OUTER HOUSE, COURT OF SESSION

[2017] CSOH 137

A86/14

OPINION OF LORD BOYD OF DUNCANSBY

In the cause

JOHN RUSSELL

Pursuer

against

ANDREW RUSSELL AND OTHERS

Defenders

Pursuer: Heaney; Allan McDougall
Second Defender: Party
For William Renfrew: Gardiner; Renfrew & Co, Solicitors, Glasgow

24 October 2017

[1] The pursuer enrolled the following motion:

> "On behalf of the Pursuer (1) to find the **third defender** (Vikki Russell) liable to the pursuer in the expenses of this action as the same shall be taxed by the Auditor of Court; (2) to find the **second defender** (Paul Casey Russell, who did not enter appearance in the action) liable to the pursuer in the expenses of the action jointly and severally with the third defender as the same shall be taxed by the Auditor of Court; (3) to find **William Renfrew, Solicitor of Wm Renfrew & Co, Ltd, Solicitors, Glasgow** (the principal solicitor acting for the third defender in this action and the nominated solicitor on her Legal Aid Certificate) liable jointly and severally with the second and third defenders to the pursuer in the expenses of this action as the same shall be taxed by the Auditor of Court; and (4) to find that the expenses be taxed against the second and third defenders and William Renfrew on an agent and client (client-paying) scale."

Background

[2] This is an action for reduction of a disposition executed by John Russell and Elizabeth Russell (the deceased) disponing a flat at 263 Cumbernauld Road, Denniston, Glasgow to themselves in liferent and Vikki Russell (the third defender) in fee. It bears to be signed by both of them on 28 September 2004.

[3] The pursuer is a son of the deceased and executor nominate under his father's will. There are four defenders including the Keeper of the Registers of Scotland who has not entered appearance. The first and second defenders are also sons of the deceased and brothers of the pursuer. The third defender is the granddaughter of the deceased and daughter of the second defender. Mr William Renfrew of Renfrew & Co, Solicitors, Glasgow acted for the third defender in this action.

[4] The pursuer sought reduction of the disposition on the grounds that when it was executed both of the deceased lacked the capacity to do so. Neither the first or second defenders entered appearance or lodged defences. The third defender lodged defences. In due course a proof before answer was allowed. On the eve of the proof the third defender withdrew her defences. The diet of proof was discharged and decree of reduction was granted.

[5] Both the pursuer and the third defender are legally aided. I was told that the only asset in the estate is the property at 263 Cumbernauld Road which has a value of £45,000. Under the legal aid rules SLAB will look for payment of legal fees from the recovered property. There are three beneficiaries under the will namely the pursuer and the first and second defenders. Mr Heaney, counsel for the pursuer, informed me that the pursuer had a duty to maximise the estate for the beneficiaries and that was why this motion had been enrolled.

[6] This motion was before the court on 3 March 2017. At that stage it was appreciated that the third defender and Mr Renfrew would require separate representation. In consequence Mr Renfrew withdrew from acting for the third defender. The appropriate motion was made and the interlocutor and Form 30.2 was served on the third defender requiring her to intimate within 14 days whether she still insisted on her defences under certification that if she failed to do so the court may grant such order including expenses as it thinks fit. That notice may have confused her since the defences had already been withdrawn. There was no response from her and she did not receive separate intimation of this motion. In consequence she was not represented.

[7] The second defender, not having entered the process, appeared on his own behalf. Mr William Renfrew, solicitor, was represented by counsel.

Disposition

[8] The disposition bears to have been executed by both John Russell and Elizabeth Russell on 28 September 2004. Despite that according to the third defender and all of her witnesses, it was executed on 11 October 2004. It was witnessed by the second defender. The solicitor who acted for the deceased was Mr Brian McConville who had his own firm. In due course it became Renfrew and Co with Mr McConville acting as a consultant for a short time. Mr McConville was described as the family solicitor.

Process

[9] Elizabeth Russell died on 5 January 2005 and John Russell senior died on 28 September 2006. The summons was signetted on 18 February 2014. Interim interdict against the third defender disposing of the subjects was granted on 19 February. The

pursuer's agents deferred lodging the summons for calling apparently in an attempt to settle the action. Eventually the summons called on 14 January 2015 and defences were lodged late on 4 February 2015. Originally the action proceeded solely on the alleged lack of capacity of John Russell senior. The averments regarding Elizabeth Russell were added in May 2015, though the issues relating to Elizabeth Russell were brought to the attention of the third defender's agents in a letter dated 13 November 2014. The action was on the adjustment roll throughout much of 2015. Indeed on three occasions the cause was restored to the Adjustment Roll at the instance of the third defender. A proof before answer was allowed on 18 February 2016 and set down for 31 May 2016. On 26 May 2016 the third defender intimated her intention to withdraw her defences. On 31 May the court allowed the Minute of Withdrawal to be received, pronounced decree of reduction and made an order under section 9 of the Land Registration (Scotland) Act 1979.

Correspondence

[10] From the outset it appears that the pursuer's agents actively sought to resolve the dispute. They recovered the medical records relating to both the deceased. They believed that they showed a *prima facie* case and pressed the third defender's solicitor, to acknowledge the strength of the case against his client. In a letter dated 13 November 2014 they set out their position that both Mr and Mrs Russell had lacked the capacity to dispone the property and enclosed some of the medical records relating to Mrs Russell. I was shown further letters dated 15 January, 6 February, 18 February , 30 June, 30 July and 11 August 2015. It appears that when the case was on the adjustment roll in June 2015 it was continued to enable the defender's agents to obtain the medical records. These had already been

recovered by the pursuer's agents and scanned onto a pen drive which was sent to the third defender's solicitors on 30 June 2015.

[11] By letter dated 6 February 2015 the pursuer's agents informed the third defender's solicitor that their client was prepared to settle on payment of the sum of £12,000 plus judicial expenses. The second defender informed me that his daughter, the third defender, was not aware of such an offer.

[12] Further correspondence was sent in 2016. In a letter dated 9 May 2016 the pursuer's agents complained that they had not received any reply to queries regarding the expert reports which they had sent on 7 and 8 April, despite a reminder sent on 25 April. The letters repeatedly asserted that the pursuer would succeed, that expenses would be awarded against the third defender and that the judge may very well refer the case to the Crown Office to investigate raising a prosecution against the second defender. The letters state that they would be founded upon in any question of judicial expenses.

Conveyancing File

[13] By letter dated 24 March 2014 to the third defender's solicitor the pursuer's agents sought sight of the conveyancing file relating to the execution of the disposition. Law Society guidance recommends that conveyancing files should be kept for at least 10 years. Mr Heaney informed me that although Mr Renfrew promised to do so the file was never delivered. In a letter dated 10 May 2016 Mr Renfrew said that he would check his storage facility but would anticipate that the file would have been destroyed. A specification of documents was then served on Mr Renfrew. By letter dated 12 May 2016 he said that he would not personally have seen the file. It would have been put in storage. He said that many "out of date" files were destroyed at that time during the moving of a storage facility

and "I am assuming that this particular file was one of them". I note that he does not say in terms that the storage facility had been checked in the two days since his previous letter.

Medical Records for John Russell Senior

[14] The medical records show that John Russell senior was admitted to Glasgow Royal Infirmary on 31 July 2004 as an emergency with increasing confusion and falls at home. The diagnosis/risk factors records 8 medical issues one of which is chronic cognitive impairment. The records show that he was transferred to Lighburn Hospital for rehabilitation where it is said his progress was limited by significant cognitive impairment. An entry for 22 September records that the family are extremely concerned at the deterioration in Mr Russell. "They state that he is much more confused than previously and are concerned at recurrent falls." So far as 28 September is concerned, the day the disposition was said to have been signed, the records show that he had no complaints, "GCS 15/15", which I take to be a reference to the Glasgow Coma Scale and satisfactory observation. The evaluation for the day says that "John remains very confused and discontented." As Mr Heaney pointed out there is no record of him leaving hospital at any time that day. It is apparent that Mr Russell had significant mobility problems.

Medical Records for Elizabeth Russell

[15] Letters written by a consultant psychiatrist dated 9 July 2003, 12 February 2004 and 4 June 2004, following a review in May 2004, show that Elizabeth Russell was suffering Alzheimer's disease and vascular dementia. It is said that she had been suffering from a dementing illness since September 2002. The letter of 12 February 2004 records that the couple's two sons (by which is meant the first and second defenders) called at the house

twice a day to cook meals for their parents. The letter records that she is "moderately severely intellectually impaired" although "she is articulate and plausible." She was admitted to a nursing home in March 2004.

Defender's Expert Reports

[16] The third defender's solicitor was advised by counsel in early 2015 that he had doubts about Mr Russell's capacity and that an expert should be instructed. It took some time to identify a suitable expert, obtain quotes and obtain approval from SLAB. In December 2015 counsel issued a supplementary note to the effect that the expert should also look at the mental capacity of Mrs Russell. Sanction for the extra costs was granted on 21 December 2015.

[17] The expert instructed was Dr Ian Fergie, a speciality doctor in old age psychiatry. He produced two reports both dated 10 March 2016. In respect of John Russell, Dr Fergie observes that the medical notes which had been shown to him did not provide an objective assessment of Mr Russell's cognitive ability nor his ability to communicate his wishes at the point at which title was transferred. The diagnosis that his memory problems had been caused by multiple small strokes seemed reasonable and that would cause him problems with both his short and long term memory as well as interfering with his judgement. He concludes that it is not possible to say with certainty that he was incapable of transferring title on the basis of the information available.

[18] In his opinion regarding Elizabeth Russell, Dr Fergie said that it was not possible to come to a definite conclusion on the basis of the facts available. He said that he thought it was extremely unlikely that she would remember any decision that she had made even after a short time. Her cognitive ability would deteriorate over time due to Alzheimer's disease

and more rapidly if she was to suffer another stroke. Capacity was usually assessed for a specific decision and there was no discussion of transfer of title in the notes so it was not possible to determine her capacity from the information provided.

[19] The reports were received by the agents on 17 March and sent to counsel for his consideration. They were then forward to the pursuer's agents who responded on 7 April to the effect that it would appear that Dr Fergie did not have the full records available to him. These were contained in the pen drive which the pursuer's agents had sent to Mr Renfrew on 30 June 2015. They in turn had sent it to counsel who apparently had not returned it to the agents. Accordingly Mr Renfrew had not furnished the full records to Dr Fergie with his instructions. The pen drive was retrieved from counsel and forwarded to Dr Fergie. On 18 May Mr Renfrew met Dr Fergie. According to counsel for Mr Renfrew, Dr Fergie's position remained the same. While there may be some issue about the deceased's mental capacity there was nothing which categorically stated that they did not have capacity to execute the disposition. A note of the meeting was prepared and sent to counsel on 24 May 2016.

Precognitions

[20] There are two precognitions from the third defender. The first was prepared for the purposes of obtaining legal aid. Much of it was obviously prepared by the solicitor though there is some personal information. In it she says that from about the age of 14 years she had lived with her grandparents. From 16 years she had been assisting them as they were getting older with cleaning shopping and general care. In the summer of 2004 her grandparents had both mentioned to her that they wished to gift the flat to her. She said that she remembered attending the solicitor's office on 11 October 2004 with her grandparents and father. Mr McConville had explained to them that by signing the

disposition the property was being transferred to her. She says that her grandparents had acknowledged that this was what they wanted to do. She specifically denied that her grandfather was suffering any impairment. She said that he had suffered a stroke but that had affected his mobility. He was "entirely cognitively competent."

[21] A further precognition is dated 22 July 2015 and was taken by Mr Renfrew following a Note from Counsel dated 13 June 2015. She was asked to deal with the matters raised in her grandmother's records as outlined above. The third defender says that she was unaware of her grandmother seeing a psychiatrist and says that she has never heard of a Mr Sheridan the social worker who carried out the assessment in April 2004. Apart from saying that there was nothing mentally wrong with her grandmother she does not address the issues raised. She gives further detail about the meeting at Mr McConville's office on 11 October. She says that when she arrived her grandparents had introduced her to Mr McConville. He had then asked her and her father, the second defender, to leave them while he advised her grandparents and had them execute the appropriate documentation. He had then called her in to the office so that he could explain what her grandparents had done and the meaning of liferent.

[22] There are two precognitions from the first defender. The first was in support of the third defender's application for legal aid. He said that his parents had first talked about transferring the property to his niece in about May 2004. They had discussed it with him and both of his brothers. He said his father did not have any mental problems and that he was admitted to hospital because of a stroke. His father had confirmed to his three sons during a visit to Lightburn Hospital in August 2004 that the transfer to the third defender would be made shortly. There was then a discussion in the car park between the three of them, that is the pursuer and first and second defender, in which it was said that the transfer

would be made shortly after he was discharged from hospital. He said the transfer was on 11 October 2004.

[23] A supplementary precognition was taken from the first defender following counsel's note. He said he was told by Dr Flannigan, the consultant psychiatrist in May 2003 that his mother was suffering from Alzheimer's disease. However Dr Flannigan was aware that she was living in her own home. It was not suggested that she could not cope with day to day life. In his view it was fairly minor and it did not prevent her from dealing with day to day affairs. He saw his mother very regularly. He said that she was mentally alert, astute and knew exactly what she was doing. He said that he and his brother Paul, the third defender, arranged for his mother to attend at Mr McConville's office on 11 October to sign the disposition.

[24] There are two precognitions from the second defender. The first says that his parents first mentioned the intention of transferring the property to his daughter in about the summer of 2004. All the sons, including the purser were supportive and agreeable to this. He had attended with his parents and the third defender at Mr McConville's office on 11 October. Mr McConville explained to both of them that by signing the disposition which he had prepared the property would be transferred to the third defender. They both acknowledged that this was what they wanted to do. He denied that his father did not have the mental capacity to sign the disposition.

[25] The second defender's supplementary precognition is again in response to counsel's note. He refers to taking his mother to the psychiatrist's appointment with the first defender. He said that it was a fairly short consultation and that he was not told of a diagnosis and never saw any report. She was able to tell the psychiatrist the date and the number of sons she had but not the name of the Prime Minister. Although she suffered

some short term memory loss she was "perfectly mentally competent and capable". He said that he and his brother arranged for his mother to be admitted to the nursing home for respite care because she could not cope being on her own at night. The intention to transfer the property to the third defender was first mentioned in about 2001 but it took his parents two or three years to get round to it. According to the precognition it was his father who had made the appointment to see the solicitor. There were in fact two appointments. The first was to take instructions and the second on 11 October was to sign the disposition. He had taken them to both appointments. The third defender had accompanied him to the second one when Mr McConville had explained to her what was meant by a liferent. The second defender also makes mention of a number of arguments and ill feeling involving the pursuer and his parents.

[26] Mr McConville produced a statement dated 1 May 2014. He could not remember the transaction or indeed Mr Russell, though he did say that he had only drawn up a few dispositions leaving a liferent. He explained his normal practice of taking notes during the first meeting and at the second meeting going over the deed and discussing or explaining any matters. He had never in 28 years in practice had a moment's doubt about a client's capacity to sign a deed. He did not remember visiting Lightburn Hospital to have the disposition signed. If he did he would have spoken to the consultant. Given that he did not remember doing so he assumed that Mr Russell had attended his office like any other client.

[27] Mr McConville was precognosced by Mr Renfrew on 29 July 2015 following on counsel's note. He dealt with Mrs Russell's involvement. He confirmed the date of execution as 11 October. His memory of these events was very hazy. He had no knowledge of the medical history of either Mr or Mrs Russell. He would act on the natural presumption that they were of sound mind. So far as Mrs Russell was concerned if he had known of her

medical history he would have asked the attending physician for a letter (presumably to confirm her competence). This would have been attached to the file and copied to the client. He said the disposition was signed in his office.

Counsel's Advice

[28] Following receipt of the note of Mr Renfrew's meeting with Dr Fergie counsel advised on 24 May 2016 that in his opinion it was likely that the pursuer would be successful and that the third defender's chances of success were less than 50%. He recommended that settlement discussions take place. These were unsuccessful and the defences were withdrawn on the third defender's instructions.

Submissions for the Pursuer

[29] In moving the motion against Mr William Renfrew personally Mr Heaney submitted that he had acted for a client, namely the third defender, who had legal aid. As such he had duties to the public purse, to the court, to his opponents as well as his client. No responsible solicitor would have allowed their client to get to the door of the court before advising that there was no tenable defence. Mr Heaney referred me to the Legal Aid Handbook, paras 8.2, 8.4 and 8.5; Macfadyen, Court of Session Practice para 502; *Bremner* v *Bremner* 1998 SLT 844, at 846J; *Stewart* v *Stewart* 1984 SLT (Sh Ct) 58 per Sheriff Ireland at 61; *Blyth* v *Watson* 1987 SLT 616, per Lord Morison at 617. I was taken through the medical records and witness statements at some length. Mr Heaney submitted that the medical records cried out for the attention of a responsible solicitor who would investigate the parents' capacity to sign the disposition. The medical records he submitted showed that they did not have such capacity. Mr Renfrew owed a duty to his client, to the legal aid board, to the court and to the pursuer

to advise his client appropriately. There had been gross mismanagement in the conduct of the litigation. He had not obtained the medical records – they had to be given to him by the pursuer's agents. He had not given all the records to the expert. If the opinion from the expert had been obtained timeously then the defences could have been withdrawn well in advance of the proof.

[30] So far as the motion for expenses against the second defender was concerned he submitted that such a motion could be made against a third party where such a person was a *dominus litus* i.e. had control over the litigation or guides it; Macfadyen Court of Session Practice, per Lord Carloway at para 514; Macphail, Sheriff Court Practice paras 4.112 and 4.113; *Walker* v *Walker* (1903) 5F 320; *McMillan* v *McKinlay* 1926 SC 673. Mr Heaney submitted that the second defender had significant influence over the conduct of the defence by the third defender, although he accepted that he could not say that he had control over the defence. The third defender had an obvious interest and she had instructed a solicitor to act for her. It was however right that the second defender should share the burden of expenses. He was the hand on the tiller and had something to explain. His statement did not tie up with the medical records and he never gave an explanation. He had witnessed the signing of the disposition by his parents. He was cited as a witness for the pursuer and he was the father of the third defender.

[31] Expenses should be awarded on the agent and client, client paying scale. The principles on which such an award should be made are set out by Lord Hodge in *McKie* v *Scottish Ministers* 2006 SC 528 at 530.

Submissions for Mr William Renfrew

[32] Mr Gardiner, counsel for Mr Renfrew had two propositions. The first was that a

solicitor could only be personally liable if he maintained a defence where there was no defence available either in fact or in law. There was no Scots case where a solicitor had been found personally liable for maintaining a stateable case. Secondly he submitted that a solicitor cannot be held liable when he is acting on the advice of counsel; *Reid* v *Edinburgh Acoustics Ltd* (No 2) 1995 SLT 982, per Lord MacLean at 984.

[33] So far as reference to the legal aid rules was concerned there was no authority for the proposition that certain special duties were owed to the opposing party by a solicitor for a legally aided client. These were matters between SLAB and the solicitor and could not import duties on a solicitor that could be enforced by a court.

[34] Both parties had stateable cases. The third defender had in her favour a rebuttable presumption of capacity. Her solicitor had precognitions from supportive witnesses. All of them were in a position to know the state of mind of the two disponers and each vouches their mental capacity. Two of them were present during the conversation with Mr McConville when the disposition was signed. There was not just one set of precognitions, the second being taken following counsel's note in 2015. If these witnesses were accepted by the court then the defence would succeed. Moreover Mr McConville had two meetings with the disponers and he had had no concerns.

[35] The pursuer's position appears to be that Mr Renfrew should have looked at the medical records, drawn the conclusion that the disponers lacked the capacity to sign the disposition and told the defenders that he was unable or unwilling to act for them. That could not be correct standing the evidence that was available to him.

[36] Turning to the expert's evidence he submitted that it was not conclusive and did not rule out the possibility that both deceased had capacity at the time of the disposition. It would have been open to the third defender to put forward a defence based on the witness

evidence. He further submitted that since the opinion did not change following the receipt of the reports it would not have made any difference if reports based on the full medical records had been available earlier. It was counsel's advice that changed the instructions, not the expert's opinion. Given the provisions around legal aid it would have been improper for her to continue in the face of counsels' opinion. In any event medical records only took the case so far. There was no necessary inconsistency between the precognitions and the reports. Mr Renfrew had at all times acted on the advice of counsel.

The Second Defender

[37] As noted above the second defender did not enter appearance and was not part of the process. Having been served with notice of the motion against him he appeared on his own behalf. He said that he had never sought legal advice on the case and was not involved in it as a party. He had attended at Mr Renfrew's office only to give his statements. He acknowledged that he had discussed the case with his daughter but had never told her what to do. It was his daughter who had phoned the lawyer and dealt with him.

Decision

[38] The duties of a solicitor towards the court have been discussed in a number of cases. In *Bremner* v *Bremner* an Extra Division held that a solicitor should be open to a finding by the court to bear any expenses clearly generated by his own fault for which his client cannot be said to shoulder any blame. In *Blyth* v *Watson*, Lord Morison sitting in the Outer House said that there was a duty on solicitors to refrain from instructing the raising of an action which they know to be clearly unfounded. There was also a duty on a solicitor to see that the legal aid fund is not unnecessarily diminished. In *Stewart* v *Stewart* Sheriff Ireland said

that if a defender who has no defence in fact or law uses the procedure not to establish his right but to delay the enforcement of a right which is undeniable, he is guilty of an abuse of process. He continued that if that person is a solicitor he ought to pay what his conduct has cost the other party to the litigation.

[39] None of these propositions are contentious but care has to be taken in assessing where fault lies and apportioning the blame on the solicitor. In *Ridehalgh* v *Horsefield* [1994] Ch 205 Sir Thomas Bingham MR giving the opinion of the court also observed that a legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party or pursues a claim which is plainly doomed to fail. He added that it is not always easy to distinguish between the hopeless case and an abuse of process. Lord Carloway in Macfadyen on Court of Session Practice (para 502) says that the power to award expenses against a solicitor arises in cases of misconduct or neglect and should only be used sparingly.

[40] As a general principle a solicitor who acts on the instructions of counsel should not be found personally liable in expenses; *Reid* v *Edinburgh Acoustics Ltd (No 2)* 1995 SLT 982.

[41] The pursuer's agents appear to have proceeded on the basis that all they need do is to found on the medical records for the proposition that at the time the disposition was executed both deceased did not have the requisite capacity. There is no doubt in my mind that there was a strong *prima facie* case to that effect. But it was not conclusive. The presence of Alzheimer's disease for example does not mean that the person has no capacity. It depends on the stage of the disease and the nature of the decision which the person is making. As Dr Fergie notes capacity is usually assessed for a particular decision.

[42] Mr Heaney did not advise me what evidence he proposed to lead at proof. It was not suggested to me that any of the doctors who attended on the deceased or compiled

reports were to be adduced as witnesses perhaps for the good reason that it is over 12 years since the disposition was signed. I assume too that the pursuer did not have an expert report.

[43] Given the medical records for both of the deceased one is bound to be suspicious about the third defender's response and those of the principal witnesses as revealed in the precognitions. There are obvious discrepancies between what appears to be shown on the face of the records and what is in the precognitions. These raise question marks over their veracity but in the absence of parole evidence I am not prepared to hold that they are untruthful. The heart of the matter is whether or not the deceased had the capacity to execute the dispositions and Dr Fergie's evidence does not rule that out. While one might also question Mr McConville's role, on the face of it he is supportive of the third defender.

[44] For these reasons I am not prepared to hold that the defence was an abuse of process and that either the third defender or her solicitor maintained a defence which they knew to be factually misconceived. It may have been pretty hopeless but it was stateable.

[45] Against that background I turn to the conduct of the defence by the solicitor. Mr Renfrew cannot be faulted for the initial response which was to take precognitions and apply on his client's behalf for legal aid.

[46] Thereafter Mr Renfrew's conduct of the case was, in my opinion, less than adequate. First he failed to respond to the request for the conveyancing file first made by the pursuer's agents on 24 March 2014. Mr Renfrew was not obliged to keep the conveyancing file; the 10 years referred to in Mr Heaney's submissions is merely a recommended time for destruction of conveyancing files and has no other status. He cannot be blamed if the file was destroyed at some point before it was requested in 2014. Nevertheless it was unacceptable not to respond to the request for some two years.

[47] Secondly there was an obvious discrepancy in the date of execution of the disposition. As noted before it bears to be on 28 September 2004 and yet all the witnesses, including Mr McConville, speak to the date of execution being 11 October 2004. There is no explanation as to where that comes from. One might suspect that it was from the file were it not for the assertion that it had been destroyed. It is odd to say the least that every witness including the solicitor who acted for the deceased refers to the disposition being signed on 11 October. None of the witnesses have made any attempt to explain the discrepancy. Since this date is an important factual element Mr Renfrew ought to have questioned the witnesses as to how they reached the view that the date was 11 October. Further if that was the date of signing an explanation was required as to how another date is shown in the disposition.

[48] Thirdly, the second round of precognitions which he took were frankly inadequate to deal with the obvious points which arose from the medical records. They were superficial at best repeating the opinion of witnesses that both deceased had capacity when the disposition was signed. They failed to deal with the obvious discrepancies. There was no attempt to analyse the medical records and get responses from the witnesses who might have been able to comment upon them. For example one might have expected an explanation as to how it was that the disposition was signed by Mr Russell in Mr McConville's office when he appears to have been in hospital. Shortly before the disposition was signed the family are recorded as having raised concerns about the deterioration in Mr Russell's condition and stated that he appears much more confused. What were the first and second defender's explanation for that? Mr Russell had severe mobility problems. One might have expected some detail as to how he was conveyed to the solicitor's office. Mrs Russell was in a home. Was she taken out for the day? Had these and

other points been properly addressed then it is possible that advice could have been tendered to the client at an earlier stage and might have resulted in an earlier resolution. That was particularly important given the pursuer's offer to settle dated 6 February 2015 on what appears now to be advantageous terms to the third defender.

[49] Fourthly the conduct of the litigation was leisurely. Mr Renfrew did not seek recovery of the medical records until June 2015. They were given to him by the pursuer's agents. He was slow in responding to correspondence. The case was restored to the Adjustment Roll at the instance of the third defender on three occasions. This was a straight forward case which could and should have been dealt with in a relatively short period of time.

[50] None of these criticisms are sufficient in themselves to establish fault on the part of the solicitor. Where the fault arises in my opinion is in the failure to properly instruct Dr Fergie and to ensure that he had all the medical records. Final sanction was given by SLAB on 21 December 2015. Dr Fergie was instructed "in January 2016" (I was not given the exact date). While the date of the proof had not at that point been fixed the record had closed and parties could expect that a proof would be fixed shortly thereafter. In the instruction of experts it is important to ensure that they have all the relevant papers; for a medical expert that means medical records. Mr Renfrew failed to provide all the relevant records to Dr Fergie.

[51] When the reports were received back from Dr Fergie it should have been obvious to the solicitor that he had not had not seen the medical records. The report on Mr Russell records that the medical records reviewed consisted of four pages of handwritten case notes for Glasgow Royal Infirmary and Lightburn Hospital and one discharge letter for Lightburn

Hospital dated 19 August 2004. I can only conclude that Mr Renfrew failed to read the reports. He merely sent them off to counsel and to the other side.

[52] It was the pursuer's agents who told Mr Renfrew on 7 April 2016 that Dr Fergie had not been provided with the full notes. By this stage the proof was looming and matters were becoming more urgent. The pen drive containing the medical records had been sent to counsel and retained by him. It needed to be retrieved. It was eventually forwarded to Dr Fergie on 19 April. I am told he had some difficulty accessing the records but hard copies could have been made available. It took until 18 May for Mr Renfrew to meet Dr Fergie. Even then it took until 24 May for counsel to be instructed, one week before the proof. It should have been obvious that any delay was likely to result in incurring the expense of a proof. As it is counsel gave advice on the prospects of success on the same day.

[53] It is said that the solicitors acted on the advice of counsel and that Dr Fergie's opinion did not change in the light of the medical records. However having asked that the solicitors instruct an expert counsel was entitled to assume that the expert would be properly instructed. He was also entitled to await the expert's concluded view before finally advising on the prospects of success. It is unfortunate that counsel had retained the pen drive with the medical records but he may have thought that there were duplicates. In any event had the solicitor noted that the medical records were not available before Dr Fergie was instructed they could have been quickly retrieved from counsel and sent to Dr Fergie with his instructions.

[54] The failure by the solicitor to give full, proper and timeous instructions to the expert resulted in his final advice not being received until 13 days before the proof. The further delay in instructing counsel compounded the problem and resulted in an abortive diet of proof. This was against a background of inadequate conduct of the case by the solicitor

which fell below the standard which one would normally expect of a solicitor conducting litigation in the Court of Session.

[55] The expert reports were received by Mr Renfrew on 17 March 2016. Had they been properly instructed they would have contained all the information to enable counsel to advise on the prospects of success at an earlier time and for the defences to be withdrawn. Allowing a period of 2 weeks for that process one could anticipate that the defences would have been withdrawn no later than 31 March 2016. In my opinion it would be unfair to expect either of the parties or SLAB to bear the cost of the proceedings after that date. Accordingly I will find Mr William Renfrew liable to the pursuer in the expenses of process from 1 April 2016 to date. For the avoidance of doubt that includes the expenses associated with the motions for expenses.

[56] So far as the scale is concerned the law on this is set out in the opinion of Lord Hodge in *McKie* v *Scottish Ministers* 2006 SC 528 at 530. Primarily this is a matter for the discretion of the court. I have already alluded to the difficulty in holding that the defence was not stateable in the absence of parole evidence. I acknowledge that Lord Hodge said in *McKie* that the judge faced with a case that has settled simply has to do the best he can. But in assessing the liability of an agent it has to be remembered that he is acting on instructions and so long as this admits of a stateable case he is not only entitled but bound to act upon them. Award of expenses on a solicitor and client basis is a sanction marking the court's disapproval of the conduct of a party to an action. While I have been critical of Mr Renfrew's conduct of the litigation the finding of expenses against a solicitor is not a step that is taken lightly. In itself it marks the court's disapproval. I do not consider that the further sanction of an award on an agent and client basis is justified and accordingly restrict the finding to the normal party and party scale.

Decision The Second Defender

[57] The position of a *dominus litus* is well summarised by Lord Carloway in Macfadyen on *Court of Session Practice* at paragraph 514, "A dominus litus is a person standing behind a nominal party to the action who has an interest in the subject matter of the action which is so direct and dominant that he is in control of that party's conduct of the proceedings."

[58] On no view cannot be said that the second defender is a *dominus litus.* The third defender is not a nominal party to the action. It is she who has the obvious interest as the disponee of the property. Indeed it may be said that the second defender had more to gain from the action succeeding since he would have a share of the estate. In the end Mr Heaney's submissions appeared to be based on the proposition that the third defender was the second defender's daughter and that it was he who witnessed the signing of the disposition.

[59] It is clear that there is a bitter family dispute and the pursuer considers that his brothers and niece have colluded to do him out of his share of the estate by ensuring that the only asset passes to his niece. For reasons outlined above I am not prepared to make that judgement. But even if that were true the third defender is an adult, not a chattel of her father, and is presumably well able to reach her own decisions and instruct a solicitor accordingly.

Third Defender

[60] The pursuer was successful against the third defender. There can be no defence to the motion for expenses. Accordingly I shall find her liable in expenses as an assisted person.

[61] The motion seeks expenses against her on an agent and client, client paying basis. Since she had a stateable defence and is legally aided I shall refuse that part of the motion. Accordingly the finding of expenses is on the usual party and party scale.

[62] The question of modification of expenses remains. Mr Heaney gave an undertaking that the interlocutor would be intimated to the third party. I shall direct the pursuer's agents to intimate a copy of the interlocutor on the third party accompanied by a letter explaining that she has been found liable in expenses as an assisted person, that she should apply to the court for modification of expenses, that she should seek advice from a solicitor or citizen's advice bureau and that failure to do so may mean that she is liable to pay more in expenses than is necessary.

[63] I shall also direct the clerk to intimate a copy of the interlocutor and this opinion on the Scottish Legal Aid Board for their information.