wife] and that trying to do anything on an agreed basis was difficult and that* ***another lawyer for [the Client] ought to be considered; but***
>
> *(5)* ***that [the Client] and his children wished that Adv Y continue to act.*** *(Panel's emphasis)*

137. If the issue of vulnerability was not made sufficiently clear in that note then in addition to this there was in the Bundle a letter from [one of the children] addressed to [the Wife] dated 20 December 2003 that records disagreement and concerns as to how a Power of Attorney executed by [the Client] in favour of [the Wife] had come about. [The child] asked why Collas Day ([the Wife]'s lawyers) were used and not Ozannes, [the Client]'s lawyers. Following this exchange [the Client] revoked the Power of Attorney in writing to both [Adv Y] and [Adv X].

138. Given the circumstances outlined at paragraphs 132 to 137 above, the Panel is simply unable to see how [the Appellant] could both have accepted instructions and acted upon them without making proper and due enquiry of at least [the Client] (alone and on more than one occasion), his children and [Adv Y]. Notwithstanding that the file note was made some 10 months earlier, a call with [Adv Y] and investigation of current circumstances was surely called for. If [the Appellant] did not read the file note from [Adv Y] such omission was even more reprehensible.

139. The file note of the First Meeting records [the Appellant]'s stating: "it would be necessary to instruct another expert in order to answer the possible question, why he had accepted what [Adv X] has researched and not undertaken independent enquiries". To this statement [Adv X] responded "that [Adv X's] neck was not on the block and it was [the Appellant]'s] matter from then on." The Panel is of the view that there could scarcely have been a more stark warning to [the Appellant] to be vigilant in conducting himself in relation to the Matter. Moreover, [the Appellant] never provided any explanation as to why he did not engage another expert other than it became logistically difficult and that he was relying on [the Wife] or her daughter to make arrangements.

140. When asked by Mr Bourne at the start of his cross-examination whether [the Appellant] thought there were any shortcomings in the service he provided to [the Client], [the Appellant] stated that hindsight was a wonderful thing but he did not know what he would have done differently and there were no shortcomings. Given the passage of time and the evidence contained in the material as identified at paragraph 56 and the outline above the Panel consider that this answer was simply a denial of circumstances that warranted full engagement with the Rules and investigation of the factual matrix that had been brought to his attention.

141. It was against this background that the cross examination continued, referring time and time again to the file notes of meetings and the red flags that should have alerted [the Appellant] properly to take control of the Matter. When asked the same question at the end of his cross-examination [the Appellant] stated that he would have thought about it a lot more. He would have investigated the Consultant's experience as he subsequently discovered that Dr Liddell had "not done one of these before". Given that [the Appellant] was placing total reliance on Dr Liddell because he himself had insufficient experience to be able to satisfy himself as to testamentary capacity and further failed to organise the second opinion that he said he would; the admission that he would have thought about it a lot more gives rise to the logical next question: In those circumstances what should he have been done? This was a question that [the Appellant] simply failed, or rather refused, to address during over four hours of cross-examination. Having said he would observe the group dynamic, and see who would show their colours first, the fact is [the Appellant] failed to do anything in relation to the group dynamic, failed to address the concerns made available to him by reason of the issues identified at paragraph 56 above, and failed properly to manage the Matter by exercising the duties he was bound to do under the Rules.

142. No evidence was provided to the Panel of what, if any, observations [the Appellant] made with respect to the 'group dynamic' or what he did or intended to do having regard to any observations. The fact is he simply allowed the status quo to remain, allowed himself to be led by [the Wife], failed to make any proper enquiry of any medical professional who was familiar with and had assessed [the Client] and determined that he did not have sufficient mental capacity to organise his own affairs, including, importantly [the Client]'s General Practitioner, Dr Hanna; not making any investigation of the Children or [Adv Y] and, crucially, not allowing [the Client] the space and time to provide instructions in an environment where it was simply [the Client] and his legal and other professional advisers present, with no time pressure. In the Panel's view [the Appellant] had ample time to arrange such meetings on any of the 28, 29, 30 September or 1 October. In the Panel's view, in the circumstances then apparent to anyone, [the Appellant] should have questioned his ability properly to act in the best interests of [the Client].

143. Having regard to the extract from [Adv Y's] file note at paragraph 136 above, the Panel is unanimously of the view that if [the Appellant] had not already formed a view as to [the Client]'s vulnerability and the possibility of undue influence having regard to his brief involvement with [the Client], including the 'Oh incident' then this passage, written as it was by a reputable, senior lawyer who had been [the Client]'s lawyer for many years was the wake-up call that [the Appellant] needed to determine his next course of action. This, combined with the other red flags identified by Mr Bourne, meant that [the Appellant] needed to ensure that he employed the care and skill required in such circumstances, including making relevant enquiry,

and considering whether he was possessed of sufficient relevant experience to manage the Matter, and if not he should have declined to act or at least, engaged people who did have appropriate experience in this area. This would have meant making proper enquiry as to the experience of those other persons, including Dr Liddell. Based on the evidence seen and heard, the Panel is unanimously of the view that [the Appellant] failed properly to do any of these things.

144. One of the questions [the Appellant] should have asked himself was whether his duty to his client was simply to get the Wills signed as quickly as possible in the apparently shrinking window of opportunity so to do, or to take heed of the complicated and potentially difficult circumstances in which [the Client] was purportedly giving instructions and to manage the situation such that any potential arguments in relation to vulnerability, the possibility of undue influence and lack of capacity were addressed properly and professionally, in such a way as to ensure that [the Client]'s wishes could be given primacy and that any potential unjustified challenge to the Wills could be effectively defended. To adopt Mr Bourne's words, [the Appellant] should, by reference to the Rules, have been properly addressing matters in relation to which any challenge to the Wills would be based rather than gathering evidence to meet a challenge to the Wills. The approach taken by [the Appellant] in the circumstances, simply to get the Wills signed and have that signing witnessed by a Medical Practitioner (because he failed to deal properly with the BMA guidelines or Questions, regardless of Dr Liddell's suitability) does not appear to the Panel either to be consistent with the duties required of an Advocate under the Rules or to take into account the circumstances in which [the Appellant] was instructed.

145. Put another way, most of the time when dealing with a lawyer's usual day to day practice it is unnecessary to engage in a careful study of the Rules. By analogy it is usually unnecessary to engage in a careful study of the Pilot's Operating Handbook when conducting a normal flight that a pilot has engaged in many times before, where the performance of the aircraft and the weather are well within the aircraft's and the pilot's skills. But where, as in this instance, an advocate was instructed in an area that was not a core area of his practice; in circumstances where testamentary capacity was clearly a primary issue of which subject the advocate had no or no sufficient prior experience; the factual matrix was peppered with issues that required full engagement with the Rules; [the Appellant] was required to study the Rules and engage with them so that he could understand what [his] duties were and conduct himself accordingly.

*146. Of note, following the First Meeting [the Appellant] stated that he asked [his assistant] to draw up a list of questions to be put to [the Client], in order to be able [to] test his testamentary capacity, which list [his assistant] drafted the next day based on the guidance contained in the case of Banks v Goodfellow. The questions to be asked are at **[54/253]** and were redrafted as appear at **[55/255]** (**Questions**). [The Appellant] was unable to answer whether he had approved the Questions. When it was put to him that the Questions were never put to [the Client] he denied this but couldn't provide any evidence as to when they were. In fact, if there was ever a time to put the Questions to [the Client] it would have been at the Video Conference with Dr Liddell. Despite the comprehensive file notes of meetings and the video recording of the signing of the Wills, there was simply no evidence before the Panel that the Questions were ever put to [the Client]. Moreover, during the Video Conference, Dr Liddell asked [the Appellant] to remind him if he missed out any issues relating to*

the assessment of Testamentary capacity. The Questions were drafted for just this purpose but not used.

147. At the Second Meeting [the Appellant] had provided two drafts of each of the wills of real and personal property. Given that [the Appellant] had said that his instructions were not clear but he thought they reflected what he understood to be his instructions, it was unclear to the Panel how there could have been any clarity as to instructions given the drafts prepared, how the draft will of Realty differed from [the Client]'s letter of instruction dated 28 September and how [the Client], with [the Wife] in the room changed his instructions yet again. The exchange between Mr Bourne and [the Appellant] is detailed at paragraphs 102 to 104 with respect to [the Client]'s instructions. The inconsistency of his instructions at the Video Conference is also noted.

148. The Panel found this to be a surprising exchange. [The Appellant], who admitted to having insufficient experience to be able to make an assessment of testamentary capacity makes a throw away comment about the effects of dementia, and is referencing his instructions to what he thought a judge might do in circumstances where it is being put to [the Appellant] that he has made no proper effort to investigate those instructions. The suggestion of [the Appellant] that the moments before the Video Conference were the opportunity for [the Client], already diagnosed for some months as being incapable of managing his own affairs and also assessed by his long-time family lawyer as being vulnerable, of his own volition to raise issues as to his testamentary wishes is plainly unsupportable. It is the Panel's view, as supported by the relevant authorities, that it was [the Appellant]'s duty to challenge [the Client] to be able to satisfy himself that [the Client] was giving his own instructions and not simply repeating those that he might have obtained from someone else. He simply failed to comply with that duty, if he recognised its engagement at all.

149. In relation to the Video Conference the Panel has no hesitation in finding that [the Appellant]'s unwarranted interjections and failure to observe the guidance contained in the BMA Guidelines and the case of Banks v. Goodfellow was conduct that was both serious and reprehensible in circumstances where [the Appellant] knew what the guidance said and what was required for an assessment of testamentary capacity.

150. Whilst the Panel did not count the number of words used during the Video Conference, it is prepared to take an indicative view, as provided by Mr Greatorex that during the assessment [the Appellant] used approximately 1000 compared to [the Client]'s approximately 359. It was quite clear to the Panel that [the Appellant] inappropriately performed the majority of the interchange with Dr Liddell and inappropriately and improperly interrupted [the Client]. The Panel could readily see why, according to [one of the Children], he felt sick after watching the Video. The Panel, having watched the Video, found [the Appellant]'s conduct and interjections during the assessment inappropriate and impossible to justify.

155. By the end of the Hearing it was clear to the Panel that [the Appellant] had, prior to the signing of the Wills, either not read or properly read or assimilated the material provided to him by [Adv X] or if he had, he had failed to understand its significance. Adopting the phrase used by Mr Bourne, it appears to the Panel that [the Appellant] simply ignored or took no adequate steps in relation to every 'red

flag' that the circumstances and documents presented. [the Appellant]'s own evidence shows that in his haste to ensure that [the Client]'s Wills were signed, in the closing window of opportunity that he considered might have been available having regard to his diminishing testamentary capacity, [the Appellant] failed at the first hurdle properly to identify the issues presented to him of vulnerability, the potential for him to be subject to undue influence, the fact that he simply might not have the capacity to make a will and that the guidance in the BMA booklet and the case of Banks v Goodfellow needed rigorously to be followed and that he act accordingly.

156. La Chambre has not been convened to investigate whether the assessment of testamentary capacity was accurate or not; or whether [the Client] was subject to undue influence or not; but simply whether, by reference to the Complaint and the relevant factual matrix, [the Appellant] infringed any of the Rules thereby engaged that would be regarded by competent and reputable practitioners as serious and reprehensible (the Sharp test at paragraph 23 above)."

41. On the basis of these findings, the Chambre rejected two of the factual allegations in the Complaint (judgment, §158): in relation to Count 1, it held that the Registrar had failed to prove to the necessary standard that the instructions (as opposed to the introduction) came to the Appellant from Advocate X; in relation to Count 3, it held that the Registrar had failed to prove that the Wills were executed with knowledge of the influence of the Wife.

42. In relation to all other evidential allegations in the Complaint, the Chambre was satisfied beyond reasonable doubt that the Appellant's acts and omissions were not simply the result of an error of professional judgment but demonstrated an ignorance or disregard of the relevant Rules or as to how they were engaged in the circumstances; and that such acts or omissions were serious and reprehensible and would be regarded as serious and reprehensible by reputable practitioners (judgment, §159). On that basis, the Chambre found that professional misconduct had been established in respect of each Count (judgment, §160–167).

43. In a separate judgment dated 28 June 2019, the Chambre held that the purpose of any sanction was laid down in *Registrar of La Chambre de Discipline v. An Advocate* (11 May 2017, judgment 22/2017) by reference to the English decisions in *Bolton v. The Law Society* [1993] EWCA Civ 32 and *Fuglers LLP v. The Solicitors Regulatory Authority* [2014] EWHC 179 (Admin). In short, the purpose is (i) to prevent any repetition by the offender, (ii) to deter others from similar breaches, (iii) to maintain high standards of professional conduct and thereby (iv) to maintain public confidence in the reputation of the legal profession (judgment, §174–177).

44. When considering what sanction to impose, the Chambre recognised that each case would turn on its own facts (judgment, §178), and that any assessment of the appropriate penalty required consideration to be given to (i) the seriousness of the misconduct (including both culpability and harm), (ii) the purpose for which sanctions are imposed, and (iii) the appropriateness of the sanction having regard to the misconduct in question (judgment, §179). Applying that approach, and taking into account the Appellant's previously unblemished record and the passage of time since the relevant events occurred, the Chambre decided to impose a public rebuke (judgment, §180–205).

45. In relation to costs, the Chambre ordered that the Appellant should pay the Registrar's reasonable costs (judgment, §206–209).

Proceedings in the Royal Court

46. Being dissatisfied with that outcome, the Appellant appealed to the Royal Court pursuant to s. 28(2) of the 2007 Law by Notice of Appeal dated 25 July 2019. The Appellant sought to reverse the findings of the Chambre, and he also sought a costs order in his favour.

47. The grounds of appeal fell essentially under four headings. The Appellant contended that:

    (i) the Chambre fell into error in hearing the Complaint at all because it was out of time (grounds of appeal, §5–10) and there was excessive delay (grounds of appeal, §11–13);

    (ii) the Chambre made errors of law in particular as to the nature of the duty owed by an advocate to his client (grounds of appeal, §14–25) and/or the manner in which the duty might be discharged (grounds of appeal, §26–34);

    (iii) the Chambre made errors of fact, most notably it failed to appreciate that the evidence did not show that, at the meeting on 28 September 2004, the Appellant had been given the Y file note (grounds of appeal, §33–45); and

    (iv) the Chambre fell into error in its approach to the five Counts in the Complaint (grounds of appeal, §44–51).

48. In relation to the sanction, the Appellant also contended that it was excessive in all the circumstances and failed to take sufficiently into account a number of relevant factors (grounds of appeal, §54–56).

49. There were preliminary hearings as to whether (i) the appeal should be conducted in private and (ii) the nature of the appeal. The reasons for the Bailiff's rulings on those issues were subsequently incorporated in the Royal Court judgment, in §24–42 in relation to the question whether the appeal should be heard in public, and in §43–56 in relation to the nature of the appeal. On the latter point, the Bailiff said at §43 that "*there was broad agreement [between the parties] that Jurats were required and that the hearing before the Royal Court was a rehearing or review*" (emphasis added). Viewed in isolation, it might not be immediately obvious what this means, because the expression 'an appeal by way of rehearing' is often used in contradistinction to 'an appeal by way of review' to describe a different form of appellate function. Exactly what the Bailiff meant and whether he was correct in his understanding of the nature of the appeal to the Royal Court is considered in more detail below in the context of Ground 1 of the appeal.

50. As to the threshold test for a finding of 'professional misconduct', the Bailiff noted that the 2007 Law does not contain a definition (judgment, §57). He discussed certain case-law from other jurisdictions (judgment, §58), but he cautioned against the danger of adopting legal tests derived from other jurisdictions without full knowledge of the relevant context (judgment, §60). Ultimately, there were three key elements in his ruling on the applicable test in this jurisdiction:

    (i) First, the Bailiff directed the Jurats that "*professional misconduct is any culpable conduct which is sufficiently serious that it would lead the Chambre to make a disciplinary order or finding*" (*ibid*).

    (ii) In doing so, he held that "*the Chambre set the hurdle too high*" by requiring that a practitioner's conduct must be both "*serious **and** reprehensible*" in

every case (Chambre judgment, §12, emphasis in the original). His decision in that regard was influenced by the fact that one of the available penalties under the 2007 Law is a private reprimand (s. 29(3)) and, as he observed, "*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*" (Royal Court judgment, §60, emphasis added).

(iii) Nevertheless, the Bailiff also directed the Jurats that, although conduct did not always have to be both serious and reprehensible, a "*minor breach*" of the Rules would not of itself constitute professional misconduct: if a breach was not serious, then it would have to be reprehensible (judgment, §61).

51. The Royal Court's disposal of the first two grounds of appeal may be summarised briefly as follows:

(i) The Bailiff dismissed the Appellant's argument that the Chambre should not have heard the Complaint at all (judgment, §107–110) and also dismissed the argument based on delay (judgment, §111–112).

(ii) Turning to the second ground of appeal, the Bailiff noted that the Royal Court was "*not deciding whether the Client had testamentary capacity but whether the Appellant took the precautionary steps required of an Advocate*" (judgment, §118). As to the content of those precautionary steps, the Bailiff directed the Jurats that "*the legal test in Guernsey is as set out in Banks v. Goodfellow*" meaning that the Appellant "*was required to satisfy himself that the Client had testamentary capacity*" (*ibid*). In seeking to discharge that duty, the Bailiff directed the Jurats that the Appellant was entitled to rely on Dr Liddell "*if he was competent to assess testamentary capacity, if he had been properly instructed and if he had been able to conduct a proper examination*" (*ibid*).

52. The Jurats' findings in relation to the balance of the appeal to the Royal Court deserve to be set out in full:

*"**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."

53. Save in relation to Count 5, the Royal Court accordingly dismissed the appeals against both of the Chambre judgments (judgment, §176).

The appeal to this Court

54. In his Notice of Appeal, the Appellant says that he is seeking to overturn the "*findings and orders of the Royal Court and the Chambre in this matter*": see §2 of the Orders sought. In the alternative, the Appellant seeks an Order that a penalty of private reprimand be substituted for that of public rebuke (§3 of the Orders sought). He also asks that the costs orders in the Chambre and the Royal Court be reversed (§4 of the Orders sought).

55. There are four grounds of appeal:

    (i) The Appellant's first and main criticism of the Royal Court judgment (§1–4 of the grounds of appeal) is that the Bailiff was wrong in law as to the nature of an appeal from the Chambre and the role of the Jurats, and that he misdirected the Jurats in §56 of the Royal Court judgment. The Appellant's argument is that an appeal from the Chambre to the Royal Court is by way of "*a true rehearing rather than a mere review*" (§1 of the grounds of appeal). In particular, the Appellant contends that the Royal Court is entitled to consider all of the material before the Chambre and is required to reach its own conclusions, rather than simply assessing whether the Chambre judgment was *Wednesbury* unreasonable. The Appellant says that this was particularly so in a case such as this where (i) the primary facts were not in dispute, (ii) there was a "*margin of appreciation*" and (iii) there was no Guernsey case-law to guide the court as to what was to be expected of an advocate in the circumstances of the case (grounds of appeal, §2).

    (ii) The Appellant's second point in the appeal (grounds of appeal, §5–7) is that the Bailiff was wrong in §60 of the Royal Court judgment in directing that the Chambre had "*set the hurdle too high for a finding of professional misconduct*" (grounds of appeal, §5). The Appellant contends that the Bailiff was wrong in law in directing that "*professional misconduct is any misconduct which is sufficiently serious that it would lead the Chambre to make a disciplinary order or finding*" (grounds of appeal, §5). The

Appellant contends that this fails to take account of a second element in the applicable test, namely the requirement to prove "*beyond reasonable doubt*" that no reasonably competent advocate would have done or omitted to do what the Appellant did or omitted to do, a test which the Appellant says was accepted by the Respondent in §66 of the Bourne Report (grounds of appeal, §5). The Appellant also contends that "*there was no sufficient emphasis on the criminal standard of proof*" in the Bailiff's directions to the Jurats (grounds of appeal, §7).

(iii) The Appellant's third ground of appeal (grounds of appeal, §8–10) is that the Bailiff was wrong in his analysis of the case-law concerning the duty of an advocate in the circumstances of this case. In particular, the Appellant contends that the test laid down in *Banks v. Goodfellow* (1870–71) LR 11 Eq 472 is the legal test for determining testamentary capacity, not a definition of the conduct required of an advocate (grounds of appeal, §10). The Appellant also contends that the Bailiff failed to remind the Jurats of a relevant passage at the end of §70 of the Canadian judgment in *Scott v. Cousins* [2001] OJ No. 19, which expressed the view that "*careful solicitors who are in doubt on the question of capacity … will supervise the execution of the will while taking, and retaining, comprehensive notes of their observations on the question*".

(iv) Fourthly, the Appellant criticises the Royal Court's handling of the facts. The main issue under this heading related to the Chambre's error in assuming that the Y file note had been given to the Appellant at any time before the Wills were executed (grounds of appeal, §11). The argument is that that error was in itself sufficient to undermine the integrity of the Chambre judgment, but the Royal Court nevertheless accorded that judgment inappropriate weight.

56. As to the sanction, the Appellant contends (grounds of appeal, §16 & §18) that he was doing his best for the Client at the time, under considerable time pressure and with the benefit of specialist medical advice and the participation of Jurats in witnessing the Wills and that, in the circumstances, a private reprimand would be sufficient if the Royal Court judgment is not overturned.

57. Finally, the Appellant also comments, in §17 of his grounds of appeal, that he "*maintains his concern that this matter was heard at all given the fact that these matters relate to events over a 4 day period 15 years ago*". However, in the course of his oral argument Advocate Dawes realistically accepted that there is no ground for appealing to this Court against the Royal Court's ruling on these matters. The fact that the children's complaint to the President and the Bâtonnier was made considerably after the expiry of the six-month period stipulated in s. 21(2) of the 2007 Law was considered carefully by the Royal Court in §107–109 of its judgment. Similarly, the fact that the investigations by the President and the Bâtonnier under s. 21, and subsequently by the Registrar under s. 22, took a total of 18 months (from December 2015 when the children made their complaint to June 2017 when the complaint was finalised) was also considered carefully by the Royal Court in §111–112 of its judgment. An appeal to this Court can only be made under s. 30(1) of the 2007 Law "*on a point of law*". In his Notice of Appeal, the Appellant has not identified any point of law relating to the Royal Court's treatment of these issues. In the circumstances, we do not consider that there is anything for this

Court to decide. For the avoidance of doubt, we would simply add that we agree entirely with the Royal Court's handling of these issues.

Ground 1: the nature of an appeal to the Royal Court

58. The Appellant's first ground of appeal is that the Bailiff misdirected the Jurats as to the nature of an appeal from the Chambre to the Royal Court. The argument is essentially that the appeal was a full rehearing, whereas the Bailiff gave directions to the Jurats as if the matter were to be judged by reference to *Wednesbury* unreasonableness and the Jurats were only entitled to overturn findings of fact by the Chambre if there was no evidence to support them.

59. In the course of his oral submissions, Advocate Dawes for the Appellant made clear that he did not challenge §55 of the Royal Court judgment. The only specific target of his attack was §56:

> "*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.*"

60. The Appellant says that §56 puts the threshold for a successful appeal in the Royal Court too high, because it overlooks the need for the Jurats to make their own assessment on the basis of all the evidence. Advocate Dawes also observed in passing (and we agree) that there is a slight oddity in the wording of the first sentence of §56. It presumably means (and was understood by the Jurats to mean): "*The Jurats must ask themselves whether it can be said that there was no evidence on which a reasonable Chambre could find as it did.*"

61. In assessing the true nature of an appeal from the Chambre to the Royal Court, it is important to focus on matters of substance, not on labels. In particular, we consider that it is of limited assistance to discuss whether an appeal from the Chambre to the Royal Court can properly be described as a 'review' or a 'rehearing' (with or without the *de novo* tag) because the application of those labels begs as many questions as it answers.

62. What can be said with certainty and clarity is this:

    (i) The issues that will need to be decided by the Chambre in any given case will include some or all of the following: findings of primary fact (including, in some cases, questions of witness credibility), inferences of secondary fact, rulings on points of law, expert appraisals as to whether any conduct constitutes a breach of the Rules, evaluative judgments as to whether the established facts constitute professional misconduct

(irrespective of whether they involve breaches of the Rules), and assessments of the appropriate sanction.

(ii) The 2007 Law neither defines nor limits the grounds on which an appeal may be made from the Chambre to the Royal Court. Accordingly, an appeal can in principle be made against any or all of the matters summarised in sub-paragraph (i) above.

(iii) Nevertheless, s. 28(1) of the 2007 Law expressly provides that the specified persons "*have a right of appeal against a decision of the Chambre*" (emphasis added). The legislation does not confer a right to have the complaint tried in the Royal Court as if there had been no determination by the Chambre. As a result, in assessing the role of the Royal Court in any given case, real meaning must be given to each of the words 'appeal' and 'against'. In short, an appellant has to show that something went wrong in the Chambre's judgment.

(iv) Exactly what an appellant has to establish, and precisely where the threshold test is set in the Royal Court on appeal, will always be contextual.

63. In particular, both the threshold test and the intensity of the Royal Court's scrutiny of the Chambre's judgment will depend upon the specific target and the specific ground of appeal in each case.

(i) For example, to the extent that an appellant is seeking to challenge findings of primary fact made by the Chambre after it has heard disputed oral evidence and cross-examination, the Royal Court will almost always accept the Chambre's findings and will not overturn its conclusions (particularly on matters of witness credibility), unless those findings and conclusions are demonstrably perverse or unsupported by any evidence: that approach is inherent in an appellate process.

(ii) To the extent that an appellant is seeking to challenge either the Chambre's findings of primary fact based exclusively on the documents or the Chambre's inferences of secondary fact, drawn from the established primary facts, the Royal Court will show considerable deference because the Chambre will have made those findings and/or drawn those inferences in the context of the full body of evidence heard at trial, whereas the Royal Court is only hearing an appeal; but nevertheless the Royal Court may be in as good a position as the Chambre to form its own view and it can accordingly do so in an appropriate case if it considers that the Chambre has misprized the relevant material.

(iii) To the extent that an appellant is seeking to challenge the Chambre's ruling on a point of law, the Royal Court will form its own view, because there can be only one right answer.

(iv) To the extent that an appellant is seeking to challenge the Chambre's appraisal of whether any conduct constitutes a breach of the Rules, the Royal Court is liable to show great deference, both because they are questions on which opinions can reasonably differ, and also because they are questions which fall within the competence of the Chambre.

(v) To the extent that an appellant is seeking to challenge the Chambre's appraisal as to whether the established facts constitute professional

misconduct, the Royal Court is liable to show even greater deference, for at least three reasons: first, because this is a question on which different opinions can reasonably be formed; second, because it will involve an assessment of the professionalism of an individual who will, in almost all cases, have given live evidence to the Chambre, and the Chambre will accordingly have had an opportunity to assess his demeanour, integrity and credibility; and third, because it is precisely the question which falls within the competence of the Chambre, rather than the Royal Court. In this context, we would particularly emphasise the fact that the legislator has, under s. 17(3) of the 2007 Law, made a nuanced decision in the composition of the Chambre (see §18 above). Each of the three panellists has a different qualification. The legislator has accordingly made a very deliberate choice not to entrust the assessment of complaints regarding professional misconduct against advocates to a tribunal composed entirely, or even in the majority, of advocates. That legislative choice must inform the intensity with which the Royal Court should be willing to scrutinise any findings by the Chambre in relation to an appeal on whether the established facts constitute professional misconduct. Not only is the Chambre the designated decision-maker in relation to those matters, but it will also bring a range of skills to the task which have been specifically selected for that purpose by primary legislation, and which are not replicated in the Royal Court, or for that matter in this Court. That disposes of one particular line of argument advanced by Advocate Dawes when he submitted that authorities such as *Meadow v. GMC* [2007] QB 462 can be distinguished. His argument was that a court might show deference to a specialist tribunal of medical experts because judges are not doctors, but he submitted that the same is not true in relation to an appeal from a finding by a disciplinary tribunal in relation to professional misconduct by a lawyer. In the context of lawyers, Advocate Dawes submitted that the court is as well placed as the tribunal to assess professional misconduct. In our judgment, in relation to appeals from the Chambre to the Royal Court (and from the Royal Court to this Court), s. 17(3) of the 2007 Law provides the answer to that argument.

(vi) To the extent that an appellant is seeking to challenge the Chambre's assessment of the appropriate sanction, the Royal Court will show considerable deference for similar reasons, although given its experience in relation to appeals against criminal sentencing and the relatively close analogy between the function of a disciplinary sanction and the function of a criminal penalty, the Royal Court will have considerable experience in balancing the relevant public interests.

64. It will be apparent from the foregoing discussion not only that the intensity of the Royal Court's scrutiny will be dictated by the specific content of each ground of each appeal, but also that the approach which the Royal Court should adopt cannot be defined with mathematical precision. The degree to which an appellate court defers to the judgment of an inferior tribunal on different categories of issue is itself almost always a matter of judgment. That judgment will be exercised by reference to the guidelines set out in paragraph 63 above, but it remains an exercise of judgment.

65. With these observations in mind, it is now possible to consider whether the Bailiff in this case misunderstood the Royal Court's function and misdirected the Jurats. In our judgment he did not.

66. It is important to assess the Bailiff's directions as a whole, and not to focus on §56 out of context. Taking that approach, it is apparent that he gave the Jurats an entirely appropriate overview of the appellate function of the Royal Court.

    (i) In §43 he rightly said that an appeal to the Royal Court is "*a rehearing or review*", in other words that it can have elements of either or both, depending on the grounds of appeal.

    (ii) In §44, he rightly held that a point of law, such as whether the Chambre had reached a conclusion which no reasonable tribunal could have reached, was a matter for the Bailiff (*i.e.* neither a matter for the Jurats nor one on which the Royal Court defers to the Chambre).

    (iii) In §45–47 he rightly held that, in so far as the appeal was on points of fact, the Jurats would have a role, including drawing appropriate inferences.

    (iv) In §48 and §51 he rightly held that (i) in so far as the appeal was against a finding of primary fact which turned on the credibility of witnesses, the Royal Court should give special weight to the Chambre's judgment but (ii) in so far as the appellate court was in as good a position as the inferior tribunal to draw appropriate inferences, it should do so.

    (v) In §49 he rightly held that, in relation to matters of judgment where different opinions might reasonably be held, the Royal Court should only interfere if the Chambre had reached a conclusion which was so at odds with the evidence as to be perverse.

    (vi) In §52–54 he rightly held that the Royal Court would not interfere with the judgment of the Chambre on the question whether, on the facts, professional misconduct had been established, or with its choice of sanction, unless the Royal Court was satisfied that that decision "*was wrong*" (*i.e.* it would not interfere merely because the Royal Court might, if it had been trying the matter, have reached a different conclusion).

    (vii) Finally, in §62 of the Royal Court judgment the Bailiff invited the Jurats themselves "*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*" and to ask themselves: "*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?*" That is what the Jurats did in §151–172 of the Royal Court judgment.

67. It was common ground in this Court that the Bailiff was entirely right in directing the Jurats as he did in §55. The Y file note apart, the facts were not in dispute, and the only question was whether the Chambre was wrong to conclude that professional conduct had been established. Against that background we consider that the Bailiff was also entirely right in directing the Jurats as he did in §56, recognising the particular function of the Chambre but reflecting also the Jurats' ability to substitute their own judgment if they considered it appropriate.

68. The final point under this ground of appeal is the Appellant's argument (in §29 of his Skeleton in this Court) that "*It is very likely*" that the Bailiff's alleged mis-directions "*had a material impact upon the Jurats' reasoning process and ultimate decision*". The thrust of the argument is that the Jurats did not evaluate the evidence for themselves. We do not accept that argument. It is apparent from the Jurats' ruling that they considered the evidence themselves and reached their own conclusions. They did not limit themselves to saying: "*A reasonable tribunal was entitled to reach the conclusion the Chambre did*". Instead, they repeatedly used words to the effect that they "*unanimously agreed that the Chambre were right to conclude…*" (§151), "*The Jurats agree with the Chambre that …*" (§154), "*The Jurats were unanimous in supporting the Chambre's conclusion that …*" (§157) (emphasis added in each case). Advocate Dawes sought to persuade us that this meant that the Jurats were simply adopting the findings of the Chambre without themselves evaluating the evidence and reaching their own conclusions. We would draw exactly the opposite inference as to what the Jurats did.

69. For these reasons, we are satisfied both that the Bailiff directed the Jurats correctly in law and also that the Jurats undertook an independent scrutiny of the evidence and reached their own conclusions, which is the exercise the Appellant contends they should have undertaken in any event. Accordingly, Ground 1 of the appeal cannot be sustained.

Ground 2: the threshold test for 'professional misconduct'

70. As noted above, the Chambre held that a practitioner's conduct must always be both serious and reprehensible in order to constitute professional misconduct: Chambre judgment, §23. The Bailiff directed the Jurats that that set the test too high, not least because one of the available sanctions is a private reprimand and it is unlikely that a private reprimand could be an adequate response to reprehensible conduct: Royal Court judgment, §60. Nevertheless, the Bailiff then also said that not every breach of the Rules constitutes professional misconduct, and a minor breach would have to be reprehensible in order to cross the line: Royal Court judgment, §61. In other words, the Bailiff was saying that conduct must at least be either sufficiently serious, or reprehensible: contrary to the Chambre judgment, it does not always have to be both.

71. The Appellant's first and main argument under this heading (§5 of his grounds of appeal) is that the Bailiff misdirected the Jurats. In particular, the Appellant says that the Chambre was correct in ruling that a practitioner's conduct must be both serious and reprehensible in all cases. We disagree. The true position is this:

    (i) It is neither possible nor desirable to provide an exhaustive definition of 'professional misconduct'. The scope and application of the concept is best left to the expert evaluation of the Chambre, subject to a number of clear legal boundaries.

    (ii) That being the position, and whilst recognising (as the Bailiff did in §60 of the judgment) that it is a somewhat circular definition, the most that can be said is that professional misconduct is any culpable conduct which is sufficiently grave to lead the Chambre to make a disciplinary finding.

    (iii) Bad faith or moral turpitude are not necessary ingredients, but if they are present they are likely to lead to a finding of professional misconduct.

    (iv) Professional misconduct is not synonymous with professional incompetence: actionable negligence might or might not constitute professional misconduct, depending on the circumstances of the case

(including for example the gravity of the error, the degree of culpability and the consequences).

(v) Neither is professional misconduct synonymous with a violation of the Rules: a breach of the Rules will obviously be a relevant factor, but an Advocate is not automatically guilty of professional misconduct on every occasion when s/he commits a breach of the Rules.

(vi) Where the alleged misconduct relates to an exercise of professional judgment, it is unlikely that a finding of professional misconduct would be made unless no reasonably competent practitioner would have acted (or failed to act) as the respondent did.

(vii) Conduct does not always have to be reprehensible (however that word may be understood). Sufficiently serious breaches of the Rules may constitute professional misconduct even if they are not reprehensible. The Chambre may even conclude that frequently repeated breaches of the Rules may constitute professional misconduct even if each breach, viewed in isolation, is not serious and the cumulative effect is not necessarily reprehensible. Like the Bailiff, we take into account the availability of a private reprimand as a relevant factor in this context.

72. For these reasons, we dismiss the Appellant's first argument under this ground of appeal. His second argument (also in §5 of his grounds of appeal) is that the Bailiff's direction to the Jurats overlooked the two-part nature of the threshold test for professional misconduct. In particular, the Appellant says that the Bailiff "*failed to take account of the requirement to prove also that no reasonably competent advocate would have done or omitted to do what the Appellant did or omitted to do*" (*ibid*). In our judgment there is nothing in this argument either:

(i) First, the question whether there has or has not been professional misconduct is not a two-part test. Rather, it is a unitary test, properly to be decided by the Chambre in exercise of its particular expertise. In particular, it is an evaluative judgment (see by analogy the position in England, *SRA v. Leigh Day* [2018] EWHC 2726 (Admin), at [158]) and in the circumstances it would be undesirable for any tribunal to adopt too formulaic an approach.

(ii) Second, as noted above, in exercising its evaluative judgment in any case where professional misconduct is alleged in relation to an exercise of professional judgment, the Chambre is 'unlikely' to make a finding of professional misconduct unless it is satisfied that no reasonably competent practitioner would have acted (or failed to act) as the respondent did. That is neither a 'test' nor any part of a test for determining professional misconduct: rather, it is simply a comment as to the likely application of the Chambre's judgment in the generality of cases. And, as Advocate Bell rightly pointed out, there would be a risk of conflating professional misconduct with civil liability for negligence if the 'reasonably competent practitioner' test were to be treated as the threshold criterion in all cases of alleged professional misconduct.

(iii) The third reason why we consider that the Appellant's argument under this heading should be rejected is that it misjudges the function of the Royal Court in general, and the Bailiff in particular, on an appeal from the Chambre. In such an appeal, the Royal Court is not conducting a trial of

any allegations of professional misconduct; and the Bailiff is not directing the Jurats as primary fact-finders or as expert assessors on the question whether, in their judgment, there has been professional misconduct. Rather, the Royal Court is hearing an appeal against a ruling which has already been made by the Chambre that there was professional misconduct; and the Bailiff is directing the Jurats as to the applicable law for determining whether that appeal should be allowed. Accordingly, the Bailiff's directions need to address any areas where the Chambre's own approach to the law was wrong, rather than labouring the point where the Chambre got it right.

(iv) In that context, it should be recognised that the Chambre in this case applied precisely the test for which the Appellant now contends – namely, that "*where conduct arises from the exercise of professional judgment it is unlikely to constitute professional misconduct unless no reasonably competent advocate could have come to the same conclusion*": Chambre judgment, §14. Furthermore, it appears from that very paragraph in the Chambre judgment that this was common ground between the parties. In the circumstances, the Bailiff did not need to dwell on that issue in his direction to the Jurats, because the Chambre had taken the correct approach.

(v) Finally, as noted above, in §62 of the Royal Court judgment the Bailiff did in any event give a direction which in substance reflected the test for which the Appellant contends when he directed the Jurats to consider this question: "*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?*" (emphasis added).

73. The Appellant's third argument under this heading is that there is a contradiction in the Bailiff's directions between §60, where he says that conduct does not have to be both serious and reprehensible, and §61, where he says: "*The breach has to be reprehensible*". In our judgment, this complaint is based on a misreading of the judgment. In §60, the Bailiff is dealing with the general position, and he says (rightly) that conduct does not always have to be both serious and reprehensible. In §61 he is dealing with a narrower point in relation to non-serious breaches of the Rules. It is in that context that he says (rightly) that the breach has to be reprehensible: in other words, a non-serious breach is not professional misconduct unless it is reprehensible. He is not saying, in §61, that all breaches must be reprehensible. There is accordingly no internal contradiction in the Bailiff's ruling.

74. The final argument under this heading is the Appellant's complaint that "*there was no sufficient emphasis on the criminal standard of proof*" (grounds of appeal, §7). In our judgment, this complaint is unsustainable. The Bailiff specifically identified the correct standard of proof in §14 of the judgment. There is accordingly no error of law on which the Appellant can rely under s. 30(1) of the 2007 Law. We would in any event repeat in this context the observations made in §72(3) above: the Bailiff was not giving directions at trial to primary fact-finders or to expert assessors on the question whether there had been professional misconduct; rather, he was giving directions on an appeal in relation to a case where the Chambre had already made a finding of professional misconduct, having applied exactly the right standard of proof (as to which, see §13 & §157 of the

Chambre judgment). In the circumstances, there was no need for the Bailiff to emphasise the applicable standard to the Jurats.

75. In the context of Ground 2, Advocate Dawes also drew our attention to the fact that neither Dr Liddell nor the Jurats who witnessed the execution of the Wills expressed any concerns about the Appellant's conduct, either at the time or in their evidence to the Chambre. In our judgment, this line of argument avails the Appellant nothing in this Court because it raises no point of law. Rather, it is an attempt to reargue the merits. The issue is addressed in more detail in relation to Ground 4 below.

76. For these reasons, we dismiss Ground 2 of the appeal.

Ground 3 – the scope of an advocate's duties

77. The Appellant's third complaint (grounds of appeal, §8–10) is that the Bailiff was wrong in his analysis of the case-law concerning the scope of an advocate's duty in circumstances such as this. There are essentially four strands to the Appellant's argument in this regard:

    (i) First, he says that the Bailiff conflated the legal test which applies when the court is assessing testamentary capacity with the separate question of what an advocate needs to do in order to discharge his/her professional duties in deciding whether to accept a prospective client's ostensible instructions to prepare a will in circumstances where testamentary capacity may be open to doubt.

    (ii) Secondly, the Appellant says that the Bailiff was wrong in law to say that an advocate must in such circumstances satisfy him/herself that the prospective client does have testamentary capacity.

    (iii) Thirdly, the Appellant says that, in directing the Jurats as to the latitude allowed to an advocate in circumstances such as this, the Bailiff conflated the question whether certain English or Commonwealth case-law should be preferred (*i.e.* as defining the legal scope of an advocate's substantive obligations) with the separate question whether, in the absence of local authority, a Guernsey advocate in 2004 "*was within the bounds of what a reasonably competent advocate could or could not do by reference to reputable and contemporaneous Commonwealth case law*" (grounds of appeal, §8).

    (iv) Finally, the Appellant says that the Bailiff gave insufficient weight and prominence to a Canadian decision which suggests that a practitioner does not need to satisfy him/herself that a prospective client does have testamentary capacity (grounds of appeal, §9).

78. Dealing with the first complaint, in our judgment it is groundless. The Bailiff made clear that the Royal Court was "*not deciding whether the Client had testamentary capacity but whether the Appellant took the precautionary steps required of an Advocate*" (§118 of the judgment). The Bailiff then proceeded to direct the Jurats as to the nature of those precautionary steps under Guernsey law, saying that the Appellant "*was required to satisfy himself that the Client had testamentary capacity*". In our judgment, there is no basis for suggesting that the Bailiff thereby confused the applicable legal test for determining testamentary capacity with the separate question of what an advocate needs to do before accepting instructions to draft a will.

79. The second question is whether the Bailiff fixed on the correct test by saying that an advocate is under a professional duty to satisfy him/herself that a prospective client has testamentary capacity before accepting instructions to draft a will. At least in the abstract, this is a more difficult question on which a considerable body of case-law has been cited to us. Nevertheless, there is on analysis a short answer to what is at heart a straightforward question for the purposes of this appeal, once two simple propositions are accepted.

    (i) First, no one could suggest (and the Appellant does not contend) that a legal practitioner is under no obligation at all to make any effort to work out whether a prospective client has testamentary capacity (or is free from undue influence) before accepting instructions ostensibly coming from that client to prepare a will. In other words, it must be accepted that a practitioner is required in such circumstances to make appropriate efforts to satisfy him/herself in that regard. Exactly what constitutes 'appropriate' efforts will inevitably depend on the circumstances of each case.

    (ii) Secondly, a practitioner's professional conduct is not going to be judged by reference to the question whether s/he reached the right conclusion as to the prospective client's testamentary capacity. If, in the particular circumstances of any given case, a practitioner makes appropriate efforts to satisfy him/herself that the client has testamentary capacity; s/he decides that the client does have such capacity; and s/he accepts instructions on that basis, s/he is not then likely to be found guilty of professional misconduct simply because a court subsequently determines (possibly on fuller evidence, with more time and with the benefit of adversarial argument) that the client did not actually have testamentary capacity. The culpability of the practitioner's professional conduct will be judged by reference to the efforts that s/he made in the circumstances, not by reference to the accuracy of his/her conclusions.

80. Taking those points on board, and looking again at both the nature of the Complaint and also at the Bailiff's direction on this point, it is apparent that there is nothing in this part of the Appellant's argument.

    (i) Turning first to the nature of the Complaint, the critical point is that the Appellant was not being accused of either (i) having failed to realise that he needed to address the question of testamentary capacity or (ii) having failed to satisfy himself (subjectively) that the Client had testamentary capacity. As to the first point, it is entirely clear from the Appellant's whole course of conduct that he was seeking to establish testamentary capacity, and that is exactly how he opened the video assessment on 1 October: "*[the Client] wishes to make a will as you know and we are concerned that he has testamentary capacity to do so*". As to the second point, no such allegation could sensibly have been made, because it is apparent from his evidence that the Appellant did in fact believe that the Client had testamentary capacity. Instead, the essential thrust of the Complaint is that the Appellant reached that conclusion without having taken the appropriate precautionary steps first. Viewed in this light, the purely legal question whether a practitioner (a) is under a positive duty to satisfy him/herself that a prospective client has testamentary capacity before accepting instructions to draft a will, and is under a concomitant duty to refuse such instructions if

s/he is in doubt, or (b) is entitled to accept instructions to draft a will notwithstanding the fact that s/he harbours some doubts about the client's testamentary capacity, is an irrelevance for the purpose of this appeal. The Appellant was satisfied as to the Client's testamentary capacity, and he was not in doubt. The question before the Chambre was whether the Appellant had done enough before reaching those conclusions, accepting the instructions, drafting the Wills, and arranging for them to be executed.

(ii) Turning then to the Bailiff's directions on this point, his ruling cannot be interpreted in context as meaning that an Advocate is professionally bound to reach the right conclusion as to whether the prospective client does, or does not, have testamentary capacity. Rather, in saying that the Appellant "*was required to satisfy himself that the Client had testamentary capacity*", the Bailiff meant in context that the Appellant was bound to take appropriate steps to satisfy himself in that regard, and that he should not have accepted instructions if he was not so satisfied. That is entirely consistent with what the Bailiff had said in §62 of the judgment, and it is also clear that that is how the Jurats understood his ruling, as is apparent from their findings, particularly in §151–157 of the judgment where they considered the adequacy of the steps taken by the Appellant to satisfy himself as to the Client's testamentary capacity.

81. For these reasons, the question whether an advocate is indeed under a professional duty in all cases to satisfy him/herself that a prospective client has testamentary capacity before accepting instructions to draft a will, and hence is under a professional duty to refuse instructions if s/he is uncertain as to testamentary capacity, is not central to the Bailiff's ruling or to this judgment. Nevertheless, we would express the view that the Bailiff's description of an advocate's professional duty in this regard represents an entirely correct statement of the position in this jurisdiction. For example, unless s/he is satisfied that s/he is receiving instructions from someone with testamentary capacity, an advocate cannot discharge his/her duty under Rule 1 to avoid doing anything in the course of practising "*which breaches, compromises or impairs or is likely to breach, compromise or impair … (e) the Advocate's duty to act in the best interests of the client*" (emphasis added). In short, if an advocate is not satisfied that the instructions s/he is receiving are truly the considered instructions of the client, then it is difficult to see how the advocate can believe s/he is acting in the client's best interests. Similarly, if an advocate is not satisfied that s/he is receiving the true and considered instructions of his/her client, it is difficult to see how s/he can discharge the obligation under Rule 55 to carry out the terms of his/her retainer with care, skill and proper diligence.

82. A comparable point can also be made in relation to the question of undue influence in respect of Rules 10 and 18. Unless an advocate is satisfied that the client's instructions are not tainted with undue influence, it is difficult to see how s/he can be satisfied that s/he is giving impartial and frank advice "*free from any external or adverse pressure … which would destroy or weaken the Advocate's … fiduciary relationship with the client*". Whilst Rule 10 is in part directly addressing the position of the advocate (*e.g.* the question whether the advocate has a conflict of interest), it is equally applicable (as the Commentary makes clear – see §29 above) to situations where pressure has been applied to the client. Similarly, Rule 18 provides in terms that an advocate "*must not accept instructions where he or she suspects that those instructions have been given by a client under duress or undue influence*".

83. The Appellant's third argument under this heading is that the Bailiff confused two separate issues – on the one hand, what is the legal scope of an advocate's professional obligations in circumstances such as these; on the other hand, whether, in the absence of any Guernsey case-law, an advocate in 2004 "*was within the bounds of what a reasonably competent advocate could or could not do by reference to reputable and contemporaneous Commonwealth case law*" (grounds of appeal, §8). In our judgment, there is nothing in this argument. The Bailiff correctly identified the scope of an advocate's professional obligations in §118 of the judgment. Separately, he made clear to the Jurats in §62 of the judgment that there were two separate questions.

    (i) First, "*The Bailiff reminded [the Jurats] that in focusing 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.*" That required the Jurats to consider the scope of the Appellant's professional obligations, as defined by the Bailiff. As noted above, that was not really the focus of the argument in the Chambre or in the Royal Court, because the Appellant fully recognised that he had to take appropriate steps to satisfy himself as to testamentary capacity and the absence of undue influence: the argument centred on whether he had done enough in that regard.

    (ii) That brings us to the second question which the Bailiff identified for the Jurats: "*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?*" That required the Jurats to consider not only whether the Appellant had in fact acted in breach of his professional obligations but also whether the breach was sufficiently culpable by reference to the standards of reasonably competent practitioners. It was in relation to that second question that the Jurats were to take into account (i) the fact that the scope of an advocate's professional obligations is not laid down in the Rules (as explained by the Bailiff in §116 of the judgment) and (ii) the fact that there was conflicting case-law from different jurisdictions as to what a lawyer is required to do in such circumstances (as the Bailiff explained in §117 of the judgment). In the circumstances, there is no scope for suggesting that the Bailiff confused those separate questions.

84. Turning finally to the fourth argument under this heading, the Appellant says that the Bailiff gave insufficient weight to the relevant Commonwealth case-law, and failed specifically to quote one passage from a Canadian decision which expresses the view that it would impose "*too heavy a responsibility*" to require a solicitor to undertake "*diligent questioning, testing or probing [until] he or she is satisfied that the testator has capacity*" and that "*careful solicitors who are in doubt on the question of capacity will not play God – or even judge – and will supervise the execution of the will while taking, and retaining, comprehensive notes of their observations on the question*" (see §70 of the judgment in *Scott v. Cousins* [2001] OJ NO 19). In our judgment, there is nothing in this argument:

    (i) First, it is important to emphasise again that the Bailiff was not giving directions at trial as to the applicable test for deciding whether there had been professional misconduct. That decision had already been taken by the Chambre, which is the specialist tribunal that has been established (or rather

continued, in its current incarnation) by statute with the specific task of making these assessments, and with its composition carefully designed to ensure that suitably qualified and experienced members are appointed to do so. Rather, the Bailiff was giving directions to the Jurats on how they should answer a very different question, namely whether the decision reached by the Chambre that there had been professional misconduct in this case was so outside the reasonable range of expert assessments which a tribunal could reach as to be set aside. In other words, the question for the Royal Court was not: "*Can the Registrar prove beyond reasonable doubt that no competent advocate would have acted as the Appellant did?*". Instead, the question for the Royal Court was: "*Can the Appellant establish that no reasonable tribunal could have reached the conclusion that the Chambre did?*" In that context, it was entirely unnecessary for the Bailiff to quote every passage from the case-law which might have been invoked at trial in support of the Appellant's case before the Chambre.

(ii) Second, it is equally important to emphasise that the Chambre's assessment of whether there had been any professional misconduct in this case was not made by reference to the question whether the Appellant had violated some hard-edged rule of law. On the contrary, it is quite apparent from the Chambre's detailed review of the evidence, much of which is quoted above, that the decision was taken essentially by reference to the question whether, in all the circumstances, the Appellant did enough. The conclusion of the Chambre (with which the Jurats largely agreed) was that the Appellant had not done enough. They reached that conclusion on the facts – for example, because the Appellant was aware of all the matters listed in §56 of the Chambre judgment and failed to ask the questions or take the other precautions discussed in §131–134 of the Chambre judgment – not because the Appellant had failed to satisfy himself (subjectively) that the Client had testamentary capacity.

(iii) Finally, it is important to keep in mind the available scope for an appeal to this Court under s. 30(1) of the 2007 Law. In our judgment, it does not disclose any error of law for an appellant to contend that the Bailiff could have given greater prominence in his directions to certain case-law, or quoted specific passages from that case-law, in circumstances where (as here) the overall tenor of the relevant case-law was properly recorded in the Bailiff's directions and the relevant passages had already been cited in argument.

85. In the context of Ground 3, Advocate Dawes again endeavoured to beguile us into a consideration of the underlying merits. He pointed to certain case-law and professional commentary which suggests that a medical examination is not always necessary for a legal practitioner to be satisfied as to testamentary capacity, and on that basis he submitted that the Appellant in this case had done more than enough because not only did he have the benefit of Dr Liddell's report of the assessment conducted on 24 September but he also arranged for a video assessment on 1 October. In our judgment, these submissions are of no avail, because they disclose no error of law on the part of the Royal Court. The evidence was fully considered by the Chambre and again by the Jurats in the Royal Court. It cannot be said that their assessment was wrong.

86. In this context, we should emphasise in the interests of clarity that a legal practitioner's obligation to see an obviously vulnerable prospective client alone before accepting instructions is not a matter of mere form. The practitioner's professional duty is to ensure that s/he is genuinely being retained by that client, and is genuinely receiving that client's unmediated instructions. If the client is seen only in the presence of a spouse, or a child, or any other person who might potentially exercise undue influence, the practitioner is exposed to a double risk. First, s/he is exposed to the obvious and patent risk that s/he is not in truth receiving the client's true instructions because undue influence is being exercised by the mere presence of the third party. The 'oh' incident in this case is exactly in point. Second, the advocate is exposed to the latent and more insidious risk of thinking of his/her function as serving the collective interests (as s/he may perceive them to be) of both the client and the spouse, child or other third party who accompanies the client. That risk was evident in this case, for example where the Appellant said that he saw his role as "*trying to help everyone*" (Chambre judgment, §103), and it underlies the Royal Court's acceptance (in §135 of its judgment) that the Appellant entirely mistook his function by putting himself under pressure to "*get the Wills over the line*". The path to professional misconduct may be paved with good intentions.

87. We would add finally that the Appellant's argument under this heading would have had more weight if either (i) he had adduced any evidence to show that, in late September or early October 2004, he had in fact read, or was aware of, the Commonwealth case-law on which Advocate Dawes now relies as to the appropriate latitude to be allowed to a Guernsey advocate in 2004, or (ii) that for some other good reason he made an informed professional judgment at the time that it was unnecessary for him to do anything more than he did. As it happens, no such evidence was adduced, and indeed it emerged during the course of the hearing that the Appellant had never previously drafted a will in circumstances where testamentary capacity was in issue (Chambre judgment, §51). In the circumstances, it is impossible for him now to contend on appeal that the existence of overseas case-law which <u>might</u> in principle have informed a deliberate decision on his part to conduct himself as he did provides any excuse for the many shortcomings which the Chambre identified.

<u>Ground 4 – the Royal Court's handling of the facts</u>

88. The main argument in the Appellant's fourth ground of appeal is that the Royal Court's "*handling of the error made by the Chambre in assuming that [the Y file note] had been given to the Appellant also amounted to an error of law*" (grounds of appeal, §11).

89. In our judgment, this complaint fails for three separate reasons. First, it would only be in the rarest of circumstances that an appellate court's handling of an error of fact by an inferior tribunal could ever amount to an error of law by the appellate court. This is not one of those rare cases. Here, the Royal Court expressly acknowledged, in §142 of its judgment, that the Chambre had fallen into error in this regard. The appropriate weight to be attached by the Royal Court to this error of fact by the Chambre is not a question of law in respect of which an appeal lies to this Court under s. 30(1) of the 2007 Law.

90. Second, and in any event, even if this were an issue on which the Appellant was entitled to appeal, we can discern no grounds for criticising the Royal Court judgment. Although the Chambre judgment refers to the Y file note more than once, it is entirely clear from the judgment as a whole, and also from the entire body of evidence, that the Appellant was aware of all the significant red flags identified in the Y file note from

other sources which were available and known to him (principally, (i) Dr Liddell's report of 24 September, (ii) the letter of instruction from the Client to [the Appellant], (iii) what was said in the various phone calls and at the meetings attended by the Appellant from 28 September to 1 October 2004, and (iv) the letter of 20 December 2003 described in §137 of the Chambre judgment). In particular, the Appellant knew from those sources (*i.e.* without reference to the Y file note) that:

(i) the Client was changing his lawyer at an advanced stage in his life;

(ii) the Client was proposing to alter his will at an advanced stage in his life;

(iii) there was a pre-nuptial agreement which the Appellant had not read;

(iv) the effect of the proposed new will would be to alter the parties' substantive positions from those under that pre-nuptial agreement;

(v) the Wife's own Advocate considered that the Client needed separate advice;

(vi) the Appellant expressed the view at the meeting on 28 September that *"it would be necessary to instruct another expert in order to answer the possible question why he had accepted what [Advocate X] has researched and not undertaken independent enquiries"*;

(vii) in response, Advocate X expressed the view "*that his [i.e. Advocate X's] neck was not on the block*" and that "*it was [the Appellant's] matter from then on*";

(viii) Advocate X also said that he should not remain in the room while the Appellant took instructions from the Client;

(ix) the Client was suffering from Alzheimer's and was incapable of managing his affairs;

(x) the Client's oldest son had been managing his affairs for some time;

(xi) there was a pending guardianship application issued by the children;

(xii) the Wife's Advocate expressed the view that the guardianship application would probably be dropped once the new wills were signed;

(xiii) the Client probably did not have sufficient capacity to nominate someone under a Power of Attorney;

(xiv) the Client's testamentary capacity was open to doubt and was diminishing;

(xv) the examination by Dr Liddell was arranged by the Wife, not the Client, and Dr Liddell considered that his instructions came from the Wife;

(xvi) the Wife had contacted Dr Liddell before the assessment in order to explain her perception of the relevant background;

(xvii) the Client did not understand why he had been driven halfway across Wales for the assessment by Dr Liddell;

(xviii) Dr Liddell had sent his report to the Wife's Advocate, saying "*I do not think it contains much of comfort <u>to [the Wife]</u>*" (emphasis added);

(xix) there was discord between the Wife and the children, which the Wife described to Dr Liddell as an unfortunate attempt by the children to wrest control of the Client's affairs;

(xx) the children wanted to see their father on his own, and there was reference to at least one incident where someone was talking to him on the phone "*where [the Wife] had been talking in the background*" (p. 4 of the 24 September file note);

(xxi) the matter was highly likely to end in litigation;

(xxii) in any such litigation, there would be an issue whether the Wife was "*exercising undue influence*" over the Client (p. 6 of the 24 September file note);

(xxiii) this was the first occasion on which the Appellant had been instructed to draft a will in circumstances where there was doubt over testamentary capacity;

(xxiv) the Appellant did not know what experience Dr Liddell had in assessing testamentary capacity;

(xxv) the Appellant left the first meeting on 28 September still unclear what the Client's intentions were regarding the house he occupied with the Wife;

(xxvi) after the meeting on 28 September, the Appellant considered that he should "*seek advice on how to proceed with the case from HM Procureur*" (p. 10 of the 24 September file note [p. 882]).

91. In all the circumstances, we do not accept Advocate Dawes' submission that the Chambre judgment "*largely turns*" on the Y file note (as he urged in oral argument). In our judgment, having reviewed the evidence and the Chambre judgment as a whole, even without reference to the Y file note there was an abundance of material to support the Chambre judgment, the key elements of which appear in §138 and §142 of its judgment (quoted above, but set out again here for convenience):

> *"138 the Panel is simply unable to see how [the Appellant] could both have accepted instructions and acted upon them without making proper and due enquiry of at least [the Client] (alone and on more than one occasion), his children and [Adv Y]."*
>
> *"142 [The Appellant] allowed himself to be led by [the Wife], failed to make any proper enquiry of any medical professional who was familiar with and had assessed [the Client] and determined that he did not have sufficient mental capacity to organise his own affairs, including, importantly [the Client]'s General Practitioner, Dr Hanna; not making any investigation of the Children or [Adv Y] and, crucially, not allowing [the Client] the space and time to provide instructions in an environment where it was simply [the Client] and his legal and other professional advisers present, with no time pressure*".

92. That was and is the heart of the case against the Appellant. Advocate Dawes made a number of detailed points on the evidence in response, but none is of any force in this Court. For example, he urged on us that the Appellant could not have made inquiries of Advocate Y or of any of the various medical practitioners who had previously examined the Client without breach of confidence, but as Advocate Bell pointed out the Client could always have given his consent to such consultation, and the fact that the Appellant never asked for the Client's consent is itself another aspect of his failure to take appropriate steps. Advocate Dawes also urged on us that a client's inability to manage his affairs is not to be equated with testamentary incapacity. That is true as an abstract

proposition, but the fact that testamentary incapacity was plainly in issue forms one of the numerous factors against which the Appellant's conduct had to be, and was judged by the Chambre and again by the Jurats in the Royal Court.

93. For these reasons, we do not consider that there is any force in the suggestion that the Royal Court gave insufficient weight to the fact that the Chambre had been wrong to conclude that the Appellant had been given the Y file note at the first meeting on 28 September 2004.

94. The third and final reason why we would dismiss this ground of appeal is that the Royal Court did not give inappropriate weight to the findings of the Chambre. Rather, having been correctly directed on the law by the Bailiff, and having been reminded that the Chambre was wrong to say that the Y file note had been seen by the Appellant at any time before the Wills were executed, the Jurats considered the relevant material for themselves, and they reached the conclusions expressed in §151–172 of the judgment. As noted above, it is significant in this context that the Jurats did not simply say that the Chambre's conclusions fell within the bounds of a reasonable tribunal's judgment. On the contrary, the Jurats expressly made their own findings, having considered the evidence themselves, and they expressed their own conclusions.

95. In the written Notice of Appeal, the Appellant also contended that "*the Royal Court's analysis of the facts was flawed as a matter of law*" in that the Royal Court "*failed clearly to identify the burden of proof, the standard of proof, the standard in fact to be achieved, and whether or not the Registrar's case had been made out to the standard required*" (grounds of appeal, §12). This argument was not pursued in oral submissions before us, and understandably so:

    (i) It is difficult to see how any analysis of the facts of any case can ever be flawed "*as a matter of law*" and no basis for reaching such a conclusion has been established in this case.

    (ii) The Royal Court judgment clearly identified the burden of proof on appeal – namely, that it was for the Appellant to establish that the Chambre judgment should be overturned. This has already been dealt with at length in relation to Ground 1.

    (iii) In so far as the Appellant was suggesting that the Royal Court failed to identify the burden of proof that was applicable in the Chambre, the complaint is misconceived: (a) as noted above, the Chambre expressly recognised that the burden was on the Registrar (Chambre judgment, §157), and (b) no issue as to the applicable burden of proof was raised in the appeal from the Chambre to the Royal Court.

    (iv) The suggestion that the Royal Court failed clearly to identify the applicable standard of proof on appeal is similarly misconceived. This has already been addressed in detail in relation to Ground 1.

    (v) In so far as the Appellant was suggesting that the Royal Court failed to identify the standard of proof that was applicable in the Chambre, the complaint is misconceived: (a) as noted above, the Chambre expressly recognised that the standard of proof was "*beyond reasonable doubt*" (judgment, §13 & §157); (b) there was no appeal to the Royal Court in that regard (nor could there be); (c) as it happens, the Royal Court also expressly recognised that the criminal standard applies before the Chambre

by virtue of s. 25(9) of the 2007 Law (see §14 of its judgment) so there is no room for any complaint in this regard by the Appellant.

The remaining Counts in the Complaint

96. Separately from the four grounds of appeal discussed above, the Appellant also submitted that the Royal Court was wrong to uphold the four Counts in the Complaint that it did because, so Advocate Dawes argued, the various necessary elements 'pleaded' in each Count could not properly be established on the available evidence. Exactly how these arguments fitted into the grounds of appeal was not entirely clear, but the Registrar did not object to the arguments being advanced, and in view of the gravity of the matter we have considered them carefully.

Count 1

97. Count 1 is predicated on the Appellant having accepted instructions regarding the Wills (i) when the instructions came from Advocate X acting for the Wife and (ii) when the Appellant had notice of (a) the guardianship proceedings, (b) the Client's "*lack of capacity*" and (c) the conflict between the children and the Wife, and (iii) without taking precautions such as (a) seeing the client alone and/or (b) satisfying himself that the Client had a free choice of lawyer.

98. The Chambre was not satisfied that element (i) had been proved: it pointed out that the introduction came from Advocate X, but not the instructions. That is not now in issue.

99. For our part, we were initially concerned as to the implications of element (ii)(b), *i.e.* the allegation that the Appellant accepted instructions "*when he had notice of … [the Client's] lack of capacity*". That might be taken as an allegation that the Appellant was aware of testamentary incapacity on the Client's part. As it happens, the evidence shows that the Appellant was aware of the Client's diminishing mental capacity, but not that he knew that the Client lacked testamentary capacity. On the contrary, the Appellant's evidence was that he believed the Client did have testamentary capacity. Nevertheless, the Registrar made clear before the Chambre that the case the Appellant had to meet was not that the Client lacked testamentary capacity, but that the Appellant failed to deal appropriately with the possibility that he lacked capacity: see §10 of the Registrar's Skeleton Argument dated 1 November 2018. There was no appeal to the Royal Court, and there is none to this Court, on the basis that the Appellant was taken by surprise and did not have a fair trial because he did not know what case he had to meet. We will accordingly confine ourselves to commenting that Count 1 could have been more happily worded. It is a matter of real importance that a practitioner should know exactly what is being said against him. More specifically, under s. 22(7)(b) of the 2007 Law, the Registrar should set out "*the specific allegations in reasonable particularity*". The word 'reasonable' should not be allowed to give the Registrar too much latitude to adjust his case in the course of a hearing.

100. Advocate Dawes' other argument under this heading was that there could have been no breach of Rule 18 (quoted in §25 above) because the Appellant did not in fact suspect that his instructions had been given by the Client under duress or undue influence. Under examination, he acknowledged that the risk of undue influence was "*on the radar*" (§100 of the Chambre judgment), but having watched the dynamic between the Client and the Wife on 28 September and again on 1 October, having learned that the Client ultimately decided not to leave the house to the Wife absolutely, and having

arranged for the video assessment on 1 October to be conducted without the Wife being present, the Appellant says that his suspicions had been dispelled.

101. This brings us back to the issue discussed in §27 above regarding the true meaning of Rule 18. In our judgment, the test under that Rule is purely subjective. In other words, the question is whether an advocate has accepted instructions when s/he actually suspected that the instructions had been given under duress or undue influence. There is no breach if the advocate did not suspect duress or undue influence, even if (viewed objectively) there were reasonable grounds for exciting such suspicion. We reach that conclusion for three reasons:

    (i) The first is linguistic. The Rule says that an advocate must not accept instructions "*where he or she suspects that those instructions have been given … under duress or undue influence*" (emphasis added). In other words, the Rule does not say that there is a breach where an advocate "*has reasonable grounds to suspect*" nor does it say that a breach occurs where the suspicion is that the instructions "*might have been given*" under duress undue influence.

    (ii) The second reason relates to fairness. The function of the Rules is to lay down a code to which advocates are required to adhere, and the penalties for contravention can be severe. Whilst it is entirely appropriate for some Rules to be expressed in general terms (such as the reference to "*proper standards*" in Rule 1(g) and "*proper diligence*" in Rule 55), where a Rule lays down a specific category of prohibited conduct, it would be unfair to an advocate facing disciplinary proceedings for the Rule to be interpreted expansively.

    (iii) The third reason is contextual. Interpreting Rule 18 more broadly would potentially have been more justified if there would otherwise have been an obvious gap in the Rules. But in this case there is not. If in any case there are reasonable grounds for suspicion but an advocate does not in fact suspect duress or undue influence, either because s/he fails to make proper inquiries or fails to appreciate the significance of the material already available, then there would be scope for alleging a breach of the duty under Rule 55 to carry out the terms of the retainer with skill, care and proper diligence. In such circumstances, there is no need (in the wider public interest of protecting clients) to interpret Rule 18 expansively.

102. It was not established before the Chambre (either beyond reasonable doubt or at all) that the Appellant did in fact suspect duress or undue influence. Indeed, that does not seem to have been the Registrar's case. We note that §12 of his Skeleton Argument before the Chambre stated in terms that "*the allegation is not that the [Appellant] could not or should not have accepted the instructions he did*", and §8 of his Closing submissions asserted that Count 1 involved a breach of the Rules consisting of "*having accepted [instructions] with notice of various matters*", a point that is repeated in §10 of the same document. Accordingly, the Registrar appears to have been saying that the Appellant did not suspect duress or undue influence, but that he should have done. In our judgment, that cannot found a breach of Rule 18, because it seeks to import an objective test.

103. For these reasons, we do not consider that a breach of Rule 18 can properly be established in relation to Count 1 on the facts of this case. Nevertheless, there is no

basis for disturbing the finding that there was a breach of Rule 1(e) and Rule 10 in respect of Count 1.

Count 2

104. Count 2 is predicated on the basis that the Appellant failed to investigate or advise on the terms of the pre-nuptial agreement "*which was in apparent conflict with the terms of the Wills*". Advocate Dawes submitted that the two were not in conflict because clause 4.1 of the pre-nuptial agreement expressly contemplated the possibility that either party might make provision for the other under his or her will. We also note that the Bourne Report stated, at §80, that the Wills "*were a departure from the pre-nuptial agreement but that does not mean that they were in conflict with it*" (emphasis added). In the circumstances, it is regrettable that Count 2 alleged that the Wills were in "*apparent conflict*" with the pre-nuptial agreement.

105. Nevertheless, this appears ultimately to be a semantic quibble. The case was advanced before the Chambre not on the basis that the Wills could not co-exist factually or legally with the pre-nuptial agreement, but rather on the basis that the Wills "*represented a move away*" from the provisions of the pre-nuptial agreement (see §13 of the Registrar's Closing Submissions before the Chambre) and the Appellant failed to take the appropriate steps to investigate why and to advise the Client. Again, no appeal was made either to the Royal Court or to this Court on the basis that the Appellant did not have a fair trial because he did not know what case he had to meet in this regard.

106. In our judgment, the unhappy wording of Count 2 does not alter the integrity of the findings made by the Chambre and by the Royal Court in relation to professional misconduct under this heading, because they were fully entitled to reach the conclusion that the Appellant ought to have investigated and advised on the terms and effect of the pre-nuptial agreement. If he had done so, it would have raised another red flag. The finding that there was a breach of Rule 1(e) and Rule 55 cannot be disturbed on this basis.

Count 3

107. Count 3 is predicated on the basis that the Appellant facilitated the execution of the Wills "*with knowledge of the circumstances including [i] [the Client's] lack of understanding and [ii] the influence of [the Wife]*". As noted above, the Chambre held that element [ii] had not been established, so that has fallen away.

108. For our part, we were initially troubled by the wording of element [i]. It might be taken to allege that the Appellant facilitated the execution of the Wills knowing that the Client did not understand what he was doing. Nevertheless, it was again made clear before the Chambre that the Registrar's case in respect of Count 3 was not founded on an allegation that the Client lacked understanding or capacity, let alone that the Appellant knew that. Rather, the case was put on the basis that "*the circumstances*" included a large number of red flags, including the Client's deteriorating mental condition, and that the Appellant failed to respond appropriately. This is clear from §14 of the Registrar's Skeleton before the Chambre and from §15–18 of his Closing Submissions. Once again, there was no appeal to the Royal Court or to this Court on the basis that the Appellant did not have a fair trial because he did not know what case he had to meet. In the circumstances, although we would again express some reservations about the wording of the Complaint, there is nothing before this Court to justify overturning the findings below in relation to Count 3.

Count 4

109. In relation to Count 4, Advocate Dawes drew our attention once again to the fact that neither Dr Liddell nor the Jurats who attended the video assessment and witnessed the execution of the Wills on 1 October expressed any concerns about the Appellant's conduct during the assessment. Indeed, Jurat Le Page expressed the view that the Appellant's conduct was not inconsistent with that of other advocates in comparable circumstances. On this basis, Advocate Dawes sought to challenge the finding of the courts below on Count 4.

110. In our judgment, these submissions do not provide this Court with any basis for interfering. The evidence of Dr Liddell and of the Jurats who witnessed the Wills was all before the Chambre, and the Chambre made the unequivocal finding that it did in §149 of its judgment. There is no basis on which the Royal Court could properly have overturned that finding, and there is no basis for this Court to do so either. We would simply add two observations to put the relevant evidence in perspective. First, neither Dr Liddell nor the two witness-Jurats had available to them all the material that was available to the Appellant or to the Chambre, so the significance of their views is very limited. Second, the relevant decision-maker in relation to allegations of professional misconduct is the Chambre, composed as it is under s. 17(3) of the 2007 Law and armed with all the evidential material and the legal submissions available at trial: whilst the views of witnesses may have some value, their function is not to be confused with that of the Chambre.

Conclusion

111. For the reasons given in this judgment, we conclude that there was no sufficient material to justify a finding of breach in respect of Rule 18 under Count 1, but apart from that the appeal against the findings of professional misconduct is dismissed. We indicated at the close of oral argument that the Court would, if necessary, invite further submissions on any consequential issues in light of our judgment on the substantive issues. We have already received detailed written submissions on penalty, but if having considered this judgment the Appellant has any further submissions they should be provided in writing within 14 days. The Registrar will have 7 days thereafter to respond in writing, with the Appellant providing any reply in writing within 7 days after that. On the other hand, if the parties are content to rely on the submissions they have already provided on penalty, they are invited to notify the Court as soon as possible and we will issue a further ruling on that basis.