

**THE SOLICITORS (SCOTLAND) ACT 1980
THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL
(PROCEDURE RULES 2008)**

FINDINGS

in Complaint

by

**THE COUNCIL OF THE LAW
SOCIETY of SCOTLAND, 26
Drumsheugh Gardens, Edinburgh
Complainers**

and

**THE COUNCIL OF THE LAW
SOCIETY of SCOTLAND, 26
Drumsheugh Gardens, Edinburgh**

on behalf of

**JENNIFER McCORIE, Soroba
House, Main Street, Blairingone,
Dollar**

Secondary Complainer

against

**JAMES KELLY, Solicitor, Dunnet
House, Saline, Fife**

Respondent

1. A Complaint dated 25 March 2014 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") in its own right and also on behalf of the Secondary Complainer, Jennifer McCrorie requesting that, James Kelly, Solicitor, Dunnet House, Saline, Fife (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.

2. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged for the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 3 June 2014 and notice thereof was duly served on the Respondent.
4. At the hearing on 3 June 2014 the Complainers were represented by their Fiscal, Valerie Johnston, Solicitor, Edinburgh. The Respondent was present and represented himself. The Secondary Complainer was present.
5. The Respondent lodged Answers and asked that they be received by the Tribunal late. The Fiscal made no objection to the late lodging of the Answers. After hearing submissions, the Tribunal allowed the Answers to be received late.
6. Given the content of the Answers, and oral admissions made by the Respondent, no evidence required to be led in relation to the averments of fact within the Complaint. The Fiscal for the Complainers withdrew one of the allegations of professional misconduct. Submissions were made by both parties. Evidence was led from the Secondary Complainer in relation to her claim for compensation.
7. The Tribunal found the following facts established:-
 - 7.1 The Respondent's date of birth is 27 March 1958. From 29 August 1989 to 18 October 1993 he was employed respectively by Mathie Lennox & Co., Solicitors, Smith & Grant, Solicitors, the Procurator Fiscal Service, and Nigel Beaumont & Co., Solicitors. He was a partner with James Kelly & Co., Solicitors from 26 November 1993 to 31 October 1997. From 12 March 1998 he was employed respectively by Nigel Beaumont & Co., Solicitors, Lambert & Co., Solicitors, Neil F. McPherson,

Solicitor, Thorley Stephenson SSC, John J. Smith & Co., Solicitors. Between 16 August 2010 and 20 May 2011 he was employed by Cassidy's Advice & Solicitor Services, and between 14 July 2011 and about May 2012 by Mann Solicitors. He fell ill in May 2012. He is not currently a holder of a practising certificate.

JENNIFER MCCRORIE.

- 7.2 The Secondary Complainer submitted a Complaint Form to the Scottish Legal Complaints Commission ('SLCC') in October 2011. The SLCC considered the Complaint and in terms of the Legal Profession and Legal Aid (Scotland) Act 2007 Section 6 ('the Act'), remitted the Complaint to the Complainers on 25 September 2012 to investigate the conduct of the Respondent.
- 7.3 The Secondary Complainer was the wife of the late Mr. A who died on 1 March 2010. The Respondent was executor nominate in respect of the estate. The Secondary Complainer owned 19% of the property Soroba House, Main Street, Blairingone. Mr. A also owned 19% and a Mrs B owned the remaining 62%. The Respondent took no action at all in his capacity as executor after Mr. A died in spite of constant requests from the Secondary Complainer that he do so. He failed to respond to any enquiries about the terms of the signed will which were believed by the Secondary Complainer to differ from an unsigned copy will in the Secondary Complainer's possession and which provided a 50% inheritance entitlement to Mr. A's daughter.
- 7.4 In July 2011 the Secondary Complainer appointed Andersons LLP ('Andersons'), LP2 Kinross to act on her behalf. Andersons sought information from the Respondent on the Secondary Complainer's behalf as a beneficiary of the late Mr. A. On 28 July 2011 Andersons wrote to the Respondent intimating their

instruction and enclosing a mandate seeking *inter alia* delivery of the Secondary Complainer's will and the file of papers held on her behalf relating to correspondence with Caesar & Howie about the arrangements for Soroba House. The mandate also requested the Late Mr A's will. Andersons wrote again by fax and post on 9, 15 and 30 August 2011 emphasising the urgency, acknowledging a telephone conversation with the Respondent on 11 August 2011 in which he had undertaken to deliver a copy of the signed will of Mr. A and details of the stage of the executry administration and requesting that both be provided. Nothing was sent by the Respondent.

7.5 On 5 September 2011 Andersons wrote again stating that in view of the Respondent's failure to provide information requested the Secondary Complainer wished him to resign as executor and wished them to deal with the executry. A further mandate was enclosed requiring *inter alia* that he confirm that he was willing to resign. Follow up letters were sent on 19 September and 12 October 2011. In spite of verbal assurances from the Respondent no substantive response was received to any correspondence and no detail of the estate was provided. Severe prejudice was caused to the Secondary Complainer by the Respondent's delays in finalising the estate. The Respondent was advised in Anderson's letter of 12 October 2011 that a formal complaint would be made about his conduct and a court action would be raised to remove him as executor.

7.6 The Respondent failed to implement either mandate or reply to any of the correspondence with any information about the estate. The estate of the late Mr. A was not complicated. The Secondary Complainer was caused considerable distress and inconvenience by the failure of the Respondent to take action as requested or provide information requested. The Respondent repeatedly gave

verbal assurances to the Secondary Complainer and to Andersons that he would reply.

- 7.7 On 27 September 2011 a formal complaint was made by Andersons to the SLCC on behalf of the Secondary Complainer.

The Respondent was admitted to hospital in 2012 and suffered a period of ill health.

- 7.8 By letter dated 7 November 2012 the Complainers wrote formally to the Respondent intimating their obligation under the 2007 Act Section 47(1) to investigate complaints relating to the conduct of enrolled Solicitors. The letter advised that the complaint was based on consideration of the information provided by the Secondary Complainer and enclosed a Summary of Complaint. He did not reply.

- 7.9 The Complainers served Notices on the Respondent on 3 December 2012 under Sections 15(2)(i)(i) of the Solicitors (Scotland) Act 1980 and Section 48(1) of the Act. The second part of the Section 15(2)(i)(i) Notice was served on him on 29 January 2013. A further Complaint by the Complainers concerning his failure to correspond with them was formally intimated to him on the same date. He did not reply.

- 7.10 The Complainers compiled an Investigation Report, a copy of which was intimated to the Respondent in a letter dated 3 September 2013.

- 7.11 By letter dated 24 September 2013 the Complainers provided a Supplementary Report to the Respondent and intimated that the Complaint would be considered by the Professional Conduct Committee on 24 October 2013. Another complaint against the Respondent was also scheduled for that date. The Respondent

requested a continuation stating that he had been unaware of the complaints as his wife had intercepted the correspondence. He indicated that he had suffered ill health. By letter dated 31 October 2013 he was advised that consideration of the Complaint had been continued to 28 November 2013 and he was asked to provide a medical certificate confirming his health in 2012, a current medical certificate, together with a full response to the complaints by 14 November 2013. A follow up e-mail was sent to him on the 20 November 2013. Further copies of the complaints, correspondence and Reports were sent to him that day. He did not provide the information sought.

- 7.12 On 28 November 2013 the Complainers' Professional Conduct Committee considered the matter and determined that the Respondent's conduct in relation to four elements of the complaint by the Secondary Complainer and in failing to respond to his professional body, the Complainers, appeared to amount to a serious and reprehensible departure from the standard of conduct to be expected of a competent and reputable Solicitor, that it appeared to be capable of being proved beyond reasonable doubt and could thus amount to professional misconduct. It further determined that the Respondent should be prosecuted before the Scottish Solicitors Discipline Tribunal.

THE LAW SOCIETY OF SCOTLAND – MRS C

- 7.13 Mrs. C, Wishaw, Lanarkshire, submitted a Complaint Form to the SLCC in November 2012. The SLCC considered the Complaint and, in terms of the Legal Profession and Legal Aid (Scotland) Act 2007 Section 6, remitted the Complaint to the Complainers to investigate the conduct of the Respondent.
- 7.14 By letter dated 15 January 2013 the Complainers wrote to the Respondent intimating their obligation under the 2007 Act

Section 47(1) to investigate complaints relating to the conduct of enrolled Solicitors. The letter contained a copy of the complaint submitted to the SLCC which alleged *inter alia* that the Respondent had been holding himself out to be employed as a solicitor by Mann Solicitors when he was not.

- 7.15 The Respondent did not reply. The Complainers served Notices under section 15(2)(i)(i) of the Solicitors (Scotland) Act 1980 and section 48(2) of the Act on the Respondent on 12 February 2013. The second part of the Section 15(2)(i)(i) Notice was served on him on 6 March 2013. A further Complaint by the Complainers concerning his failure to correspond with them was formally intimated to him on the same date. He did not reply.
- 7.16 The Complainers compiled an Investigation Report, a copy of which was intimated to the Respondent in a letter dated 26 September 2013.
- 7.17 By letter dated 16 October 2013 the Complainers provided a Supplementary Report to the Respondent and intimated that the Complaint would be considered by the Professional Conduct Committee on 24 October. The Respondent sought a continuation as hereinbefore averred which was granted. He did not provide the information sought.
- 7.18 On 28 November 2013 the Complainers' Professional Conduct Committee considered the matter and determined that the Respondent's conduct in failing to respond to his professional body appeared to amount to a serious and reprehensible departure from the standard of conduct to be expected of a competent and reputable Solicitor, that it appeared to be capable of being proved beyond reasonable doubt and could thus amount to professional misconduct. It further determined that the Respondent should be prosecuted before the Scottish Solicitors Discipline Tribunal.

7.19 The Secondary Complainer was caused significant inconvenience and distress as a direct result of the Respondent's inaction and in particular:

- (a) his failure to take any steps to administer or wind up the estate of her late husband between the 1 March 2010 and January 2012; and
- (b) his failure to respond to correspondence or produce the signed will of her late husband between 1 March 2010 and the date of the hearing on 3 June 2014.

8. Having considered the foregoing circumstances, and having heard submissions from both parties, the Tribunal found the Respondent guilty of Professional Misconduct in respect that he:

8.1 between 1 March 2010 and January 2012 failed to take any steps to administer or wind up the estate of the late Mr A;

8.2 between 1 March 2010 and January 2012 delayed unconscionably and ultimately failed altogether to respond to the reasonable requests of the Secondary Complainer and solicitors appointed on her behalf for information regarding the terms of the signed will of the late Mr A or to obtemper mandates sent to him dated 28 July 2011 and 5 September 2011 insofar as relating to the Secondary Complainer as an individual and as a beneficiary in terms of the said will;

8.3 between 7 November 2012 and 28 November 2013 repeatedly failed to reply to the reasonable enquiries of the Complainers in the case of Mrs Jennifer McCrorie and to comply with notices served upon him; and

8.4 between 15 January and 28 November 2013 repeatedly failed to reply to the reasonable enquiries of the Complainers in the case of Mrs C and to comply with notices served upon him.

9. Having noted two previous findings against the Respondent and having heard submissions from the Respondent in mitigation and evidence from the Secondary Complainer with regard to her claim for compensation, the Tribunal pronounced Interlocutors in the following terms:-

Edinburgh 3 June 2014. The Tribunal having considered the Complaint dated 25 March 2014 at the instance of the Council of the Law Society of Scotland and the Council of the Law Society of Scotland on behalf of Jennifer McCrorie against James Kelly, Solicitor, Dunnet House, Saline, Fife; Find the Respondent guilty of Professional Misconduct in respect that he (a) between 1 March 2010 and January 2013 failed to take any steps to administer or wind up the estate of the late Mr A; (b) between 1 March 2010 and January 2012 delayed unconscionably and ultimately failed altogether to respond to the reasonable requests of the Secondary Complainer and solicitors appointed on her behalf for information regarding the terms of the signed will of the late Mr A or to obtemper mandates sent to him dated 28 July 2011 and 5 September 2011 insofar as relating to the Secondary Complainer as an individual and as a beneficiary in terms of the said will; (c) between 7 November 2012 and 28 November 2013 repeatedly failed to reply to the reasonable enquiries of the Complainers in the case of Mrs Jennifer McCrorie and to comply with notices served upon him; and (d) between 15 January and 28 November 2013 repeatedly failed to reply to the reasonable enquiries of the Complainers in the case of Mrs C and to comply with notices served upon him; Strike the name of the Respondent, James Kelly, from the Roll of Solicitors in Scotland; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and

client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent and may but has no need to include the names of anyone other than the Respondent.

(signed)

Alan McDonald

Vice Chairman

Edinburgh 3 June 2014. The Tribunal having considered the Complaint dated 25 March 2014 at the instance of the Council of the Law Society of Scotland on behalf of Jennifer McCrorie against James Kelly, Solicitor, Dunnet House, Saline, Fife; and having considered whether it was appropriate to award compensation to the Secondary Complainer; Ordain the Respondent in terms of Section 53A(2)(d) of the Solicitors (Scotland) Act 1980 to pay to Jennifer McCrorie, Soroba House, Main Street, Blairingone, Dollar by way of compensation the sum of £1,500 in respect of inconvenience and stress resulting from the misconduct and that within 28 days of the date on which this Interlocutor becomes final with interest at the rate of 8% per annum from the due date until paid.

(signed)

Alan McDonald

Vice Chairman

10. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on

IN THE NAME OF THE TRIBUNAL

**Alan McDonald
Vice Chairman**

NOTE

At the hearing on 3 June 2014 the Respondent sought to lodge Answers late. His Answers had been emailed to the office for the Tribunal at 4.41pm on 2 June 2014. The Fiscal took no objection to the late lodging of Answers. After hearing submissions from the Respondent in relation to his reasons for the lateness of his Answers, the Tribunal allowed them to be lodged late.

Thereafter the Tribunal sought clarification from the Respondent with regard to his position. In particular in his Answers the Respondent had denied receiving constant requests from the Secondary Complainer in relation to the winding up of the estate of her late husband and the content of the signed will. The Respondent indicated that despite the content of his Answers his position was that he accepted the averments of the Complainers in relation to this matter. He clarified that he was admitting the averments of misconduct set out within the Complaint apart from that numbered 7.3 within the Complaint. The Fiscal indicated that she was no longer insisting upon the disputed averment of misconduct. Given the extent of the Respondent's written and oral admissions, and the withdrawal of the disputed averment of misconduct the Tribunal proceeded on the basis of submissions for both parties.

SUBMISSIONS FOR THE COMPLAINERS

Mrs Johnston explained to the Tribunal that given the lateness of the Respondent's Answers, and the position therein, she had been unable to countermand her witnesses for the hearing today. She confirmed that the Respondent had delivered to her the signed will and had given her authority to deliver the will to the Secondary Complainer. The will was in the terms expected by the Secondary Complainer and this would help resolve outstanding issues.

Whilst the Fiscal had had no objection to the lodging of late Answers, and whilst the Respondent was prepared to sign any mandates necessary in relation to his medical treatment, it was too late in the day for her to take any further action in connection with these matters.

In her submission this Complaint was a clear case for the Tribunal all hinging around the signed will produced today.

She referred the Tribunal to her Production 2 which was the Complaint submitted by the Secondary Complainer. This indicated that the Respondent had drawn up a will for Mr A. In that will, the Respondent was appointed as executor. All efforts by the Secondary Complainer to obtain the will were unsuccessful. Production 2 is dated 18 October 2011 – a considerable time after the death of the Secondary Complainer's partner. The Respondent now accepts that he failed to progress the executry.

The particular problem for the Secondary Complainer was the split ownership of her home. The owner with the largest share has issues with care home fees. Unfortunately, Mrs Johnston was unable to give the up to date position with this difficulty but she could confirm that the Secondary Complainer still lives at the same address.

The Fiscal indicated that efforts were made by a firm of solicitors, Messrs Andersons, to obtain the will. The Secondary Complainer was also attempting to recover her own will and papers the Respondent held for her. Having failed to do anything to wind up the estate itself, the Respondent said he would produce the will to the Secondary Complainer but at no stage did he do so. Thankfully he had produced the will today.

The Secondary Complainer, Messrs Andersons, the Law Society and the Fiscal herself had all sought recovery of the will. The will produced today confirmed the Secondary Complainer's entitlement to the property and supercedes the other document which appeared to give 50% of the deceased's estate to his daughter.

The first indications to the Law Society from the Respondent regarding his health were made in October 2013. Unfortunately, the Respondent did not produce anything for the Law Society to consider.

The Fiscal clarified that there was no averment of misconduct in the Complaint relating to the content of the Complaint made by Ms C. The only misconduct averred

in this relation was the Respondent's failure to reply to the Law Society which the Respondent was now accepting.

SUBMISSIONS FOR THE RESPONDENT

In his submissions in relation to the late lodging of Answers, the Respondent indicated that he had not held a practising certificate since August 2012 and had not worked since 16 May 2012. The Chairman asked the Respondent what he had been doing for the past year. The Respondent indicated that he had spent a great deal of time in the office of a former client of his. This individual had had three cases outstanding in the Court of Session. The Respondent had been helping this man's current solicitors. Additionally, the Respondent had been engaged in employment work for this former client and had been helping him in the administration of two of his companies. This had all been done on an ad hoc basis. Whilst working for this former client, the Respondent lived with him. The costs of transport were all paid for the Respondent. Additionally, he had been engaged in low level work for another company.

He had represented his former client at two employment tribunals.

The Respondent indicated that he had not been in any great shape to do anything until 2013. Since then he had done the work previously mentioned. The people who he was working for were long standing friends. They knew he was not a solicitor. In response to a request for clarification from the Chairman, the Respondent confirmed that he had been functioning since October 2013. This had included him giving briefing notes to new solicitors in relation to Court of Session cases. The Respondent was asked to clarify the delay in the lodging of Answers. The Respondent indicated that what had happened to him in May 2012 had been a factor for approximately one year. Additionally he had had no funds and his papers were in three different locations. The Respondent accepted that he had done nothing since October 2013 despite the fact that the papers had been in his possession. He indicated that his health was only one factor and that he could not offer any cogent explanation.

The Respondent stated that what had happened to him was not a defence or an excuse. These matters should have been dealt with better and quicker. He accepted paragraph 6.5 to 7.6 of the Complaint with exception of paragraph 7.3. He accepted that the Secondary Complainer had contacted him repeatedly.

The Respondent said he was not proud of what had happened. He had been a friend of the Secondary Complainer and her husband for more than 25 years. He wanted to apologise to the Secondary Complainer for the distress he had caused and was delighted that the contents of the will were what she had expected.

He indicated that he had not been aware of the other competing will but accepted that this did not excuse his failures. He indicated that he should have referred the executy to someone else who knew what they were doing. He indicated that there would be no prospect of a repeat of this because he would not get involved in executy work again.

He accepted that his state of health was no mitigation in relation to the executy. From the time of drawing up the will he had been very busy with a huge amount of civil litigation. When he moved to the firm of Mann and Company he had thrown himself into that project. Within that firm he was left to his own devices with no qualified assistance. Although it was not apparent to him at the time, his kidney failure had probably been working on him for some nine months before he fell ill.

He submitted that he was genuinely remorseful especially regarding Mrs McCrorie.

With regard to the averments relating to Ms C, he indicated that he had been discharged from hospital in approximately August 2012. He was not properly right for approximately nine months. Mail was not getting to him as his wife was keeping it back. He confirmed that he was not aware of any other outstanding complaints.

The Respondent indicated that he resided with his brother in East Lothian and had no actual income. He was not in receipt of benefits. He had no debts. He had been receiving Disability Living Allowance for one year. On 11 June he was due to attend a further assessment for DLA.

He indicated that he had no other assets and his former home is owned by his wife and daughter. He confirmed he was able to drive again and owned his own car.

He believed there was a prospect of him receiving £5000 from one of the friends for whom he worked if one of the Court of Session cases was successful. He hoped after the hearing to be in a position to apply for jobs within the law but did not expect to be able to go back to work full time. He was due £4000 from one of his employers. If the Tribunal made a reasonable award for compensation then he was in a position to pay a small amount now. The Respondent submitted that he did not have employment as such.

In answer to a question from the Tribunal, the Respondent indicated that he had first become aware of these allegations at the turn of last year. He had indicated at that time to the Law Society that he was fit and able to deal with correspondence.

At this juncture the Fiscal for the Complainers drew the Tribunal's attention to her Production 20, an email from the Respondent to the Law Society dated 22 October and Production 11, an email exchange between the Law Society and the Respondent in November 2013.

The Respondent accepted the terms of these Productions and confirmed that he had been aware of these matters since October 2013. He explained that he had had difficulties dealing with matters since October 2013 because all of his papers were in different locations. He had been banned from driving by his consultant and had had to sit another test. He had not found things easy. He accepted that he had said to the Law Society that he would tend to matters but that he had not. He submitted that he could not ask anyone to help him because no one else knew where his papers were. The will was not in a cabinet or file as such but in amongst other papers. Whilst on the face of it he was working for his friends this work amounted to him going into the office and doing some dictation. He could not use a computer and it would take him three days to do a file note. He could not speak well and could not get himself understood. His friend was very supportive of him.

He accepted that he understood that there would be consequences for not responding to these matters and he accepted that he should never have failed to deal with the will. He indicated that he had no excuse or defence to these matters. He submitted that he was not trying to undermine the situation of Ms C or the Law Society. He submitted that he had not had any problems for a long time. Although his illness was a factor it was not an excuse.

He had had income from the work he had been doing. On one occasion he had been paid £500 for a week's work. He had not had any money since the last Court of Session case had completed. He was due to be paid for the preparation of a 29 page Affidavit. On one occasion he had received a cheque for £1000. When living down here his friend sends him many emails which he requires to deal with.

The Tribunal asked the Respondent to clarify exactly when he had been given back his driving licence. The Respondent indicated that he had had to sit a further test as his driving licence had been suspended. He had successfully completed that test and had got his licence back round about January 2013. He was able to drive when he had been told he could. In fact he had driven to Wick once.

The Respondent was asked what reassurances he could give that would not be a repeat of his failure to respond to Law Society correspondence. The Respondent indicated that he could not give any guarantee that this would not happen again. He indicated that he would try his utmost not to involve himself in the kind of work that was likely to result in a Complaint. He indicated that he would try his best not to put himself in a situation in the first place that would result in correspondence from the Law Society.

DECISION

Following these submissions, the Tribunal adjourned to consider the question of professional misconduct. Albeit, the Respondent had accepted misconduct, it was a matter for the Tribunal to assess whether the admitted averments of fact met the required test for professional misconduct.

The Tribunal gave careful consideration to the Productions, Answers and Oral Submissions.

For a period of almost two years the Respondent had failed to take any steps to administer an estate where he was appointed executor.

For a period in excess of two years, before falling ill, the Respondent had failed to respond to either the Secondary Complainer or her solicitors and had failed to produce the signed will. Thereafter, following his illness the Respondent had done nothing to produce the signed will until the date of the hearing. In November 2013 the Respondent had indicated to the Law Society that he would deliver up the signed will to their offices.

The Respondent had failed to respond to correspondence and notices from his regulatory body in relation to two separate matters. In October 2013 he had requested further time to deal with matters. The Respondent had regained his driving licence in January 2013, and had been in a position to work for the past year. Despite this, the Respondent failed to respond to the matters raised by the Law Society.

The Tribunal considered that each of these matters amounted to professional misconduct, clearly falling well below the standard to be expected of a competent and reputable solicitor, that could only be described as serious and reprehensible.

Accordingly, the Tribunal had little hesitation in finding the Respondent guilty of professional misconduct. The Tribunal reconvened and intimated the finding of professional misconduct to the parties.

The Tribunal invited submissions regarding disposal, and in particular the question of compensation for the Secondary Complainer.

The Fiscal provided the Tribunal with two sets of previous Findings for the Respondent.

With regard to the question of compensation, the Respondent accepted that he had caused the Secondary Complainer distress and indicated that he was willing to accept whatever disposal the Tribunal should impose in this connection. He indicated he had no desire to cross examine the Secondary Complainer as he did not want to add to her distress. The Tribunal adjourned the hearing to consider the content of the previous Findings and for enquiries to be made with the Secondary Complainer regarding her wish to give evidence.

When the Tribunal reconvened it asked Mr Kelly to clarify the circumstances with regard to the previous Findings that had been placed before them. In particular, the Tribunal asked for the Respondent's submissions with regard to the analogous nature of these matters.

The Respondent submitted that he could not give the Tribunal any guarantee that such matters would not be repeated. He stated he has always dealt with correspondence since his last involvement with the Law Society. He accepted there was little or nothing he could say in connection with his failures to respond to correspondence. All he could do was to resolve to do his best not to get into that position again. He would avoid taking on work that he cannot do. He is a court based lawyer and is comfortable with that type of work. He submitted that this case was the lack of attention to correspondence. He stated that it had been some years since anything like this had come up and that this was a measure that the Tribunal could take account of particularly given that he had been working flat out for some of that time.

The Respondent accepted that these current matters had arisen whilst he was still subject to a restriction on his practising certificate. He accepted that there were still eight or nine months remaining of the restriction. The Respondent indicated that he had applied for the restriction to be removed and that application was refused. He was unable to confirm when he had made that application. The Fiscal confirmed that the application had been made on 9 June 2010 and had been refused as premature.

The Tribunal drew to the Respondent's attention that one of the previous Findings had related to court work. The Respondent submitted to the Tribunal that his submissions with regard to him being in a safer position doing court work were still valid given

that at the time of the previous Findings he had only been qualified for some three or four years and he had been working on his own account for approximately one and a half years. The Respondent indicated that he had not worked on his own account since approximately 1997.

With regard to the claim for compensation, it was confirmed to the Tribunal that the Secondary Complainer wished to give evidence.

The Secondary Complainer was sworn in as a witness and thereafter gave evidence in response to questions put to her by her solicitor, Mr D.

Ms McCrorie gave evidence that she married Mr A at the beginning of 2010. He had died on 1 March 2010. In 2009 the Respondent had attended at her home to prepare a will for Mr A. Her husband had signed the will. The Secondary Complainer did not have a signed copy. She indicated that on numerous occasions in the course of 2010 going into 2011 she had contacted Mr Kelly asking him to deal with the estate and produce the will. The Respondent had indicated that he would produce the will and he might have to pass the executry on to another solicitor. Neither of these things happened. The longer the situation dragged on the more and more stressed she had become by the uncertainty of it all. She was on her own following the loss of her husband. She was able to keep the house going because she had had a reasonably well paid job. The position with regard to the house was extremely uncertain. Ownership was split between three people: herself, her deceased husband and a third individual who held 62%. This third party had been taken into a care home and her solicitor was pressing for money to be released for her care. In Ms McCrorie's attempts to get things moving, she had instructed Mr D to represent her. Mr D began to contact the Respondent directly. She had made a complaint to the Law Society to try and resolve the situation. There was a great deal of cost incurred in trying to resolve the matter and she had had to outlay a tremendous amount of money. That in itself was incredibly stressful. She had had to go to court to have Mr Kelly removed as an executor and thereafter had to ask the court to order him to produce the will. Despite that the will had not been produced. Her solicitor had made a claim on the professional indemnity insurers for the Respondent. That claim had been rejected on

several occasions but within the last six months the insurers had accepted liability. She understood the insurers would settle her costs.

Her husband had a daughter by his first wife. She had been putting pressure on the Secondary Complainer to have the estate wound up in order to secure a share of the moveable estate. There had been an earlier will which left the daughter 50% of Mr A's estate. It was critical that the most recent will was produced. Her work had been extremely demanding of her time and she had obtained great support from others at her golf course. These things had helped take her time up. The matter had gone on for some four years. She had had to deal with solicitors. Luckily she did not have to seek help from any medical practitioner. Often phone calls to the Respondent had resulted in her leaving voicemails. She had become increasingly frustrated and angry at times very angry. She did not know where she stood. Being on her own she found that at night things would go through her mind and she would become extremely upset. Whilst giving evidence the witness became upset and tearful.

On the conclusion of her evidence in chief, the Tribunal invited both parties to ask any further questions. Both declined.

Both parties were invited to make any further submissions necessary regarding mitigation. The Fiscal clarified that the Restriction on the Respondent's practising certificate had not expired as the records of employment outlined in paragraph 7.1 above did not total five years.

In response to a question from the Tribunal the Respondent confirmed he could not foresee any improvement in his financial position.

The Tribunal adjourned the hearing to consider disposal.

DISPOSAL

The Tribunal considered that the misconduct in this case was extremely serious.

In relation to the Findings of misconduct relating to the executry and will, the conduct had persisted over a period of in excess of four years. Any competent solicitor, whether experienced in executry matters or not, must have realised the consequences of failing to carry out the duties of executor or even produce the signed will. The Respondent had had no regard whatsoever to the effects his inaction would have on the beneficiaries of the will and the family of the deceased. This raised clear issues of protection of the public.

His misconduct was seriously damaging to the reputation of the legal profession.

The Tribunal had regard to the Respondent's expression of remorse at the hearing, including the fact that he declined to cross examine the Secondary Complainer to avoid causing her further distress. The difficulty for the Respondent however was that this expression of remorse came very late in the day. He had waited until the morning of the hearing to deliver the signed will to the Fiscal. The Complaint in this case had been served on the Respondent in April 2014. Therefore, at the very latest the Respondent must have been aware of the disputed nature of the will then and yet still did nothing. The Respondent had explained that a difficulty in transport and his papers being in three separate locations had caused him delay in recovering the will. Yet, in his submissions he indicated that he had regained his driving licence in January 2013, had a car, had been able to drive to Wick and work for friends for some considerable period of time.

Additionally, the Tribunal, in this case, had also found the Respondent guilty of professional misconduct in connection with two separate Complaints of failing to respond to Law Society correspondence and notices. The Respondent had been before the Tribunal on two previous occasions where he was found guilty of professional misconduct. The first of these was a complaint raised in 1997 which related to the Respondent's failure to respond to correspondence from the Law Society. The original correspondence arose because of some issues raised by a Sheriff in connection with court proceedings. The Finding of misconduct had resulted in the Respondent having his practising certificate restricted for an aggregate period of at least five years.

The second Finding of misconduct arose from a Complaint raised in October 1998 in relation to an undertaking the Respondent had given to the Tribunal itself in the course of the aforementioned case to respond to the correspondence of the Law Society. The Respondent had breached that undertaking. That Finding of misconduct resulted in the Respondent being suspended from practice for a period of one year.

The Respondent showed little insight into the serious consequences of his misconduct in relation to his failure to respond to his regulatory body. The regulatory function of the Law Society is there to instil public confidence in the profession. The Respondent had had contact with the Law Society in October and November 2013 and yet continued to fail to provide any information. Even in the proceedings before the Tribunal the Respondent had given little priority to these outstanding matters, waiting until the eve of the hearing itself to lodge Answers. This inaction had to be set against the background described by the Respondent himself of him undertaking considerable responsibilities for others. Such blatant disregard for the importance of dealing with correspondence from his regulatory body is extremely damaging to the public trust in the profession. The Respondent was unwilling to give much in the way of reassurance that there would be no repeat of such conduct. The first Finding of misconduct had arisen because of correspondence arising out of court proceedings. The current Complaint had arisen as a result of chamber practice. The Respondent's practising certificate had already both been restricted and for a time been suspended. In fact, the current incident had arisen whilst the Respondent was still subject to a restriction. The Respondent's conduct in this case, together with the previous Findings, clearly demonstrates that he is not a fit person to be a solicitor. In these circumstances the only conclusion that could be reached was that his name should be struck from the Roll of Solicitors.

The Tribunal found that the Secondary Complainer had been directly affected by the misconduct. With regard to the question of compensation, whilst the Respondent was not working on a full time basis, he clearly had some paid work and had stated that he was shortly due to receive £4000. In assessing the appropriate amount to be awarded, the Tribunal considered that the Respondent's conduct had had a serious affect upon the Secondary Complainer over a period of approximately four years, that the Secondary Complainer had been caused significant inconvenience throughout that

time by the misconduct, that the Secondary Complainer had clearly been caused worry, concern, anxiety and upset, and the Respondent had failed to take any step to rectify matters until the day of the hearing when the signed will was produced. It was clear from the evidence of the Secondary Complainer, and the admission of the Respondent, that she had been caused considerable distress by the Respondent's misconduct. In all of these circumstances, the Tribunal considered that the appropriate amount of compensation to be awarded to the Secondary Complainer was £1,500.

The Respondent confirmed that his correspondence address was still as noted above. The Fiscal sought an award of expenses which the Respondent did not oppose. Accordingly the usual awards of expenses and publicity were made.

Alan McDonald
Vice Chairman