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

F I N D I N G S

in Complaint

by

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

Complainers

against

LYNSEY ANN McLEAN, Solicitor, Marshall Wilson Law Group Limited, 2 High Street, Falkirk

Respondent

1. A Complaint dated 21 November 2013 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that, Lynsey Ann McLean, Solicitor, Marshall Wilson Law Group Limited, 2 High Street, Falkirk (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct. The Secondary Complainer is Simon John Black Hutchison, Hutchison Law, 5 Manse Place, Falkirk (hereinafter referred to as "the Secondary Complainer").

2. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged on behalf of the Respondent.

3. In terms of its Rules the Tribunal appointed the Complaint to be set down for hearing to take place on 14 February 2014 and notice thereof was duly served on the Respondent. When the case called on 14 February 2014 the Law Society were represented by their Fiscal Paul

Marshall, Solicitor, Edinburgh. The Respondent was represented by Hugh Neilson, Solicitor, Airdrie. The Secondary Complainer was represented by David Adam, Solicitor, Edinburgh. The Tribunal agreed to the Respondent's motion to adjourn and a new hearing was fixed for 26 May 2014. The Tribunal awarded expenses in favour of the Complainers for the preparation and discharge of the hearing on 14 February 2014. The Tribunal reserved the question of expenses in respect of the Secondary Complainer who had made a motion for expenses.

4. When the case called on 26 May 2014 the Law Society were represented by their Fiscal Paul Marshall, Solicitor, Edinburgh. The Respondent's agent, Mr Neilson was unwell and the Respondent appeared on her own behalf. The Secondary Complainer, Mr Hutchison was present and represented himself. The Complainers and the Secondary Complainer objected to the Respondent's motion for an adjournment. The Tribunal allowed the case to be adjourned in the interests of fairness and justice. Expenses of the hearing of 26 May 2014 were awarded in favour of the Complainers. The case was adjourned until 23 June 2014.

5. When the case called on 23 June 2014 the Law Society were represented by their Fiscal Paul Marshall, Solicitor, Edinburgh. The Respondent was present and represented by Hugh Neilson, Solicitor Airdrie. The Secondary Complainer was in attendance. A Record incorporating an adjusted Complaint and Answers was lodged. A Joint Minute was lodged agreeing certain parts of the evidence and the Tribunal heard evidence from the Secondary Complainer.

6. The matter was then adjourned part heard until 27 & 28 August 2014 when the Tribunal heard further evidence from the Secondary Complainer, evidence from another two witnesses and the start of the evidence from the Respondent. The case was then adjourned part heard until 17 November 2014.

7. The case called on 17 November 2014. The evidence of the Respondent was concluded. The Tribunal then adjourned the case until 28 November 2014 and asked parties to lodge written submissions.

8. The case called on 28 November 2014 and the Tribunal heard submissions from both parties and commenced its deliberations.

9. The Tribunal resumed and concluded its deliberations on 18 December 2014.

10. After careful consideration of all the evidence and the productions lodged the Tribunal found the following facts admitted or proved:-

10.1 The Respondent is Lynsey Ann McLean. She was enrolled as a solicitor on 21 June 2004.

10.2 The Respondent entered into a partnership with the Secondary Complainer in August 2010 by way of oral agreement. There was no written partnership agreement. The partnership traded under the name Hutchison McLean. The partnership office was located at 5 Manse Place, Falkirk ("the office"). On a date between 2 December 2011 and 31 January 2012 which with precision the Tribunal was unable to determine, the partnership was dissolved.

10.3 Around March/April 2010 the Secondary Complainer invited the Respondent to enter into partnership with him. There was agreement that the Respondent would contribute £200,000 for a 50% share of the business. Prior to the partnership commencing, the Secondary Complainer advised the Respondent that he was in financial trouble and owed HM Revenue & Customs in respect of personal income tax. The Respondent discovered that in fact there was a pending sequestration petition in respect of the Secondary Complainer

before Falkirk Sheriff Court. The Respondent fearful that she would lose her employment and under pressure from the Secondary Complainer arranged borrowings with her bank in order to make the necessary payment to the firm upon her becoming a partner and it was agreed that they would commence partnership on 1st August 2010.

10.4 In September 2010, with the benefit of a bank loan she made payment of £100,000. At the insistence of the Secondary Complainer that was paid from the Respondent's bank account to the HMRC to the extent of £77,000 and the balance of £23,000 being transferred to the Secondary Complainer's bank account. As result of these transfers the Secondary Complainer's sequestration was avoided. The Respondent also agreed that during the currency of the partnership she would under draw her profit share by £1,000 per month until a further £100,000 had been paid. It was agreed between the parties that they would share profits equally. The consequence was that the Secondary Complainer was entitled to draw £5,000 and the Respondent £4,000 per month. They also agreed that £2,000 per month for each of them would be set aside for the payment of personal taxation but this did not happen until March 2011. They also agreed that no personal expenditures would be put through the business. In particular it was agreed that various mobile phones used by the Secondary Complainer's son, daughter, wife and new partner would no longer be paid through the firm. It was also agreed that the Secondary Complainer would no longer pay money on a monthly basis out of the firm account to his wife. He was at that time separated and in the course of divorce proceedings. Such payments continued to be made by the Secondary Complainer a fact only discovered later by the Respondent.

10.5 At all times the Secondary Complainer was the designated cash room partner. From 1st August to November 2010 the firm was busy and the Respondent was receiving her drawings as agreed though monies were not being put aside for tax. Without any prior warning on Christmas Day 2010 the Respondent noticed that her drawings had not been paid. Upon phoning the Secondary Complainer he indicated that there were insufficient funds to pay. Around the second week of January she received drawings of £3,000. That reduced sum was not the subject of any discussion between the partners. For the next several months a similar pattern developed with the Secondary Complainer instructing the cashier from time to time as to what, if any, drawings were to be paid out to the Respondent. The Respondent repeatedly took this up with the Secondary Complainer. The Respondent continued to press to be paid properly.

10.6 In or around June 2011 it came to the Respondent's attention that money was being paid out per month from the firm account to an account including the name of Ms A in the sum of £2,000. That later increased to £2,500. Ms A was the Secondary Complainer's then partner/fiancée. The Respondent challenged the Secondary Complainer about this and was assured that the money was coming out of his drawings. From July 2011 onwards there was a pattern of the Respondent not receiving her share of drawings on the agreed monthly dates. The Respondent continually sought to have the Secondary Complainer engage with her and give a detailed account of the firm's incomings and outgoings. She indicated that she wanted to more fully understand the financial position of the firm and for them to agree if possible any cut backs or savings that might be made.

10.7 Over the next several months it was brought to the Respondent's attention by the firm's cashier that the Secondary Complainer was charging monies to his credit card for matters which had nothing to do with the firm's expenditure. In August 2011 a car repair bill had been charged through the firm for a vehicle not used by either of the partners. On at least one occasion the Secondary Complainer took drawings of £12,000 in one month. Insofar as they were paid the Respondent received August drawings in September, September drawings in October and October drawings in November. The Respondent continued to press the Secondary Complainer for explanations and for a meeting at which matters could be properly explained by him and, hopefully resolved between them. On 31st October 2011 the Secondary Complainer texted the Respondent to advise her that again her drawings would not be in her account. In response she indicated to him that on return from holiday she would be going through every receipt and payment to find out what money was coming in and where it was going.

10.8 On 7th November upon returning from a 2 week holiday and seeking again to engage with the Secondary Complainer, he continued to evade the issues she wished to discuss. The Respondent then acquired knowledge that a firm credit card statement had been redirected to the Secondary Complainer's home address, historically statements having been addressed to the office address.

10.9 On 29th November the Respondent finally had an opportunity of discussing matters with the Secondary Complainer. She indicated to him that matters could not continue as they had been and that they required to go through the firm's whole records and identify efficiencies. He indicated that he had no intention of effecting efficiencies, that he was driving the

cheapest car that he had ever driven and that she had to decide what she was going to do. About that time the firm's overdraft was again at its limit of around £30,000. That was not mentioned by the Secondary Complainer. On Thursday 1st December the Respondent discovered that nothing had been paid into her account by way of her drawings. Just before 5pm that day the Secondary Complainer ran past the Respondent leaving the office and indicating that he had an urgent matter to deal with.

10.10 On Friday 2nd December the staff brought to the Respondent's attention a hand written fax from the Secondary Complainer to HMRC. That fax had confirmed that £14,000 had been transferred the previous evening to them. The Secondary Complainer at that time was subject to fresh sequestration proceedings by the HMRC which action had been continued to 7th December. None of this had been disclosed by the Secondary Complainer to the Respondent. She was left to discover this herself. It transpired that the sequestration petition was dismissed on 7th December. The Respondent also discovered around October 2011 that the firm had entered into a Compromise Agreement with Mrs B, the Secondary Complainer's ex-wife. The fact that this agreement had been entered into was brought to the Respondent's attention by the cashier. Prior to that she knew nothing about it or about any liabilities incurred by the firm thereunder.

10.11 The Secondary Complainer's conduct, in particular in changing the address of the credit card statement to prevent the Respondent obtaining information to which she was entitled as a partner of the firm; his failure to communicate the threat of his imminent sequestration and his entering into a Compromise Agreement binding the firm without the Respondent's

knowledge or consent, destroyed trust and confidence between the partners.

10.12 At or around 4.30pm on Friday 2 December 2011 the Secondary Complainer received a telephone call from the Respondent. The Respondent made this call to the Secondary Complainer's mobile telephone. The Respondent discussed with the Secondary Complainer the cases that were scheduled to call at Falkirk Sheriff Court on the following Monday so that she could prepare for Court. During that call the Respondent asked the Secondary Complainer when he would return to the office that day. The Secondary Complainer advised the Respondent that he would return after 5pm in order to collect files. He did not return.

10.13 On the afternoon of 2nd December the Respondent telephoned the Law Society in a state of distress to enquire as to whether payment had been received for her practising certificate and asking where her practising certificate was. She was told it had been sent out. At that time she felt she had had enough of working with Mr Hutchison and was minded to end the partnership. That evening at around 6:50pm she sent an email to the Law Society advising that as at 5th December 2011 she would be working with Marshall Wilson Law Group and that she would cease to be a partner in Hutchison McLean on 2nd December. She had spoken to Mr C, a partner of Marshall Wilson who had agreed that she could use office space there as a temporary measure. Later that evening Mr C cautioned her not to do anything precipitant.

10.14 Having been assured that she had a practising certificate and having the belief of the existence of further sequestration proceedings against the Secondary Complainer the Respondent decided to remove the vast majority of the firm's files to

another location. The Respondent arranged to deliver the files removed from the partnership's offices to the offices of Marshall Wilson Law Group Limited, 2 High Street, Falkirk on the evening of Friday 2 December 2011.

10.15 The Respondent removed the files based on an apprehension about what might happen if the Secondary Complainer was sequestrated.

10.16 The Respondent did not give the Secondary Complainer prior notice of her intention to remove client files from the office. She did not communicate to the Secondary Complainer either orally or in writing that she had resigned.

10.17 At or around 1.30pm on Saturday 3 December 2011 the Secondary Complainer attended the office. At that time the partnership had approximately 200 open client files. When he attended at the office the Secondary Complainer noted that approximately 20 client files remained in the office.

10.18 The Respondent had removed a considerable number of current files for clients as well as a number of closed files. She expected her removing of the files to be a temporary measure dependent on the outcome of the sequestration proceedings.

10.19 The client files removed by the Respondent can be divided into three categories: Category 1- files where criminal legal aid had been granted and the Respondent was the Nominated Solicitor for legal aid purposes; Category 2 – files where criminal legal aid had been granted and the Secondary Complainer was the Nominated Solicitor for legal aid purposes; and Category 3 – files where the clients were privately paying.

10.20 Upon discovering that the files had been removed, the Secondary Complainer immediately telephoned the Respondent on her mobile telephone. The Respondent did not answer her mobile telephone. The Secondary Complainer left a telephone voicemail for the Respondent on her mobile telephone at that time asking her to telephone him within the half hour. The Secondary Complainer also sent a text message to the Respondent repeating that request. The Respondent did not telephone the Secondary Complainer as requested. Later that day, the Secondary Complainer telephoned the Respondent on her mobile telephone for a second time. The Respondent did not answer her mobile telephone. The Secondary Complainer left a telephone voicemail for the Respondent on her mobile telephone at that time advising that if she did not telephone him within the half hour he would assume that she had stolen the files which had been removed and would involve the police and the authorities.

10.21 The Respondent did not return the call to the Secondary Complainer because she did not think he would be susceptible to a calm discussion.

10.22 Between 4pm and 4.30pm on Saturday 3 December 2011 the Secondary Complainer travelled with his fiancée to the Respondent's home. He delivered a letter demanding that she explain her position and return the files to the office.

10.23 In his letter the Secondary Complainer said that he accepted her resignation and gave her until Sunday 4th December 2011 to return her laptop, car, mobile phone, credit card and all files to his home address. At that time the Respondent had not communicated to the Secondary Complainer that she had resigned. The Respondent telephoned the Secondary Complainer at around 5pm. He did not answer his phone but as

requested did phone back later that evening to discuss matters. She told him that she had not resigned and explained why in the light of his failure to engage and persistent over spending she had taken the action she did. He demanded the return of all files. He asked her to bring all the files to court on the Monday. She asked to meet him in Falkirk Sheriff Court on Monday to discuss matters and he agreed to do so. On Monday 5 December the Secondary Complainer met with the Respondent at Falkirk Sheriff Court. At that time the Secondary Complainer recovered from the Respondent the files that were necessary for that Court day and the following Court day. When there the Secondary Complainer created something of a scene referring to her in the corridors of the court as a "thief". He also produced a quantity of signed mandates for files. He told clients that they did not have a choice of instructing her as they required to deal with him. That behaviour was repeated in the court over the following two weeks.

10.24 The Secondary Complainer caused and permitted others on his behalf, knowing he could not do so himself, to carry out an act involving calling on clients at their residences and presenting them with mandates in his favour to be signed without any indication that such clients could exercise a right to nominate the Respondent or any other solicitor to act for them.

10.25 On 5th December upon her return from court the Respondent phoned the Secondary Complainer again in an effort to see if they could discuss matters and it was agreed that she could keep the files until Thursday. However just after 8pm on Monday 5th December she received a text message from him saying that upon reflection he simply wanted all the files in his name returned as per his lawyer's letter. At that time she had not received a letter from his solicitors.

10.26 The Respondent on a daily basis for the next two weeks delivered up to the Secondary Complainer those files for court where he was the nominated agent or had delivered a mandate.

10.27 One client's trial was adjourned namely Mr D on Friday 9th December.

10.28 The Secondary Complainer instructed Messrs Levy & McRae to pursue the return of the files that had been removed. Levy & McRae wrote to the Respondent on 5 December 2011 stating *inter alia* that in removing the files she was in breach of her duties as a partner. The letter advised that if the files were not returned by 5pm on 6 December 2011, legal proceedings would follow. The letter also stated that the Respondent's actions indicated that she had no intention of remaining a partner in the firm and that her resignation from the partnership had been accepted. While the act of removing the files was said to be indicative of resignation there was never any communication oral or in writing from the Respondent to the Secondary Complainer indicating that she had resigned.

10.29 By Wednesday 7 December 2011 the Respondent wrote to a client of Hutchison & McLean to say that she was "no longer with Hutchison Solicitors and was located within the offices of Marshall Wilson Law Group".

10.30 The Respondent instructed Fagans Solicitors, Airdrie in connection with this matter. On 7 December Levy & McRae wrote to Fagans Solicitors advising that the Respondent must return all files to the Secondary Complainer. On 7 December the Secondary Complainer made a complaint to the Scottish Legal Complaints Commission in connection with the Respondent's conduct. On 9 December the Secondary Complainer wrote to the Scottish Legal Aid Board to report the

Respondent's conduct and seek their advice on securing settlement of accounts payable to Hutchison McLean.

10.31 Subsequently and in the course of December 2011, a number of the files which had been requested by the Secondary Complainer were returned by the Respondent to the Secondary Complainer. As at 20 December 2011 the Respondent continued to hold a number of files which the Secondary Complainer had requested. As at 20 December 2011 approximately 100 of the 180 files removed by the Respondent had been returned to the Secondary Complainer. On that date Levy & McRae wrote to Fagans Solicitors with a list of files that still had to be returned.

10.32 On 12 January 2012, the Respondent continued to hold a number of files that had been removed from the partnership's offices and which the Secondary Complainer had requested be returned. On that date Levy & McRae wrote to Fagans Solicitors by email with an up to date list of those files where the Secondary Complainer was the nominated solicitor, and where it was said the Respondent had received mandates from those clients, and where she had failed to return the files as at 10 January 2012.

10.33 On 31 January 2012 the Respondent continued to hold a number of files that had been requested by the Secondary Complainer. On that date Levy & McRae served a Court Summons on the Respondent by way of Sheriff Officer. Appended to the Summons was a list of the files removed from the partnership's office by the Respondent and which the Respondent had failed to return to the Secondary Complainer as at 27 January 2012.

10.34 Following service of the summons the files listed therein were returned by the Respondent to the Secondary Complainer over a number of weeks. The Respondent's method of return was to hand files to the Secondary Complainer at Falkirk Sheriff Court or to leave bundles of files for the Secondary Complainer on a table in the Solicitor's Room at Falkirk Sheriff Court.

10.35 The return of the outstanding files was complete by on or around 29 March 2012 at which time the Court of Session pronounced an interlocutor allowing a Joint Minute to be received in settlement of the action, and in terms thereof finding and declaring that as from 3 December 2011 the partnership of Hutchinson McLean was dissolved.

11. The Tribunal found the Respondent not guilty of professional misconduct but considered that the Respondent's conduct may amount to unsatisfactory professional conduct and Remitted the Complaint in terms of Section 53ZA of the Solicitors (Scotland) Act 1980 to the Council of the Law Society of Scotland.

12. The Tribunal issued its Interim Findings and asked parties for submissions on expenses and publicity. Written submissions were lodged by the Complainers and by the Respondent. As the Respondent's submissions asked for a finding of expenses to be made against the Secondary Complainer, the Interim Findings were sent to the Secondary Complainer, who was asked if he had any submissions to make.

13. The case called again on 4 June 2015. The Law Society were represented by their Fiscal Paul Marshall, Solicitor, Edinburgh. The Respondent was present and represented by Hugh Neilson, Solicitor, Paisley. The Secondary Complainer was not present or represented.

14. After hearing oral submissions from the Complainers and the Respondent and having noted written submissions from the

Complainers, Respondent and Secondary Complainer, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 4 June 2015. The Tribunal in respect of the Complaint dated 21 November 2013 as amended at the instance of the Council of the Law Society of Scotland against Lynsey Ann McLean, Solicitor, Marshall Wilson Law Group Limited, 2 High Street, Falkirk; Find the Respondent not guilty of Professional Misconduct; Remit the Complaint to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980; Find the Respondent liable in the expenses of the Complainers and the Tribunal in respect of the procedural hearings and any preparation relating thereto, held on 14 February 2014 and 26 May 2014 including the 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; Find no expenses due to or by any party in respect of the remainder of the case; Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent and the Secondary Complainer and may but has no need to include the names of anyone else.

(signed)

Alistair Cockburn

Chairman

15. 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

Alistair Cockburn
Chairman

NOTE

Prior to the hearing on 14 February 2014, a motion to adjourn the hearing had already been intimated by the Respondent. The hearing had been converted from a substantive hearing to a procedural hearing. Dates were checked with all of the parties prior to the case calling and all parties agreed that they were available for 26 May 2014.

When the case called, Paul Marshall suggested that it would be appropriate to hear first from Hugh Neilson so that appropriate consideration could be given on future procedure and the question of expenses.

Hugh Neilson referred to his earlier email that had explained that he and his client had faced difficulties which had prevented him from being prepared for this hearing. He had hoped that he would be able to proceed on the 14 February but had been unable to retrieve all of the necessary information. He indicated, in broad terms, the difficulty had been in retrieving papers. Hard copies had been passed between three different firms of solicitors in connection with other matters and a bundle of these papers had gone missing. These had now been retrieved. The Respondent herself had also been trying to recover some texts and emails. She had recovered some and now accepted that the others were passed praying for. He indicated that the material recovered would reflect on whether there was any culpability in terms of the Sharp Test. He confirmed that he was available for the date identified prior to the case calling. He asked the Tribunal for 14 days to lodge Answers. He also indicated that he would lodge all such documents as he was looking to lodge at the same time as he lodged his Answers. He hoped that many of the facts could actually be agreed and gave an undertaking to discuss a Joint Minute with the Fiscal.

The solicitor for the Secondary Complainer, Mr Adam, indicated that the Secondary Complainer had no opposition to the motion to adjourn but that there was a motion for expenses. The Secondary Complainer had to have a meeting with Mr Macreath and the Fiscal to assist the Fiscal with the preparation for this hearing. The Secondary Complainer had to instruct alternative agents to cover his court business that was due to call today. This case has been hanging over the Secondary Complainer's head for some years. A number of facts had already been heard by the Court of Session. The

Respondent should have been prepared long before this. There had been inconvenience caused to all including the Secondary Complainer.

In response to a question from the Chairman, Mr Adam clarified that he was making a motion for expenses for today's hearing and stated that the Secondary Complainer had incurred personal expense.

Mr Marshall indicated that he had no objection to the motion to adjourn. He moved for expenses in relation to the discharge of today's hearing to include preparation for the hearing itself. He clarified that he was seeking expenses on behalf of the Law Society only and asked that Tribunal took great care in ascertaining the Secondary Complainer's expenses.

Mr Neilson indicated that he had no difficulty with an award of expenses in favour of the Law Society for the discharge of today's diet. He indicated that the expenses of preparation should be reserved as a proper award of expenses can only be tackled at the end of the day.

Mr Marshall clarified that he was looking for expenses in relation to the discharge of today's diet and that the preparation he referred to was not preparation for the whole case but for today's diet.

Mr Neilson conceded that that would be appropriate.

Mr Neilson questioned the competency of an award of expenses to the Secondary Complainer separate to the Law Society. Mr Neilson emphasised that it was not the intention of the Secondary Complainer to have Mr Macreath appear at the hearing today. The Fiscal would have appeared. To ask for the expenses of Mr Macreath dealing with Mr Marshall in preparing the whole case was inappropriate if even competent. He suggested that any such expense could be considered as part of the inconvenience founding the claim for compensation.

Mr Neilson referred the Tribunal to Rule 5 of the Tribunal Rules. This Rule set out the obligations on the Council of the Law Society in dealing with Complaints on

behalf of the Secondary Complainer. Mr Neilson indicated that if it was accepted that expenses had been incurred in relation to the instructing solicitors then the Tribunal would hear about that in the hearing itself in considering the award of compensation.

Mr Adam emphasised to the Tribunal that Rule 5(b) was there to allow the Secondary Complainer to be engaged in the process. He conceded it was not the intention of the Secondary Complainer to have representation today however he had incurred expenses in liaising with the ad hoc Fiscal to outline the nature of his loss and the extent of his loss. Rule 5(b)(v) allows the Secondary Complainer to appear. Rule 44 refers to the Tribunal making such an award of expenses as it thinks appropriate. The Secondary Complainer had engaged an agent to liaise with the Fiscal as he was entitled to do in terms of Rule 5. He argued that Mr Neilson was confusing loss with expenses. Expenses are a separate question from loss. A Secondary Complainer is entitled to engage in proceedings.

In answer to a direct question from a member of the Tribunal, the agent for the Secondary Complainer confirmed that it had not been the Secondary Complainer's intention to be represented at today's hearing. Mr Adam was here simply to seek expenses of the process to date in terms of the procedure to date.

In answer to a question from a member of the Tribunal, Mr Adam confirmed that the Secondary Complainer was asking for an award of expenses to cover the cost of his agent liaising with the Fiscal.

Mr Neilson emphasised to the Tribunal that an award of expenses to the Secondary Complainer would be inappropriate. The Secondary Complainer had stated clearly that he would not have been represented today and that he was only represented today in order to move for expenses. Mr Adam was not here to have any input into any procedure only to move for expenses of discharge. Any Interlocutor for expenses would have to be comprehensible and enforceable. He found it difficult to see how such an Interlocutor could be framed. He asked that the question of expenses for the Secondary Complainer be reserved.

The Tribunal allowed the motion to adjourn and fixed a new hearing for 10:30am on 26 May 2014 at the Scotsman Hotel. It allowed the Respondent 14 days to lodge Answers and thereafter the Complainers 14 days to make further adjustments. The Chairman indicated that it would be helpful for the Complainers to lodge an adjusted Record. Parties were reminded of the time limits within the Rules for lodging Productions.

The Tribunal granted an award of expenses in favour of the Complainers for the preparation for and the discharge of the hearing fixed for 14 February 2014. It reserved the question of expenses for the Secondary Complainer – without considering the competency of the motion. The Secondary Complainers had conceded that there would have been no agent present at the hearing if it had proceeded. Any expenses incurred to date appeared to be expenses of the whole process.

This case called again for a full hearing on 26 May 2014. Mr Hugh Neilson, the Respondent's agent, had phoned the Tribunal office on Friday 23 May 2014 to advise that he had been due to have a meeting with his client on Thursday but had been taken into hospital and accordingly had been unable to do so. Mr Neilson was now at home but very unwell and asked that the matter be adjourned. Mr Marshall, on behalf of the Law Society, had opposed the motion for adjournment on Friday and accordingly the matter had called before the Tribunal on 26 May 2014.

Ms Mclean appeared on her own behalf and moved the Tribunal to adjourn the Tribunal hearing given that her representative was unwell. Mr Marshall on behalf of the Law Society opposed the motion on the basis that the Respondent's agent had not been due to meet her until Thursday of last week but there had been many days and weeks since the time the case last called on 14 February 2014 when matters could have been resolved. Mr Marshall however accepted that he understood that the Respondent's solicitor was having further medical attention today. Mr Marshall however pointed out that no productions had been lodged yet for the Respondent and questioned whether or not even if the Respondent's agent had been present, whether the Respondent would have been in a position to proceed.

Mr Marshall moved for the expenses to be awarded to the Law Society in respect of today's hearing if the matter was adjourned. He indicated that the Secondary Complainer was present and that it might also be appropriate to hear his views as Mr Marshall did not represent him.

In response to a question from the Chairman with regard to what was happening in respect of the civil court action of account reckoning and payment, Mr Marshall stated that he understood it was ongoing but that Mr Macreath was having difficulties contacting Mr Neilson.

Mr Hutchinson, the Secondary Complainer, stated that there were two actions in the Court of Session: one in connection with the files which had been concluded; and in the other action, nothing had happened for months and it was sitting in limbo because Mr Neilson had not been attending.

Mr Hutchinson stated that it was unprofessional of the Respondent and her solicitor to ask for an adjournment at this stage. He indicated that he understood that people could get ill but if the case had been ready to go alternative representation should be have been arranged for today. Mr Hutchinson pointed out that on 14 February 2014 the case was adjourned and three months further on, matters were no further forward. Mr Hutchinson stated that he had been inconvenienced as Monday was his busiest court day and he had had to pay an employee to cover his cases. It had also caused him significant inconvenience and stress having to prepare for the hearing.

Ms Mclean stated that the Mr Neilson had acted for her in this case since its inception and there was a large degree of *delectus personae*. Mr Neilson had undertaken a lot of hard work and a file had been received from Harper Macleod which contained the missing correspondence. A draft Joint Minute had been received from Mr Marshall last Tuesday and she and Mr Neilson had intended to have a meeting on Thursday to go through it and make sure they were prepared for the hearing today. Ms Mclean stated that she thought the Joint Minute was nearly finalised.

Mr Marshall clarified that the Joint Minute was just a summary of what was already admitted by the Respondent in the Answers. The Joint Minute had to be reviewed and signed but had no complexity.

Ms Mclean stated that in respect of the civil court case, they have been waiting for months to get the draft accounts of dissolution from accountants in Glasgow. She indicated that Mr Hutchinson had not approved them yet. Mr Hutchinson stated that this was false and that matters had been delayed because Ms Mclean had not paid the accountant's account. Mr Hutchinson stated he had signed the accounts and sent them back to the accountants. The Chairman indicated that there was clearly a lack of agreement on the matter and that it would not be helpful to pursue this further. Mr Marshall stated that in any event this was irrelevant to the issue of whether or not there was professional misconduct although he appreciated that the Tribunal might wish to be aware of the broader picture.

The Chairman stated that this was an unusual case because of the personal nature of matters and that the Tribunal would have to be careful how it proceeded because the Tribunal would not normally get involved in matters concerning a dissolution of a partnership.

The Tribunal decided to allow the case to be adjourned in the interests of fairness and justice. The Tribunal however indicated to Ms Mclean that it was unlikely that the case would adjourned again and that she might want to think carefully about whether or not Mr Neilson would be able to represent her on the new date of 23 June 2014. The Chairman also directed that any documents which the Respondent wished to lodge be lodged with the Tribunal within 14 days together with the Joint Minute being prepared between the parties.

The Tribunal considered it appropriate to award expenses in favour of the Law Society in respect of appearance at the Tribunal today given the particular history of this case. The Respondent was strongly advised to discuss matters with Mr Neilson and decide whether or not he felt he would be able to represent her on the next occasion and if there was any doubt about this , have a backup in place so that she would be in a position to proceed on 23 June 2014.

Mr Hutchinson was advised that the issues he had raised with regard to inconvenience and expense to himself would be considered at the appropriate stage in the proceedings.

When the case called on 23 June 2014, a Joint Minute in relation to certain parts of the evidence was lodged. 14 documents had already been lodged and an additional Production 15 was lodged together with an amended Production 11 as one page of the court diary had previously been omitted by mistake.

It was agreed between the parties that the productions would become adminicles of evidence when spoken to by the witnesses or otherwise agreed in the Joint Minute. There was no objection to the late lodging of the additional productions. There were no other preliminary matters.

EVIDENCE FOR THE COMPLAINERS

MR HUTCHISON – EVIDENCE IN CHIEF

Mr Hutchison chose to affirm. He confirmed that his full name was Simon John Black Hutchison and that he was a 53 year old solicitor who has been in practice for 31 years. He advised that in 1987 he was made a partner in Miller Samuel in Glasgow and then entered into a partnership with Martin Hogg in Falkirk. He then set up on his own in 1994 and is still a sole practitioner in Falkirk. He advised that his firm is currently called Hutchison Law and prior to that he was in partnership with the Respondent under the name of Hutchison McLean which was a two partner firm.

The witness advised that the partnership commenced in August 2010 by way of an oral agreement. The witness stated that the Respondent joined the firm about 7 years ago by assigning the last few months of her traineeship and then became an assistant and in 2009 became an associate and in 2010 she became a partner.

The witness stated that the Respondent made a personal contribution to the capital of the firm when she joined. He advised that when he was discussing her being made a

partner, he gave the Respondent a bit of paper with some thoughts of what the firm was worth and left it with her. He stated that she then got advice from financial advisors although he did not know who they were.

Mr Hutchison stated that the Respondent then came back with a figure of £200,000 to buy a 50% share in the firm. He stated that it was agreed that she could pay £100,000 initially and that the remainder would be financed over 10 years or so at the rate of £1,000 per month. The witness advised that after a bit of toing and froing he and the Respondent went to the partnership bank and they agreed to finance her share. He stated that it was agreed that nominally the Respondent would get £1,000 a month less drawings than him and the accountants would sort the financial details out. The witness stated that his drawings would be £5,000 a month and the Respondent £4,000 a month, should there be sufficient funds of course. He advised that in some months there were not sufficient profits to pay that level drawings and in those months neither of them got their full drawings and sometimes these drawings were paid late i.e. not on the first of the month.

The witness advised that the firm had an agreed overdraft limit and at the time the drawings were not paid, the firm had reached the overdraft limit.

The witness advised that payments were made from partnership funds to his ex-wife and advised that at the time she was an employee of the firm. He confirmed that payments were made as wages and that her salary had tax and national insurance costs deducted from it. He advised that his ex-wife was employed as administrator and to help with the books.

The witness stated that payments were also made to his fiancée, now his wife, from firm funds and stated that at the time he had a joint account with his then fiancée. He stated that it was his drawings which were going into that joint account. He stated that the firm's books would show that payments were being made to "Ms A" which were his drawings of around £2,500 per month.

The witness confirmed that the partnership of Hutchison McLean was in existence between August 2010 and December 2011. He stated as at August 2010 the overdraft

was around £10,000. He stated for most of 2010 the firm was doing quite well. However 2011 was not a good year and turnover was down and so were profits.

The witness advised the Tribunal that he refuted the Respondent's averments regarding his being involved in any financial impropriety. He stated that the year 2011 was a very difficult time. He explained that Legal Aid had been cut and stated that all firms had to cut their costs accordingly. He stated that there was no impropriety but accepts that the firm did not cut costs quickly enough. He stated that there were a number of reasons for that. He stated that Ms McLean started to concentrate on other things and at the time all she could talk about was her other business. He stated that this was the case from mid-2011 onwards.

Mr Hutchison stated that the main practice area of the firm is criminal defence work and that 95% of that is Legal Aid funded. He explained that he has offices in the middle of Falkirk which he bought in 1994. He stated it is a ground floor and basement office in a small block of offices.

The witness was asked how many live files the firm had open at the time of ending of the partnership. He clarified that the live period for a file was the period between the file being opened when instructions were initially received until the time the client was dealt with by the court and the account rendered to the Scottish Legal Aid Board and paid. Mr Hutchison advised that at the time files were removed from the office the firm had around 200 live files. He stated that almost all of the files were removed and that only between 10 and 20 files were left in the office.

He stated that the background to the files being removed was that on 2 December 2011 he had finished work early and picked up his youngest child from school before 5pm. He advised that the Respondent called him and asked him what had happened in the course of that day. He had told the Respondent that he was coming into the office to collect files over the weekend. He advised that he then had a conversation with the Respondent about what would be happening next week as Monday 5 December was to be a very busy day. He advised that this was a normal conversation for them at the end of a week.

He stated that he went into the office on Saturday about 1:30pm with his young son who is now 13 years to collect the files that he needed to work on. He stated that he opened the doors to the office and that they were locked as normal including the external storm doors. He noted that the files he had left on his desk were not there and that they were not in the room at all. He stated that he then noticed that other files were not in another room where they should have been and then went into the filing room and noticed that there were no files there either. He stated that at this point he panicked and realised the files were missing. He advised that he then phoned his fiancée who is now his wife and she came to the office. He stated that he tried to call the Respondent but he did not get an answer. He advised that he probably called the police as well but he could not really remember. He stated that there was no sign of a break-in as there was no damage to the storm door or the locks.

Mr Hutchison advised that he came to the view that the Respondent had taken the files but stated at that point he had no idea why. He stated that he got a locksmith to change one of the locks on the storm doors. He advised that he visited the Respondent's house because she had not answered his calls and that his secretary and his cashier came to the office to assist. He composed a letter to the Respondent and took it to her mother's house because he knew that she was not at home. He stated that he gave the Respondent's partner the letter and told him that the Respondent had to get in touch with him to say what was going on.

Mr Hutchison advised that he phoned the Respondent twice, once at 1:45pm and left a voicemail message and then again at 2:30pm and then left a further voicemail message to say that if she did not contact him within half an hour he was calling the police. He stated that the first voicemail message was something along the lines of asking her whether she had got the files and what she was doing and what was going on. Mr Hutchison advised that the Respondent did not return either call. He advised that he drafted the letter that afternoon. He was referred to Production 15 of the List of Documents, a letter dated 3 December 2011 and confirmed that was the letter he hand delivered to the Respondent's partner, Mr E. He confirmed that as stated in that letter all of the Respondent's personal items had been removed from the office.

Mr Hutchison advised that of the approximately 180 live files removed from the office, about 60-70% of those were cases where the Legal Aid certificate was in his name. He advised that there were also a number of private client files, one involving his mother-in-law and another, a friend of his who had never met the Respondent and had never given her authority to take the files. He advised that none of the legally aided clients had given their authority for her to take the files either.

The witness was referred to the third paragraph of the letter of 3 December 2011 where there was a request for the firm's assets to be returned to him by the next day. He advised that the Respondent did not comply with this request. He stated that she did not contact him on the Saturday but eventually contacted him on the Sunday just before 5pm. He advised that all the Respondent said was that she would see him at court tomorrow with the files for court that day. Mr Hutchison confirmed that this contact was by telephone. He stated that he repeated his request for the files to be returned and that all the Respondent said was that she would see him at court on Monday with the files for Monday.

Mr Hutchison stated that the letter of 3 December 2011 refers to Legal Aid certificates being in his name. He advised that when a lawyer applies for Legal Aid the name of the firm and the name of the lawyer acting are noted on the Legal Aid certificate and he stated that in relation to the files, most of the certificates were in his name. He stated that the significance of this was that he was the nominated solicitor for those clients and nominated solicitors are under a duty under the Law Society Rules and the Legal Aid Board Code of Conduct to act for the client until they are mandated by another solicitor and the file was transferred. He stated that until Legal Aid is transferred a solicitor has a duty to act in the client's interest. He advised that until Legal Aid is transferred another solicitor does not have the right to these files.

In response to a question from the Chairman as to whether he was equiparating the file with the Legal Aid certificate, the witness responded that without possession of the file it becomes difficult for the nominated solicitor to discharge his duty to the client.

Mr Hutchison stated that he had client cases calling in court the following day on Monday 5 December 2011. He advised the firm kept an old fashioned handwritten court diary of the court cases and that was still in the office. He was referred to Production 11 from the List of Documents and confirmed that this was a copy of some pages from the Hutchison McLean court diary from December 2011.

The witness referred to the copy of the page for Monday 5 December 2011 and stated that as at Sunday night he did not have any of the files which he needed for court the next day. They were all in the Respondent's possession.

The witness advised that on Monday 5 December 2011 he arrived at court and presented the Respondent with mandates completed by most of the clients listed in the diary which he had obtained during the weekend. He stated that she gave him the files. He advised that he did not have a mandate for Mr F. He was in custody when he went to see him and decided to stay with the Respondent that day but after that he signed a mandate and then Mr Hutchison got the file back. He stated that the Respondent dealt with the case of a man called Mr G and from memory he got all of the other files back and represented the clients that morning.

In relation to the mandates, Mr Hutchison stated that he took advice from Mr H of Levy & McRae as Mr Macreath was on holiday and Mr H's advice was to get mandates from all clients even if the Legal Aid certificates were in his name. Mr Hutchison stated that in his view he did not need the mandates for the files where the Legal Aid certificates were in his name.

The witness stated that not all the cases were able to proceed that day and that three of them were adjourned for other reasons, so he did not need to tell the court that he had not been able to prepare as he did not have the files over the weekend. He advised that the files were hand delivered to him by the Respondent in the agents' room.

In response to a question from the Chairman, Mr Hutchison confirmed that he perhaps could have been able to deal with the trials without the files as he had significant experience but conceded that it would not have been easy to have done so.

He advised that for the rest of that week there were some cases that had to be adjourned. On Tuesday 6 December 2011 the cases of Mr I, Mr J, Mr K and Mr L were all sheriff and jury cases calling at the first diet and these needed significantly better preparation than the summary cases which called on the Monday. He stated that the Mr I case had to be continued to a further first diet and was then adjourned to January as items had to be lodged with the court. He stated that eventually a plea was agreed but that could have been made on 6 December 2011 if he had had the file. He advised that luckily the client still got the benefit of a discount. Mr Hutchison explained that when a plea is agreed sheriffs are required to give a discount, usually a quarter to a third of the sentence. He stated that this was important for the client and that Mr I was inconvenienced because Mr Hutchison had only just got the file back. He stated that if he had had the file on the Monday he would have agreed a plea with the fiscal in advance of the case calling on the Tuesday. He stated that he thinks he got the file back on the morning of 6 December and that he could have agreed a plea with the fiscal on 5 December if he had had the file.

In response to a question from the Chairman as to why the case was not disposed of on 15 December, the witness advised that the plea was tendered on 15 December but background reports were called for and it was continued to January.

The witness advised that the same thing happened in the cases of Mr K and Mr L, they were continued to Thursday 15 December too.

The Chairman asked the witness whether there was a similar inconvenience to clients i.e. a delay of nine days before a plea being tendered. In response the witness advised that he could not remember when the Mr K and Mr L cases were disposed of but he stated that they would have still had matters hanging over them for longer than was necessary.

The witness was then referred to the court diary entries on Wednesday 7 December 2011 and stated that this was a busy day as there were lots of intermediate diets fixed. He explained that an intermediate diet is fixed in summary procedure prior to a trial diet as a preliminary hearing when pleas can be tendered and information exchanged. He advised that intermediate diets usually took place between two to four weeks

before the trial. The witness stated that on Tuesday 6 December he provided the Respondent with mandates and she gave him the files there and then for that day and that this happened on Wednesday and Thursday of that week as well. He stated that on Wednesday 7 December 2011 she gave him the files for Ms M and the Mr N**.** Mr Hutchison advised that by Thursday 8 December 2011 he was sending the mandates to the Respondent's new business address if he had not already passed these to her. He stated that he got all the files apart from the files for Mr O and Mr P. He stated that he did not have mandates for these two files and did not deal with them in court that day. Mr Hutchison advised that on the Thursday the Respondent indicated to him that she was going to stop responding to mandates and on Friday 9 December he had to adjourn the trial in the case of Mr D as he did not have the file and advised that he told the sheriff why he did not have the file and that the trial was adjourned to a later date.

The witness stated that he thought that the information regarding the Respondent no longer responding to mandates was intimated to him by Fagans Solicitors who were acting for the Respondent.

The witness advised that the next week he would come to the court and that there would be a pile of files – client's files, left for him on the table in the agents' room. He stated that the agents' room should be secure but in the past items had been stolen from it so everyone knew that it was not secure.

Mr Hutchison stated that he instructed Levy & McRae to attempt to recover the files and advised that they wrote to the Respondent and to her solicitors demanding that the files were returned. The witness was referred to Production 7 of the List of Documents, a letter from Levy & McRae to the Respondent dated 5 December 2011. The witness stated that on the second page of that letter it stated:-

> *"You are therefore hereby advised that if the files in question are not returned to the Firm and Mr Hutchison by close of business tomorrow, 6 December 2011, by 5.00pm, legal proceedings for recovery will follow without further notification to you.*

Our client's right to damages in relation to your unlawful act in removing the files is reserved in all respects."

Mr Hutchison explained that the Respondent was then given a further deadline regarding the return of the files and his original deadline was extended. He stated that on the Monday after the files were removed he had a conversation with the Respondent and she said that they would meet on Thursday. He stated that he first of all agreed to that and then reflected on it and came to the conclusion that was too long to wait and so he instructed Levy & McRae to write that letter on his behalf. He advised that the Respondent then agreed to meet with him on Tuesday 6 December at 5pm. He stated she did not attend that meeting and he texted her at 5:05pm and again at 5:40pm and she did not reply to either texts.

Mr Hutchison was referred to Production 8 of the List of Documents, a letter from Levy & McRae to Fagans Solicitors dated 7 December 2011. He confirmed that in that letter Levy & McRae repeated their demand for the recovery of all the files.

The witness advised that he also complained to the Scottish Legal Complaints Commission and to the Legal Aid Board. He was referred to Production 9 of the List of Documents, a letter from him to the Scottish Legal Complaints Commission dated 7 December 2011. The witness confirmed that the third paragraph of that letter was consistent with the evidence that he had given in this case. He referred to the last paragraph of the first page of that letter and confirmed that computer backup disks had been removed. He stated that he had assumed that the Respondent had taken then. He advised that he did not know if there was data on them or not.

In response to a question from the Chairman, the witness advised that his staff had told him what was missing and if he had written in that letter that there were backup disks missing it was because his cashier must have told him that at the time.

The witness was referred to the second page of the said letter attached as Production 9 and confirmed that what was stated in that letter was an accurate summary of his attempts to contact the Respondent on Saturday 3 December and Sunday 4 December.

The witness was referred to the fourth paragraph of the second page of that letter where it stated:-

> *"The Trials therefore could not be prepared as I would have done over the weekend and three Trials on Monday morning actually had to be adjourned although in two of them there were (sic) for other reasons luckily."*

The witness agreed that what the note said rather than his memory would have been accurate that no cases had to be adjourned. He advised that his recollection on 7 December 2011 would have been better than it is today. He stated that letter would be accurate and that he cannot remember whether it was two trials or three trials which had to be adjourned for other reasons.

The witness was then referred to the sixth paragraph of the said letter and confirmed that paragraph and the seventh paragraph were accurate at the time he had prepared the letter.

In answer to the question as to how he came to know that the files were in Marshall Wilson's office, the witness replied that on the Saturday afternoon when he was standing outside the office, a local police officer said to him that she had seen the Respondent outside Marshall Wilson's office. He stated that also on Thursday or Friday of the week before the files were removed the Respondent had been in conversation with one of the partners from that firm at the Sheriff Court at Falkirk and that the conversation had ended abruptly when the witness had walked into the room. The witness stated that he was convinced that the partner from Marshall Wilson was in cahoots with the Respondent. The witness advised that the only contact with the Respondent over that weekend was as stated in the evidence he had just given. The witness stated that he did not know the name of the police officer involved but the name of the other solicitor who she was speaking to was Mr C. The witness confirmed that in the letter at Production 9 he had recorded an accurate record of the circumstances regarding the missing files as dictated on 7 December 2011.

The witness was referred to Production 10 of the List of Documents, a letter from Mr Hutchison to the Scottish Legal Aid Board dated 9 December 2011. The witness confirmed that this was the letter he had sent to the Legal Aid Board on 9 December 2011. The witness was referred to the third paragraph of that letter where he mentioned that the Respondent was using the Legal Aid firm code for Marshall Wilson. The witness explained that by the time he had written this letter the Respondent had admitted she was working from Marshall Wilson's offices and he stated that she is still there.

In response to a question as to how he knew about the Legal Aid code, the witness replied that there was a file for which the Respondent had applied to transfer the Legal Aid and from that process he could see that the Respondent was using Marshall Wilson's Legal Aid code. He explained that two codes are used on Scottish Legal Aid Board forms, one is a personal code relating to an individual solicitor and the other is a firm code relating to a particular firm of solicitors. He advised that the firm code identifies to SLAB who is to be paid in terms of the Legal Aid certificate. The witness stated that his evidence was that on Saturday 3 December 2011 the Respondent was already at Marshall Wilson's offices but he did not know when she started using the firm code.

The witness was referred to Production 1 of the List of Documents, a letter from Levy & McRae to Fagans Solicitors dated 20 December 2011. The witness was asked what the list attached to that letter showed. He advised that it was a list of client's names and dates of birth relating to cases where files were not returned after mandates were signed.

The witness advised that this list was produced by comparing the court diary and the mandates and he stated that if the files were not returned the details of those clients were put on that list. The witness confirmed that this was an accurate list produced at the time.

In response to a question from the Chairman as to whether all of these files were files where the witness was the nominated solicitor under the Legal Aid certificate, the

witness replied in the negative and stated that at that stage he did not know who the nominated solicitor was, however all clients had signed mandates.

In response to a question from the Chairman as to whether that meant that he may have written to clients who had the Respondent as the nominated solicitor in terms of the Legal Aid certificate, the witness replied in the affirmative stating that at that stage he did not know who was the nominated solicitor.

The witness advised that Levy & McRae continued to pursue the return of the files after the production of the letter of 20 December 2011. The witness was then referred to Production 5 of the List of Documents, an email by Levy & McRae to Fagans Solicitors dated 12 January 2012 with a list of files dated 10 January 2012 attached. The witness was asked what that list of files was and responded that the list was a list of files where he was the nominated solicitor and there had been mandates sent to the Respondent as she had failed to return the files. The witness confirmed that this was a two page list and was accurate at the stage it was prepared. He confirmed the list had been produced by comparing the court diary, the mandates he had and the files he had and by also checking computer records. The witness confirmed that the firm's computer records recorded who the nominated solicitor was.

The witness advised that he gave instructions for paragraph two of that letter to be written threatening court action. He advised that the action was subsequently raised. The witness was referred to Production 3 of the List of Documents, a copy Court of Session interlocutor dated 29 March 2012 and confirmed that this was the interlocutor issued by the court at the conclusion of the action. The witness was referred to Production 6 of the List of Documents, a copy summons in the court case with a list of files dated 29 January 2012 attached. The witness advised that this was a correct list and this was a list of files where he was the nominated solicitor and the files had not been returned. He explained that this list was produced in the same way as he produced the other lists and confirmed that this was an updated list in relation to the other lists previously referred to. He stated that this list only included the files where he was the nominated solicitor.

The witness stated that by the end of March 2012 all of the outstanding files had been returned. The witness advised that it was only after the court action was raised and the summons was served that the files were all returned by the Respondent.

The witness advised that the Respondent had not told him at any stage that she was planning to remove the partnership files. The witness stated that the vast majority of the files removed related to criminal defence work funded by the Scottish Legal Aid Board (SLAB). He advised that after proceedings in each case had been completed an account was prepared which was sent off to SLAB. He explained that most of these files involved cases where there was a block fee paid, although in solemn cases this was not the case. He stated that in some cases there are extra fees paid for trials and deferred sentences and that payment is usually made by SLAB by BACS payment within two to six weeks of the account being submitted. He stated that the money was paid into the client account of Hutchison McLean.

The witness was asked if a partner wanted to understand what money was coming from the SLAB how could they check. The witness replied that the SLAB sends a payment schedule by DX mail in advance of payments being made and that they could look at that. He advised that the Respondent also had access to these payment schedules and had full access to all financial matters up to 3 December 2011.

In answer to a question from the Chairman, the witness advised that the Respondent had the same rights as Mr Hutchison to the operation of the firm bank account. The witness advised that the Respondent had full access to the books and records of the firm and that he had not done anything to prevent that access up to 2 December 2011.

CROSS-EXAMINATION OF MR HUTCHISON

Under cross-examination the witness advised that when the partnership started in 2010 he was the senior figure in that partnership as at that stage he had been qualified for over 28 years. He confirmed that the Respondent had been qualified for five years when he offered her partnership. He confirmed that the Respondent was offered a 50/50 profit share.

In answer to a question as to whether he thought that at the time he was being generous to the Respondent, the witness replied in the negative. The witness confirmed that at the time files were removed the majority of Legal Aid certificates were in his name.

The witness agreed that by and large it was a matter of chance who became the nominated solicitor in a particular case, as it was broadly speaking whoever saw the client the first time who applied for Legal Aid. But he advised it was not always so. He advised that when the Respondent was an assistant he would try to make sure most of the nominations were in his name but by 2009/2010 he was doing other things as well as law and most of the nominations were in the Respondent's name at that stage.

He stated that essentially it is a matter for the client to choose the nominated solicitor. Most of the nominations were in his name at the time the files were removed because these were his clients as it had originally had been his sole practice. He stated that the goal for putting the nominations in his name was continuity for the clients. The witness disputed that the reason for the nominations being in his name was to protect the business. He stated that if the same solicitor deals with a client that is good for continuity for the business and also good for the client. The witness accepted that during the term of the partnership when he thought they were a team and a partnership, cases were sometimes dealt with by himself and sometimes by the Respondent.

The witness accepted that in giving the Respondent a 50% share of his business he rated her as good at her job. He advised that he never had a problem with her work. He said she was good at administration and good with clients.

The witness was asked whether he was desperate for a financial injection to his business. He replied that he was not desperate. He said he had to pay a tax bill but said that it took several months for the Respondent to get her finances together and if he had been desperate he would not have been able to wait for that time.

The witness confirmed that he spoke to the Respondent a few months before August 2010 about entering into a partnership. He stated that his intention was with an eye on

the future he wanted someone younger that he could trust to come into the partnership and allow him to retire. He stated that he did not think he had said he would retire in 10 years exactly but it was something along those lines. He confirmed that he told the Respondent that he was looking for a cash injection into the business. The witness was asked if he had suggested to her the kind of cash injection he was expecting and he replied in the negative. The witness stated that he prepared a document regarding the history of the firm. He advised this was an A4 piece of paper and in the first half he gave a brief report on the history of the firm, its profit, turnover and number of regular clients. He advised that the second half of the document outlined ways that accountants value firms and what it would mean in financial terms. He stated that it suggested every figure from 0 to £100,000 of value. He said that it was a light-hearted document and it said at the bottom of it that the consideration could possibly be £25 and a Curly Wurly (a piece of child's confectionery).

At this stage Mr Neilson sought to lodge that document as an additional Production. This was not opposed and it was added to the joint bundle as Production 16. The document was then shown to the witness. The witness agreed that this document was produced a few weeks after he initially discussed entering into a partnership with the Respondent. The witness stated that he was not able to place an exact date on the production of that document. The witness was asked whether the last bit regarding the Curly Wurly was a joke and he replied in the negative stating that what he meant was that anyone could value the practice differently. The witness denied drafting and re-drafting the document. He stated that prior to preparing it he had discussions with friends who were accountants but did not formally take advice from accountants. He stated that the point of the document was for the Respondent to consider it and then come forward for a proposal as to how much the business was worth.

The witness stated that after the Respondent had spoken to financial advisors, she came back to him proposing that the business was worth £400,000 and that she would pay him £200,000 with £100,000 of that being paid back over a period of time. The witness denied that he was suggesting that a capital injection of £250,000 was required.

The witness was asked if he had an idea of what kind of figure he was looking for and replied that he thought that the business was valued about £200,000 and that when the Respondent came back with double that figure he was very happy to accept that.

It was suggested to the witness that this was not a good start to a fiduciary relationship between two solicitors with him being qualified for 25 years and her only 5 years and paying more than the business was worth. The witness' response was that he was not a valuer and the Respondent took advice as to what the business was worth. The witness was asked whether he was aware of the Respondent taking legal advice and replied he did not know what advice she took other than the valuation advice. The witness confirmed that he was aware that the Respondent went to the firm's bank to get funds. The witness was asked whether the Respondent mentioned to him that her mother was putting her house up as security for the loan and in response the witness stated that he remembered some talk about her mother having to guarantee the loan but stated that he was not party to the discussions nor did he think he should have been. The witness confirmed that he had a close relationship with the Respondent at work and knew a fair bit about her personal circumstances and had met her family. The witness confirmed that he knew that the Respondent had bought a house in 2009.

The witness advised that when the £100,000 was paid, £77,000 of that was paid direct to HMRC and the balance to him. He confirmed that there was urgency in relation to the payment to HMRC because he owed them money for income tax. He advised that HMRC had raised an action for sequestration. He confirmed that this action had already called in court and had been continued. The witness denied that he was aware that one six week continuation was all that would be allowed by HMRC. The witness confirmed that the sequestration petition was dismissed after the Respondent paid the £77,000.

The witness denied that he would have been sequestrated if the Respondent had not made the payment of £100,000 to the business. He stated that he would have found the money to pay the outstanding tax bill.

Mr Neilson advised that he wished to put a document to the witness seeking to contradict what he had said in evidence in chief. At that stage the witness was asked to leave and Mr Neilson explained that he wished to put to the witness an extract of two pages from a draft financial statement from the firm of Hutchison McLean. Mr Marshall objected to the lodging of this document on the grounds that he had not previously seen it and so was unable to investigate its contents. The Chairman indicated that the document appeared to be a year-end statement – a snap shot in time. Mr Marshall was content that the document was considered by the Tribunal on that basis.

The Tribunal adjourned to consider the document. The Tribunal examined the document and considered that there did seem to be a discrepancy in the evidence given by the witness in examination in chief and what was contained in the document which would need to be explained.

When parties returned to the hearing following the adjournment the Chairman advised that the decision of the Tribunal was that Mr Neilson should be allowed to put the document to the witness as there was some possibility of the document testing the witness' credibility but that would be contingent on the witness accepting the accuracy of the document.

Mr Marshall then advised the Tribunal that in the course of leaving the room Mr Neilson had unfortunately made a negative comment about the quality of the witness' evidence which was overheard by Mr Hutchison and stated that he should refrain from making any comment in future. Mr Neilson agreed that he would be cautious in future to avoid any repetition of such behaviour.

The Chairman indicated that he would give a direction to the witness in the light of what had occurred.

The witness was asked to return to the hearing and the Chairman explained that the Tribunal thought that there is some possibility of the document testing his credibility but that that would be contingent on the witness accepting the accuracy of the document.

The Chairman explained to Mr Hutchison that the Tribunal had been advised that he had overheard a conversation between Mr Marshall and Mr Neilson which indicated Mr Neilson's view of his evidence. The Chairman indicated that the Tribunal had no control over what was said by Mr Neilson and that he wished to make it clear that the Tribunal dissociated itself from these comments.

Mr Neilson explained to the witness that he was about to show him a document which he was led to understand was part of a draft financial statement as at June 2011 produced by the accountants, Wylie & Bissett for the firm of Hutchison McLean for the year to 31 March 2011. Mr Neilson asked the witness to confirm that at the time of the year end 31 March 2011 Wylie & Bissett were the accountants for his firm. The witness replied in the affirmative and confirmed that the firm were charged with producing drafts accounts. The witness confirmed that as a partner he would normally see the draft accounts. The witness confirmed that he recognised the document but stated that he had not signed it. The witness was asked if there was anything that struck him as being inaccurate about the document and the witness replied that he had no idea because he did not know if this was a draft or a final document. The witness stated that it bore to be a draft and that it was in the normal format. He was asked to look at the balance sheet and was asked if there was anything about that which surprised him. The witness replied that he had no idea. The witness was referred to the figure under the bank overdraft and it stated that as the 31 March 2011 that was £41,693 and at 31 March 2012 it was £36,902. It was put to the witness that he had suggested in his evidence in chief that the overdraft had increased between August 2010 and sometime in 2011. The witness did not accept that and stated that he said that the overdraft level was about £10,000 in 2010 and that at the end of 2011 it was over £30,000.

The witness was asked what these draft accounts showed that the level of the firm's overdraft was broadly in March 2010. The witness responded that he had no idea and that he had not seen this document before. The witness was asked if he remembered that round about this time i.e. March 2010 the overdraft was broadly speaking what was shown in these accounts. The witness stated that he could not answer that. The

witness was asked whether in March 2011 the overdraft was broadly speaking what is shown in these accounts; again the witness stated that he could not answer that.

It was put to the witness that he bought a house in 2009 and used a significant amount of money from the firm to finance a purchase of that house.

Mr Marshall objected saying that there was nothing in the pleadings regarding this matter. Mr Neilson stated that there were averments in the Record regarding the financial position that the witness was in at the time.

The witness was asked to withdraw from the hearing.

The Chairman asked Mr Neilson where he was going with his line of questioning. In response Mr Neilson stated that he wished to put to the witness that he should remember the state of the overdraft because in 2009 the overdraft went up because he used money from the firm to purchase a new house. Mr Neilson stated that he was entitled to take the money from the firm but stated that the overdraft stayed at the higher level for a few years as a result of the expenditure and that the witness well knew that.

In response Mr Marshall asked where the source of the evidence was.

The Chairman stated that he did not think that that mattered as the Tribunal would assess the answers in assessing the credibility of the witness. The Chairman stated that it does not require to be established what the level of the overdraft was. It is up to Mr Neilson to argue that it affects his credibility when the witness says he that he does not know what his overdraft was at a particular time. The objection was overruled.

The witness was allowed to return to the hearing.

The Chairman warned the witness to take particular care in answering the questions.

Mr Neilson asked the witness when he bought his house. The witness stated that was in April 2009. He asked the witness if he used a significant amount of the firm's money to buy the house. The witness replied that he drew funds out of the business to purchase the property. Mr Neilson asked if that would have significantly raised the firm's overdraft. The witness stated that right at that moment it would have done. The witness was asked could the overdraft have risen to a level in the region of between £20,000 and £40,000. The witness stated that he did not remember. It was put to the witness that the overdraft went up to around £30,000 and remained at that figure broadly speaking for the next three years or so. The witness said that he could not agree with that because he did not have the financial figures with him. Mr Neilson asked the witness to consider ball park figures only and asked if broadly speaking he agreed with his proposition. The witness stated that he did not. It was put to the witness that the overdraft remained at the £30,000 figure for the next couple of years and the witness denied this. The witness advised that his mortgage for the property was around £200,000 and that the difference between the purchase price and the mortgage was between £23,000 and £24,000.

The witness was asked if the overdraft was between £8,000 and £10,000 at the time before the house purchase. The witness replied "I said in August 2010 the overdraft was about £10,000. I didn't say what the overdraft was in 2009."

The witness was asked did the purchase of the property cause the overdraft to increase. The witness stated "I think at the time the overdraft facility was around £30,000 and I wasn't using it all." The witness was asked whether he was operating on overdraft when he bought the house and the witness replied in the affirmative. The witness was asked if he had any recollection of the overdraft limit and the witness replied in the negative. The witness stated that he did recollect that on a regular basis in 2009 the overdraft was on a fairly constant level. He was asked what level that was and stated that he was not ready for these questions. The witness was asked whether he recalled if when he used the extra £23,000 to £24,000 that took him to the overdraft limit. The witness replied in the affirmative stating that he thought it took him up to about £30,000.

The witness was asked whether he was telling the Tribunal that as a sole practitioner and preparing the trial balances he did not know what level the overdraft was. The witness stated that he did not remember from six years ago. The witness stated that at some point he re-financed the business property that he owned and that changed the overdraft situation. He stated that he did not know if the level stayed the same or if he re-financed to pay it off. The witness stated that he did a re-finance in 2012 and reduced his overdraft.

There was no further evidence led and the case was adjourned to 27th and 28th August 2014.

The Chairman gave a direction to the witness that he was not able to discuss any of the evidence with any of the witnesses who, to his knowledge, would be giving evidence and advised that the same applied to the Respondent.

The Chairman advised that the Tribunal would issue written confirmation of where the Tribunal will be sitting on the adjourned dates but stated that the start time would 10:30am.

This case called again for a continued hearing on 27 August 2014. Mr Marshall asked the Tribunal to allow his Inventory of Productions 6, 7, 8 & 9 and his additional list of witnesses to be lodged late. Mr Neilson confirmed that he had no objection to Productions 6, 7 and 9 but had an issue with one of the items included in the 8th Inventory of Productions. This was an email sent by the Respondent to the Law Society. Mr Neilson explained that this email did not tell the whole story and was followed up by a further email from the Respondent saying that the first email should be ignored. The second email explained the situation fully. Mr Neilson explained that he presently had an expert instructed who was trying to locate the second email but this had not yet been found. The Chairman indicated that it was difficult to rule on whether or not to allow the production without having seen it and the Chairman accordingly was given a copy. Mr Neilson clarified that the Respondent did not dispute that she had sent the email, she was however in an emotional condition at the time and had not taken advice. Shortly afterwards, over the weekend, she emailed again to say, ignore the first email and to explain her position and make it clear that

she still regarded herself as in the partnership. The Chairman pointed out that so far no evidence had been heard from Mr Hutchinson with regard to the termination of the partnership. The Chairman also pointed out that production 20, which Mr Neilson was objecting to, was futuristic in its nature. The Tribunal allowed the lodging of the Production on the basis that the Respondent would be able to explain the email and further on the basis that if the second email was found before the Respondent's evidence was concluded, this could be tendered in evidence and the expert could be brought as an additional witness. Mr Neilson confirmed that on that basis he would not continue with his objection. Mr Neilson lodged one Inventory of Productions for the Respondent and Mr Marshall indicated that he had no objection to this. All the Productions were accordingly accepted late.

The cross-examination of Mr Hutchison continued.

Mr Hutchison confirmed that Production 22 was a list of files that had been prepared on his instruction where he was nominated solicitor. Production 5 was an email from Levy McRae to Fagans which attached a list of files where Mr Hutchison was the nominated solicitor and he confirmed that he also instructed the production of this list. Mr Hutchison clarified that the email at Production 5 was asking for the return of files where Mr Hutchison was the nominated solicitor, where he had received a mandate and where the Respondent had still not returned the files. Mr Hutchison explained that the two lists were not the same because some of the files had been returned by 12 January 2012. The other list was prepared to show the situation as at 2 December 2011. Mr Hutchison denied that a significant number of the files on the list had already been fee'd and paid by 2 December 2011. He conceded that perhaps some of them had. Mr Neilson then referred Mr Hutchison to two files relating to Mr L and submitted that these files had been sent for payment on 24 and 30 November. Mr Hutchison stated that he did not know whether this was correct. Mr Hutchison however pointed out that if the accounts had been submitted for payment it did not necessarily mean that the accounts had been paid and accordingly the files were still live. Mr Neilson pointed out to Mr Hutchison that a number of other files on the list had also had accounts sent to the Legal Aid Board for payment prior to the end of November. Mr Neilson also put it to Mr Hutchison that for the client Ms Q it was the Respondent who submitted the account to the Legal Aid Board. Mr Hutchison

indicated that if this was so then there was perhaps a mistake on the list. Only the nominated solicitor can render the account. In response to a question from the Chairman, Mr Hutchison confirmed that the nominated solicitor was not necessarily the person who did the work but was the person who first sees the client. In connection with the file for Mr R, Mr Hutchison said he did not recall the case, however the file was not included in the email listing files on 12 January 2012 so it might be the case that the Respondent was the nominated solicitor. Mr Hutchison stated that he could not recall sending a fax to the fiscal or sending a copy of this fax to the Respondent but that if he had done so it would have been on his client's instructions. At this stage Mr Neilson asked permission to lodge another document, the Chairman however queried how this would test the witnesses credibility and Mr Neilson did not pursue it. In connection with the file for Mr T, Mr Hutchison accepted that this case had possibly been abandoned and could not dispute that legal aid may not have been granted.

Mr Neilson then referred Mr Hutchison to the Respondent's Production being a letter dated 6 December from Levy McRae to the Respondent saying that she must return the files by 5pm on 7 December. Mr Hutchison accepted that this letter was served by Sheriff Officer on the Respondent on 7 December 2011. Mr Hutchison confirmed that he spoke to the Respondent at court on Tuesday 6 December 2011. Mr Neilson also referred Mr Hutchison to Production 7 being a copy of a letter dated 5 December from Levy McRae to the Respondent which was in identical terms apart from on the second page it stated that the files must be returned by 6 December rather than 7 December. Mr Hutchison stated that he remembers asking the Respondent on the Tuesday whether she had received the letter from Levy McRae and she said that she had not. He remembered that he had said that he had a copy of the letter but the Respondent would not take it from him. The second letter was sent by Sheriff Officer because she stated that she had not received the first one. At this stage the Chairman queried as to where Mr Neilson was going with this line of questioning. The witness left the room and Mr Neilson indicated that he was going to suggest that Mr Hutchison had gone ballistic and would do anything to get his files back and that his position was that the letter of 5 December had never been sent and it was not Levy McRae who produced it but Mr Hutchison. The Chairman pointed out that the Tribunal was concerned with regard to the ownership of the files and the terms of the

partnership. The Chairman enquired as to whether Mr Neilson was trying to adduce evidence that the removal of the files was due to the financial circumstances of the firm. Mr Neilson stated that the questions were relevant as they went to the honesty of the witness. The Chairman indicated that he would allow a further two direct questions on the issue. The witness returned and Mr Hutchison confirmed that he did not produce the letter to her but that he did assert to the Respondent that a solicitor's letter had been sent to her demanding the return of the files. Mr Hutchison stated that at this time he could not say for certain whether Levy McRae had sent the letter but they had said that they had sent it and they gave him a copy. The Respondent had agreed to meet him at 5pm to return the files on 6 December but she did not come. In response to a query from the Chairman, Mr Hutchison confirmed that the letter was sent again because the Respondent stated she didn't get the first letter and the dates were changed because the Respondent would not get the second letter in time to produce the files by 6 December.

Mr Hutchison stated that he did not agree that there was friction between him and the Respondent. He explained that he was at the Respondent's son's birthday party around that time and pointed out that the Respondent did get her drawings the following week. The Respondent had authorised the cashier to pay the rest of her drawings in November because she required the money. Mr Hutchison stated that he did not remember if he had got his drawings paid by then. Mr Hutchison was adamant that he did not accept that the Respondent was trying to get questions addressed in connection with his drawings and the finances of the firm. He stated that they did not have any conversations with regard to the wages paid to his fiancé or to his ex-wife in connection with the wage not reflecting the work done and he did not accept that this was a bone of contention between him and the Respondent. Mr Hutchison explained that his ex-wife was an employee and was paid a wage of around £1100 a month. His ex-wife did administration and helped him with the accounts and diary. In response to a question from the Chairman, Mr Hutchison confirmed that he was utilizing the earned income relief. He confirmed that there were no discussions with regard to this with the Respondent.

Mr Hutchison also confirmed that his ex-wife was paid maintenance from his drawings every month from the office accounts in the sum of around £690 per month.

He further explained that there was a Compromise Agreement drawn up under which he paid his wife £1500 a month and this was consequent upon the termination of his ex-wife's employment. In response to a question from the Chairman he confirmed that the decision to enter into the Compromise Agreement was also agreed by the Respondent. He advised that it was a lump sum of £18,000 paid over 12 months and was equivalent to 12 months' salary. In response to a question from the Chairman he stated that he did not remember discussing whether to terminate his ex-wife's employment with the Respondent. He stated that this was a side issue to the overall divorce settlement between him and his ex-wife. He stated he could not remember who signed the Compromise Agreement but it was done when the Respondent was a partner. Mr Hutchison further confirmed that there was no discussion until it was done but that the Respondent was aware that there was to be a Compromise Agreement as part of the divorce settlement. In response to a question from the Chairman Mr Hutchison confirmed that the firm of Hutchinson McLean was to pay the sum due and that the agreement was between the firm and his ex-wife. Mr Hutchison stated that the money was paid out of his drawings. The Chairman asked Mr Hutchison how his partner was to know that the money was paid from his drawings. Mr Hutchison indicated that she could look at the books. He however accepted that he should have sat down with her and made sure she was fully aware of the situation. In response to an enquiry from the Chairman, Mr Hutchison stated that he had bound the firm but had not had proper discussions with the Respondent. He however stated that the Respondent was not annoyed and there was no post Compromise Agreement discussion. Mr Neilson pointed out that this coincided with occasions when there was not enough money to pay drawings. Mr Hutchison stated that this was correct but there was not enough money to pay his drawings either. Mr Neilson put it to Mr Hutchison that there were discussions about drawings not paid on time on two occasions in 2011 and the Respondent had complained. Mr Hutchison did not accept that he had avoided the Respondent just before she left and pointed out that they saw each other every day and had lunch once a week.

Mr Hutchison did not accept that in July 2011 the Respondent was asking about the payments to his ex-wife and confirmed that he did not remember telling the Respondent that his ex-wife did not get a wage. Mr Hutchison confirmed that his divorce was on 11 July 2011 and so the wages would have stopped around that time.

The maintenance was then £690 per month for the children and a Compromise Agreement of £1500 started around then. He confirmed that latterly the wage to his ex-wife was around £1217 per month but he thought that perhaps the maintenance had been more than £690 per month before the divorce. He confirmed that he and his ex-wife separated in February 2007 and that in 2008 she was being paid £1200 per month maintenance plus a wage of £1100 per month. In response to a question from the Chairman, Mr Hutchison confirmed that between 2007 and 2011 his ex-wife was paid a salary even though she was not at the office. Mr Neilson indicated to Mr Hutchison that the Respondent's position was that his ex-wife received £1217 as a wage until November 2011 and then got £1500 per month. Mr Hutchison said he was not sure if that could be right but that it was possible that the Compromise Agreement was not done until November. Mr Hutchison stated that the Respondent did not question him with regard to the categories of payments to his ex-wife and that he did not tell the Respondent in July that the £1217 was not wages. He did not accept that the Respondent questioned him about whether this was a tax fiddle. Mr Hutchison stated that he did not remember that the category of payments to his ex-wife changed from salary to drawings. He stated that the cashier did the salaries and that he did not remember instructing the cashier to make a change in the category and he had no knowledge of a change taking place. He confirmed however that he told the cashier that his wife was no longer on a salary once the Compromise Agreement started.

Mr Neilson indicated that he wished to lodge bank statements for July, August, September, October, November and December 2011 which would show that the ex-wife's income category changed from salary to drawings. The Chairman enquired as to why Mr Neilson was asking to lodge late productions and he indicated that he did not know what the witness was going to say. Mr Marshall indicated that he objected to the bank statements being produced at this stage and stated that he had not seen a full set of bank statements. Mr Neilson stated that the Respondent's position was that she only got access to the bank accounts from August 2011 because prior to this the bank account was in the sole name of Mr Hutchison. Mr Neilson lodged the bank statements for July and August 2011 so the Tribunal could consider whether they should be allowed either to test credibility or to be lodged as productions. The Tribunal adjourned to consider the matter.

It was clear from the two bank statements that the July statement related to the account of Hutchison Solicitors, Sole Trader but the August statement showed that the Sole Trader account had closed and become a joint account of Hutchison McLean. The July bank statement showed the payment to the Respondent's ex-wife as being £1217 as a salary whereas the August statement showed the £1217 as being drawings. In the circumstances the Tribunal considered that these statements did call into question the credibility of the witness in connection with communications about the accounts and the change of categorization of the payments to Mr Hutchison's ex-wife. The Tribunal however was not impressed by Mr Neilson producing documents at this late stage and only allowed the documents to test the witness's credibility not as productions.

Mr Hutchison clarified that he previously traded as Hutchison Solicitors as a sole trader and when he took on the Respondent as a partner it created the firm Hutchison McLean. Mr Hutchison accepted that in terms of the bank statement of July 2011 the name of the account was still Hutchison Solicitors and conceded that the firm of Hutchison McLean was trading using a bank account in the name of Mr Hutchison. Mr Hutchison stated however that he would have expected the Respondent to be a signatory by July 2011 but he could not remember. He pointed out that a bank statement came in every day to the office and went in the cashier's box and that the Respondent did have access to information about the bank account. Mr Hutchison accepted that the August account showed that on 4 August the Partnership Account was opened and the Sole Trader's Account closed with the bank account remaining the same account. He stated that he assumed that this is what happened and that it must have been him that did this. He however indicated that he did not remember and he was surprised that the bank took so long given that the partnership had been in existence for a year. He indicated that the cashier would have changed it on his instructions but he could not remember and he also stated that he did not know the veracity of the documents lodged as bank statements. He accepted that the Partnership Account must have been opened by himself and the Respondent but he did not recall both of them providing mandates and signatures for the bank. He indicated that he did not say that he had actioned the change of bank account earlier. In response to a question from the Chairman as to why he had said he was surprised if he had not previously instructed it, Mr Hutchison was not sure. The Chairman

pointed out to Mr Hutchison that if he found that the documents were not correct he would have the opportunity to let the Tribunal know in due course.

Mr Neilson put it to Mr Hutchison that in July the Respondent discovered that he was making payments to his ex-wife and in June discovered that he was making payments to his fiancé and that she took her concerns up with him. Mr Hutchison denied that this was the case. He indicated that he was not challenged by the Respondent in connection with her not knowing what was going on with the finances and not having a joint bank account. Mr Hutchison did not accept that it was due to pressure from the Respondent that he closed the Sole Trader Account and converted the account into the name of the partnership. Mr Hutchison stated that the Respondent had full access to the accounts on a daily basis and had been given all the information and that she knew all about his matrimonial position. He stated that the change of name made no difference. In response to a question from the Chairman, he stated that he and the cashier were signatories on the firm account when he was a sole trader. He did not remember if he advised the bank of a change of signatories on the account.

Mr Neilson pointed out to Mr Hutchison that the July bank statement showed a payment on 28 June of £1216 to his ex-wife by way of a salary and a payment on 27 July 2011 of £1217 by way of salary to his ex-wife and maintenance on 29 July of £690 to his ex-wife. Mr Hutchison accepted that this was correct. Mr Neilson put it to Mr Hutchison that the August statement showed a payment to his ex-wife of £1216 by way of drawings. Mr Hutchison accepted that this was what was shown but stated that it was still salary because it was the same figure and tax and national insurance had been taken off. Mr Hutchison stated that he did not know why it had been designated as drawings and he had no idea how this had come about. In response to a question from the Chairman, he accepted that it was unlikely that the bank had done this on their own accord. Mr Neilson put it to Mr Hutchison that he did it because of the complaints from the Respondent. Mr Hutchison stated that if that had been the case then the July payment would have been changed too and it hadn't been.

As there was a witness in attendance from the Legal Aid Board it was agreed that Mr Hutchison's evidence be interrupted to allow her evidence to be led.

EVIDENCE IN CHIEF – (ALISON CRAIG), TEAM LEADER WITH THE CRIMINAL APPLICATIONS DEPARTMENT AT THE SCOTTISH LEGAL AID BOARD

Ms Craig advised that she managed a team who assessed legal aid applications, summary appeals and dealt with transfers and applications for legal advice and assistance. Ms Craig explained that when legal aid funding is granted there is a unique reference number given. A nominated solicitor applies on behalf of the assisted person and legal aid is granted to them which enables them to do the work and get paid. The statutory duty falls on the nominated solicitor. Ms Craig confirmed that if there is a change of the nominated solicitor the assisted person would have to get in touch with the new solicitor and then the solicitor and the assisted person would fill out a transfer application which can be done on line and could be done on line in 2011. The Board would then assess the transfer application using Regulation 17 and the good reason test. A good reason had to be given before legal aid could be transferred. The new solicitor would need a mandate from the client to apply for legal aid and the solicitor asking for the transfer must send the mandate to the old solicitor. If the good reason test is satisfied, the application would be granted and if not it would be refused and then the Legal Aid Board would notify both parties.

Ms Craig indicated that she did have experience of firms where partners went their own separate ways and usually partners would agree lists of cases and clients. Some clients could stay with the partner who leaves, in which case they would amend the firm code. She indicated that the Legal Aid Board would expect mandates from both solicitors if there was a block transfer. She indicated that there would be a covering letter with the mandates from both and confirmation from the assisted person that they agreed with what was happening. Ms Craig stated that if the solicitor wrote to the client and heard nothing they could assume that the client agreed with the suggested way forward and proceed. The Legal Aid Board required the solicitor to tell them that they had written to the client and the transfer would not be effective until this was done.

Ms Craig confirmed that she was given a list of file names and asked if Mr Hutchison was the nominated solicitor as at 2 December 2011. She entered the reference numbers into their system which showed her who the nominated solicitor was now and who the nominated solicitor was as at 2 December 2011. She confirmed that Production 22 was the list that she was given and that SLAB records showed Mr Hutchison as being the nominated solicitor on all these files as at 2 December 2011. Ms Craig also confirmed that she checked to see if any of the files had been transferred to the Respondent and the 3rd column on the list shows this and there were 5 cases where this had been done. Ms Craig explained that SLAB had received confirmation on 6 December 2011 that the Respondent had joined Marshall Wilson but she did not know whether or not this was as a partner. The finance department stated that there was a phone call from Marshall Wilson on 6 December to advise of this and also Mr Hutchison sent a letter dated 6 December to the Scottish Legal Aid Board.

CROSS EXAMINATION OF ALISON CRAIG

In cross-examination Ms Craig confirmed that the Fiscal had given her the list. She accepted that there were a couple of files which were on the list twice. She also accepted that some of the files related to advice and assistance which cannot be transferred and require a fresh application. She indicated that she did not know if some of the cases had been completed as at December 2012. Ms Craig explained that a solicitor must be registered with the Scottish Legal Aid Board to be able to carry out legal aid work. She indicated that, so far as she was aware, the Respondent was de-registered on 5 December, which was the date the letter came in from Mr Hutchison, which was received on 6 December. If a solicitor is de-registered they cannot do legal aid until they are re-registered. Ms Craig stated that she assumed that the Respondent was de-registered from legal aid with Mr Hutchison's firm. In response to a question from the Chairman in connection with whether an agency solicitor could be registered for legal aid even if they moved from firm A to firm B without it impacting on their registration, but just affecting their ability to be paid, Ms Craig said that payment would be made to wherever the nominated solicitor said it should go. She indicated that if the Respondent was de-registered from Hutchison McLean and did not register with another firm she couldn't apply in her own name. She also

clarified that if there was a transfer between two firms the block fee would be divided into two between the two firms.

At this stage the case was adjourned to 28 August. Mr Marshall indicated that he did not intend to lead evidence from witnesses numbered 2, 3 and 4 on his witness list but would have one other witness to lead for the Law Society.

When the case called on 28 August 2014 as a preliminary matter Mr Marshall advised that Mr Hutchinson had produced a copy of a fax sent to the bank in January 2011 and asked that he be allowed to lodge it as a late production. Mr Neilson indicated that he had no objection and this was allowed and numbered Production 23.

Mr Neilson continued with his cross examination of Mr Hutchinson.

Mr Hutchinson stated that Production 23 was a file copy of a fax sent on 27 January 2011 to the Bank of Scotland asking them to amend their records to show that the firm of Hutchinson Solicitors would now be known as Hutchinson McLean Solicitors and consist of two partners being Mr Hutchinson and Ms McLean. Mr Hutchinson confirmed that it was the Respondent that wrote this letter. Mr Hutchinson stated that he accepted that until this date, the partnership was trading using his sole practitioner's bank account. He indicated that he did not remember whether he took any steps to change the bank details. Mr Hutchinson confirmed that Mr U was the firm's relationship manager at the bank. Mr Hutchinson stated that he did not remember a conversation with the Respondent with regard to changing the bank account. He indicated that he did not know whether the bank account was changed in January 2011 due to the terms of the letter. He did not know what procedures were required for changing bank details. He indicated that he did not think he did his banking online at that time. He however did telephone banking. He confirmed that the Production 23 letter was sent with his knowledge. He denied that he failed to respond to the Respondent's requests to have the bank account changed.

Mr Hutchinson did not accept that after August 2011 the Respondent was still complaining about not being able to access the banking records using the password she had been given. In connection with payments to Ms A, who is now Mr

Hutchinson's current wife, Mr Hutchinson stated that the payments to her went to their joint account and were part of his drawings. Initially the sum of money involved was £2,000 per month although he indicated that he remembered a figure of £2,400 but he did not know when this started. Mr Hutchinson stated that he did not know whether the Respondent found out about the payments to his current wife from staff in June 2011. He indicated that it should not matter to the Respondent how his drawings were made up and that it was none of her business. He however indicated that he did not remember whether or not he told her this. Mr Hutchinson stated that the Respondent could have looked at the bank statements at any time. Mr Hutchinson further stated that he did not remember whether the Respondent sought an explanation in connection with the payments to his current wife. He accepted that it would be a legitimate enquiry. Mr Hutchinson accepted that there were discussions with the Respondent with regard to drawings being late on several occasions but this was due to the firm's financial position. Mr Hutchinson stated that he did not remember whether the Respondent's August drawings were not paid until September and her October drawings were not paid until November. He indicated that he did not accept that by the time the Respondent left with the files she had not been paid her drawings for November.

Mr Hutchinson accepted that he might have said in Summer 2011 that there was no room to cut costs. In connection with the firm's overdraft, it was £10,000 when the Respondent joined the partnership and when the partnership was terminated it was £30,000 but it fluctuated during the period. Mr Hutchinson stated that the overdraft was at its limit on occasions. Mr Hutchinson indicated that the Respondent texted him after her son's birthday party and told him that she had told the cashier to pay her drawings because the bank had withdrawn her overdraft. Mr Hutchinson did not accept that on 29 November the Respondent spoke to him about finances and indicated that matters could not continue the way they were. Mr Hutchinson confirmed that the Respondent did not send him a text on 31 October or at any time about the cut backs. He however did receive a text on 9 November and a voicemail message on 2 December.

Mr Hutchinson confirmed that by 2 December he had dealt with the sequestration proceedings against him. He indicated that he had told the Respondent about the

sequestration proceedings but he did not remember when. He paid the Inland Revenue from his personal account on 1 December. Mr Hutchinson did not accept that on 2 December staff told the Respondent that he had written a handwritten note to the Inland Revenue saying he intended to pay £14,000 and thereafter make arrangements with the Inland Revenue.

In response to a question from the Chairman, Mr Hutchinson accepted that he may have written the handwritten note to the Inland Revenue seeking their confirmation that proceedings would be at an end if he paid them the £14,000 and made arrangements with regard to repayments. Mr Hutchinson accepted that he had been involved in two different sequestration proceedings. Mr Hutchinson accepted that if a solicitor is sequestrated he cannot practice on his own account. He indicated that he did not know exactly what would happen if he was sequestrated but he was aware that there could be a serious difficultly. However as at the Friday morning, matters were resolved. Mr Hutchinson indicated that he did not recall a conversation with the Respondent telling her that matters had been sorted out in connection with his sequestration. He however told her that he would make an agreement to pay the Inland Revenue. He advised that he made the agreement with HMRC on Thursday and he was out of the office all day on the Friday. He was however sure that the Respondent was aware that matters were resolved and he thinks that this was transmitted to her on the Thursday evening. Mr Hutchinson accepted that he ran out of the office on the Thursday evening to make the transfer. He did not accept that he fobbed the Respondent off. He accepted that the Respondent would be anxious about it.

Mr Hutchinson stated that after the Respondent took the files he was angry and he may have said that she should bring the files back within half an hour so that matters could be dealt with in an adult way. There were two phone calls and he was annoyed and concerned. Neither of these calls were returned. Mr Hutchinson stated he had an idea that the Respondent had gone to Marshall Wilson. He drove past their offices and saw a light on but he did not go in. Mr Hutchinson confirmed that he gave the Respondent until 5pm on Sunday to return the files, the laptop and the car and indicated that he would accept her resignation. He spoke to her on the Sunday and she indicated that she had not resigned as a partner but she did not give him a proper

explanation. Mr Hutchinson accepted that the Respondent wanted to sit down and discuss matters. He indicated that he would do this but only after all the files had been returned. Mr Hutchinson confirmed that he and the Respondent met on Monday morning in court and that he had agreed to this because he had had no choice. He stated that the Respondent had not left the files for the Monday's trials in the office. He accepted that some of the files had the Respondent as nominated solicitor.

Mr Hutchinson confirmed that he produced a lot of mandates and that he caused clients to be contacted over the weekend and told that he needed mandates if they wanted him to continue to act for them. He indicated that he did not know if some of these clients were ones where the Respondent was the nominated solicitor. They were the ones that were in court that day. Mr Hutchinson confirmed that this was done by his staff who delivered letters to clients to say that the files had been taken by the Respondent and if they wanted Mr Hutchinson to act they needed the mandate to recover the file. Mr Hutchinson said that he could not know at that point who the nominated solicitor was as he did not have the files. It was not just the files that were required for court on the Monday. Mr Hutchinson stated that once he got the files back if the Respondent was the nominated solicitor he arranged for a transfer. He indicated that's what happened when clients where the Respondent was the nominated solicitor got contacted and signed mandates. This would lead to a transfer.

On the Monday the Respondent came with the files for court that day and gave him the ones where he was the nominated solicitor or he had a mandate. This happened in the same way each day that week and the following week she left bundles of files on the table in the agent's room. Mr Hutchinson indicated that he agreed to this but he was still demanding all the files back where he was the nominated solicitor. He indicated that it was possible that he called her a thief in the court corridor and that he told clients that she had taken the files with no authority. He denied approaching her clients and asking if they really wanted to keep her as their solicitor. He accepted that there was bad blood between them. Mr Hutchinson stated that the Respondent agreed to meet on the Tuesday but then did not turn up. She wanted the meeting before returning the files. On the Tuesday morning it was agreed that she would return the files and meet him at 5pm but she did not come. Mr Hutchinson stated that he felt that he was being blackmailed. He advised that there was a phone call on Monday evening

proposing a meeting on Thursday but after Mr Hutchinson had consulted his solicitor and now wife, they said that was too long to wait and so he made the meeting the Tuesday. He sent two texts to her when she did not come on Tuesday. Mr Hutchinson did not accept that he told the Respondent's clients that her whereabouts were unknown. He indicated that he did not personally visit clients. They were written to, phoned or visited by his staff.

In response to a question from the Chairman, he accepted that he caused and permitted people to visit clients at home with mandates and with a letter.

Further in response to a question from the Chairman, Mr Hutchinson indicated that he did adopt a policy of each time a client was met having them sign a mandate regardless of whether he was the nominated solicitor. Mr Hutchinson indicated that he did not know how long this practice went on but it probably stopped once the Respondent said that she would not implement mandates and the Court of Session proceedings were commenced. Mr Hutchinson confirmed that the Court of Session proceedings were settled by way of Joint Minute. He indicated that the Respondent agreed that the partnership was terminated on 3 December for the purposes of those proceedings.

RE-EXAMINATION OF MR HUTCHINSON

Mr Hutchinson stated that the Respondent had access to the bank statements because they were delivered to the office on a daily basis. She had had access to them from the start of the partnership. She also had access to the safe. Mr Hutchinson confirmed that the Respondent gave him files at court each day. He however had mandates with regard to cases that were due to call later and the Respondent got Fagans to write to Levy Mcrae to indicate that mandates should no longer be sent as she was not going to respond to them. He thought this was around about 8 December. He confirmed that in connection with the case of Mr D, there was no file and the case was adjourned. He confirmed that the removal of the files affected his ability to represent clients. He told the firm of Levy Mcrae of the problems caused while there were no files.

Mr Marshall attempted to refer Mr Hutchinson to Production 1. Mr Neilson objected as there had been no reference to Production 1 in cross examination or questions from the Chair. Mr Marshall stated that the question from the Chairman had suggested that there was no difficulty caused by the lack of files. The Chairman confirmed the details of the two questions that he had asked. Mr Neilson stated that there were no questions either by himself or the Tribunal with regard to potential adverse impact on clients and therefore he maintained his objection.

The Tribunal adjourned to consider the issue. The Tribunal's view is that only matters touched on in cross examination can be raised in re-examination and re-examination is not a new line of enquiry. Production 1 was referred to and put to Mr Hutchinson in examination in chief, there was nothing in cross examination by Mr Neilson with regard to inconvenience to clients. The Tribunal's questions were specific and restricted and therefore the Tribunal did not allow further questions on this matter. The Chairman indicated that it was a matter of inference for the Tribunal to take in due course from the facts established.

Mr Marshall then referred to Production 19 which had been lodged after his conclusion of the evidence in chief of Mr Hutchinson. Mr Neilson objected as this was not the subject of cross examination. Mr Marshall stated that it was relevant to how aware Mr Hutchinson was about the circumstances of the Respondent going to Marshall Wilson. The Chairman indicated that Production postdated when Mr Hutchinson had acquired the knowledge and queried whether this fact was in dispute. It was pointed out that there was agreement about this in the Joint Minute. The Tribunal considered that this did not arise from cross examination and did not allow the question.

Mr Marshall then referred to Production 18 being bank statements which had been handed to him by Mr Hutchinson after the conclusion of evidence in chief. Mr Marshall indicated that as he was not allowed to discuss evidence with Mr Hutchinson he was not sure of the relevance of these and suggested that the Tribunal may wish to allow Mr Hutchinson to speak to them. Mr Neilson objected and pointed out that re-examination was not an occasion to throw a bundle of documents in late and ask the witness what the relevance of them was. The Tribunal's view was that the

Productions were lodged after the evidence in chief of the witness and that the evidence in chief could not be re-opened. The Productions could be spoken to by other witnesses who had not yet given evidence. Mr Marshall stated that the material was produced in response to questions in cross examination. Mr Marshall then indicated that he was withdrawing his request to have Production 18 put to the witness at this stage.

In response to a question from the Chairman, Mr Hutchinson stated that he would have expected the bank to get in touch with him after the Respondent sent them the letter in January 2011. He indicated that he did not know why the bank did not act on the letter. He confirmed that there was no new cheque book issued post January 2011.

Further in response to a question from the Chairman, Mr Hutchinson confirmed that he did not write to clients to say that he and the Respondent were no longer in partnership and advise them of the right to be represented by him, the Respondent or someone else. Mr Hutchinson indicated that that kind of letter would normally be sent jointly by the partners when a partnership was dissolved. In further response to a question from the Chairman, Mr Hutchinson accepted that there were two petitions for sequestration over a period of one and a half years and that accordingly the firm was not in the best financial situation.

In response to a question from a member of the Tribunal in connection with why if it was a 50/50 partnership he expected all the files to be returned, Mr Hutchinson stated that there was no right to take the files where he was the nominated solicitor or private clients files.

In response to a further question from the Chairman, Mr Hutchinson accepted that both parties would be entitled to assets of the partnership to be able to do a final accounting. In response to a further question from Mr Neilson, Mr Hutchinson stated that there was no month when the Respondent did not get drawings and that she did receive her November drawings.

The Tribunal then heard evidence from Denise Robertson.

EVIDENCE IN CHIEF - DENISE ROBERTSON, MANAGER OF THE REGISTRARS DEPARTMENT OF THE LAW SOCIETY

Ms Robertson confirmed that she had eight members in her team and she dealt with the Roll of Solicitors, practising certificates etc. She was responsible for maintenance of the Roll. Ms Robertson confirmed that each solicitor had an individual record card which included the firm where they worked. Solicitors were required to contact the Law Society if they changed firm. These changes must be notified to the Law Society by way of letter or email. Ms Robertson confirmed that if an email came in saying a solicitor had moved the records would be updated and the email would be connected to the record. The record would show the new firm and the previous firm with the dates. Ms Robertson confirmed that all emails relating to this would be attached to the solicitor's record.

In connection with the Respondent's case, her manager asked her to look at the emails and check the individual records for the Respondent. She was also asked to check and see if there was another email. She found the email being Production 20 stating that the Respondent had left the firm of Hutchinson McLean on 2 December and was starting with a new firm on 5 December. Ms Robertson confirmed that she found no trace of any other emails.

CROSS EXAMINATION OF MS ROBERTSON

Ms Robertson confirmed that there was a statutory obligation on a solicitor to notify the Law Society of changes if the solicitor moved firms. Solicitors should also notify of any change of status. Ms Robertson indicated that the Law Society records would be 99% accurate and that she did regular checks. The only emails on records would be the ones that her staff or herself thought should be linked to the individual solicitor's record.

In response to a question from the Chairman, she confirmed that if there was something else in the email as well as information about a change of firm, the email would still be linked to the solicitor's individual record.

Ms Robertson confirmed that the records department has their own email address and that if an email was sent to the general Law Society email address it would be up to someone in the other department to recognize that this was for the records department and send it on to her. Ms Robertson accepted that the Production 20 email did not say what the Respondent's status was at Marshall Wilson. Mr Neilson referred the witness to Production 21 being the Respondent's record card. This has the start date at Marshall Wilson of 3 December 2011 and has her down as a consultant. Ms Robertson stated that she accepted that the email at Production 20 did not mention that the Respondent was a consultant. Ms Robertson stated that she assumed that they contacted the firm and they told them this. She confirmed that emails with the firm would be linked to the firm file and she did not know if there was any such email in this case. She also explained that they would usually put Saturday as being the start date if it was over a weekend so that the end date at one firm would be one day and the start date at the other firm would be the next day. Ms Robertson stated that she was not aware that in January 2012 the Respondent notified them that she was a consultant.

Mr Marshall indicated that he now closed his case.

EVIDENCE FOR THE RESPONDENT

LYNSEY McLEAN'S EVIDENCE IN CHIEF

The Respondent gave evidence and confirmed that she completed her traineeship solicitor with Hutchinson Solicitors and then became an assistant and then an associate in March 2008. On 1 August 2010 she became a partner. The Respondent confirmed that she did criminal defence work. At the end of March 2010 the issue of partnership was raised. At this time the Respondent was building her own client base. She was being paid a salary of £36,000 a year as an associate and was happy with this. She was however delighted when Mr Hutchinson suggested partnership. She indicated that this was quicker than she expected. Mr Hutchinson advised her that he was looking to wind down/retire in 10 to 15 years times. Mr Hutchinson also did criminal work.

The Respondent indicated that her workload increased and that a year after qualifying she was doing sheriff and jury work and the workload was split evenly between her and Mr Hutchinson. It was predominantly legal aid work. The work split was 50/50 until Mr Hutchinson became a councillor with the Council in 2008 and then the Respondent was doing most of the work.

At this stage Mr Marshall objected in that this was not put to Mr Hutchinson in cross examination. The Tribunal upheld this objection.

The Respondent stated that after she returned from maternity leave in 2008 the workload was more evenly split. Mr Hutchinson then had problems in his personal life and was away from the office more.

In connection with the partnership suggestion, Mr Hutchinson wanted a capital contribution. One morning he came in with an A4 piece of paper with various figures and statistics and also gave her year-end accounts for the years 2007, 2008 and 2009. Mr Hutchinson indicated to her that the top figure for valuation of the business was £700,000 and there were also various other values down to a figure of £250,000. Mr Hutchinson told her he had researched this on the internet. He indicated that he was looking for £250,000 by way of capital injection. The Respondent said she would speak to her financial advisor. Mr Hutchinson's position was that it would be a 50/50 partnership otherwise it was not worth doing. The Respondent was very interested in this as it would mean tripling her salary. She explained that she came to this conclusion based on the accounts and the fact that Mr Hutchinson's take home profit in 2009 was £150,000. She told Mr Hutchinson that she would need to take out a loan. At this time she was about to get married and had a young child. She had just bought a new house with £50,000 equity in it. The Respondent asked her financial advisor for advice and was told it was a good deal. She offered Mr Hutchinson £200,000, £100,000 being a lump sum with the remainder being taken from her drawings at the rate of £1,000 per month.

In response to a question from the Chairman, she confirmed that the £1,000 per month would remain in the business attributed to her in her capital account. She advised that

the loan money was released from the Bank of Scotland on 27 September 2010 secured against her mother's house. £77,000 was paid to HMRC and the balance to the Bank of Scotland account that she thought was the firm account but it was actually Mr Hutchinson's personal account. In July 2010 Mr Hutchinson was being sequestrated by HMRC. She found out about this the day his case was calling in court from a local lawyer. She asked Mr Hutchinson about it and he said he was having difficulties in connection with his wife and kids and his new wife and renting a flat etc. Mr Hutchinson spoke to Mr Page at the bank and he gave the bank's permission for the £77,000 to be paid to HMRC rather than into the firm's capital account. Mr Hutchinson's sequestration case was continued. Mr Hutchinson stated that it would be outstanding until the £77,000 was transferred and then his sequestration would be avoided. The sequestration petition was dismissed in September. They agreed that they would both set aside £2,000 per month for tax purposes in their own savings accounts but this did not happen until March 2011.

The Respondent confirmed that she received £4,000 in August 2010, £4,500 in September 2010 including travelling expenses, £4,000 in October 2010, £4,000 in November 2010 but only £977 for December. She indicated that there was no warning of this problem. The December payment was paid before Christmas and it was on Christmas day that she found out that she had no money and she phoned him. Mr Hutchinson said there was a problem with the SLAB payments. The Respondent indicated that in January 2011 cheques bounced.

Mr Marshall objected to this as it was not put in cross examination. Given the hour the matter was adjourned part heard until 4 and 5 December 2014. Mr Neilson was to check his notes with regard to bounced cheques between now and then.

On 17 November 2014, Mr Neilson continued with his examination in chief of Lynsey McLean. Ms McLean confirmed that it was agreed between her and Mr Hutchinson that nothing personal would go through the business. She indicated that she did not want his children's mobiles being put through the business. Ms McLean advised that her drawings were due at the end of December but Mr Hutchinson asked if she could take them prior to Christmas and accordingly she expected her drawings just before Christmas. On Christmas day she became aware that her drawings had not

been paid so she phoned Mr Hutchinson. He said that the Scottish Legal Aid Board had been slow in making payments and he was in a dispute with them. She did not enquire whether or not he had been paid his drawings.

On 29 December 2010 she received £977 which was the same as the amount of the loan repayment required in connection with the loan on her mother's house. She did not get the remainder of her December drawings until the second week in January when she got £3000 rather than the £4000 she should have got. She made enquiries of Mr Hutchinson with regard to this. She confirmed that there had been no prior discussion with regard to drawings being late or not being paid in full. The same thing happened with regard to the January and February drawings. Ms McLean stated that there was no discussion with regard to what was happening with her £1000 per month capital contribution. She was upset and would phone Mr Hutchinson and hang about the office waiting to see him. She did see him from time to time but had no chance to talk to him in any detail about matters because there were always others around.

In June 2011 the casher showed her a bank statement showing that Mr Hutchinson was still making payments to his now wife, of between £2000 and £2500 per month. She did not work in the firm. The Respondent challenged Mr Hutchinson about it early one morning but he said it was his drawings. Ms McLean indicated that she did not know whether or not this was his drawings although she accepted what he said but did not quite believe it. She indicated that by June she was getting her full drawings again but then in July and August she was not. She tried to pin Mr Hutchinson down with regard to matters and told him that enough was enough and that they had to go through the finances and cut back.

In August, the cashier advised the Respondent that car repair bills had been put through the business in relation to cars that did not belong to either Mr Hutchinson or the Respondent. There was also petrol and mobile phones etc not connected to the business. Ms McLean stated that she tried to speak to Mr Hutchinson about it but he said that it was all coming from his drawings. Between August and November, the Respondent's drawings were always late and were not paid in full. On 31 October the Respondent was on holiday and Mr Hutchinson sent a text telling her that there was no money and that there would be nothing going into her account. The overdraft

facility was “maxed out”. The Respondent found this out from the cashier when she asked the cashier about it after she got the text. Ms McLean stated that she advised Mr Hutchinson that enough was enough and that once she was back from her holiday she was going to go through everything. It was her son’s third birthday party on 30 October and Mr Hutchinson was there but they did not have a discussion about finances at the party.

She came back to the office on 7 November but the cashier grabbed Mr Hutchinson first in connection with a missing credit card statement. It turned out that the firm’s credit card statement had been sent to Mr Hutchinson’s home address rather than to the office.

Between the 7 November and 2 December, the Respondent phoned Mr Hutchinson on numerous occasions saying that she required a meeting. He would not come into the office in the morning until after the staff and he was away more and more which made it more and more difficult to pin him down. The Respondent had to deal with all the meetings for clients. Ms McLean stated that she advised Mr Hutchinson that she wanted a meeting to go through everything and make any necessary cut backs. The Tuesday of the last week in November she was able to speak to Mr Hutchinson and tell him that things could not go on as they were but he said that he was driving the cheapest car he had ever had and had no intention of cutting back and that it was up to the Respondent what she wanted to do.

In response to a question from the Chairman, Ms McLean stated that she deduced from this that he meant she would have to go on with the hit and miss situation with regard to whether or not she received her drawings. Mr Hutchinson did not say anything to her with regard to the overdraft or the firm’s liquidity.

Ms McLean confirmed that the drawings should have been in her account by 1 December but were not. She tried to speak to Mr Hutchinson on the Thursday evening of 1 December. About 4:50pm he ran past her saying that he had a matter to deal with and that he was in trouble. On 2 December she saw him briefly at court but he had not come into the office before court and she did not have a chance to speak to him as he was in the cafe and there were a lot of other people around. She told him that she

needed to speak to him. Ms McLean explained that she went back to the office at lunchtime and noticed a new printer/fax/photocopier/scanner had been delivered.

She was told that Mr Hutchinson had sent a fax that morning to Her Majesty's Revenue & Customs confirming that £14,000 had been paid. Ms McLean confirmed that this was not in respect of any tax due by her. She saw from the terms of the fax that it related to an action ongoing in court. She indicated that she had an idea that this might be related to Mr Hutchinson's sequestration. She found out on 5 December that the sequestration action had been due to call on 7 December and it had been continued from a previous date. Ms McLean explained that she was very angry and upset and extremely concerned that the person who she was in partnership with could be sequestrated which would mean she would be left on her own with a busy criminal practice. Ms McLean stated that she knew that if a solicitor was bankrupt their practising certificate would be suspended and they would not be able to practice until the Law Society gave permission and then it would only be under supervision of a firm approved by the Law Society. Ms McLean stated that she thought she would have to get up to speed with all the cases and the firm was very busy. She had visions of the Law Society not giving permission for Mr Hutchinson to be supervised by her. She stated that she was not confident that she could cope with all Mr Hutchinson's caseload as well as her own. She was also aware that as a partner she would have joint responsibility for the debts of the firm including the overdraft which was at its limit. She had also knocked over a red file in the office that morning which had lots of cheques in it which had not been sent out and related to unpaid debts.

Mr Hutchinson did not come back to the office that day and phoned and said he would not be back until after 5pm. She phoned him in the afternoon to ask what was he was doing at the court on Monday and left a message. He phoned back and said that he would do the trials and it was agreed that she would do the intermediate diets and the cited court. He palmed her off on the phone and it was a very short phone call with no opportunity for any other discussion.

At this point Mr Marshall objected in respect of Mr Neilson leading the witness. This was sustained and Mr Neilson was asked to put the questions in non leading manner.

Ms McLean confirmed that she phoned the Law Society to enquire whether or not the practising certificates were coming and if the cheques for the certificates had been cashed. She was concerned as to whether the cheques had cleared but she was advised that the certificates would be issued. She stated in this conversation that she was leaving because she had had enough and she was very upset and crying. The conversation was followed by Production 20 being an email.

Ms McLean stated that she was planning to walk out and not go back and felt like she just wanted to give up. She decided that she was going to leave and would have no more to do with the business as she could not cope. She explained that she had spoken to Mr C earlier that afternoon and had told him everything including the position with her mum. He was her friend and she off loaded on him. At this point Ms McLean became upset and accordingly a short adjournment was allowed.

Ms McLean explained that she was extremely upset that afternoon and was trying to understand what was happening and what potentially might happen. She did not think she was strong enough to turn the firm around and she did not know what was happening. In response to a question from the Chairman, she confirmed that she knew a payment had been made as per Mr Hutcheson's fax, which referred to a court action. She however did not know when the action was going to call and she suspected that it was a sequestration action and thought that the worst outcome might happen. She stated that she did not know if the money paid by the Respondent would be enough or how much was outstanding in connection with tax. She was afraid that her mum would lose her house. She had no one to talk to in the office. When she spoke to Mr C he said not to do anything hastily or rashly. She first spoke to Mr C before she spoke to Mr Hutcheson and the Law Society. In connection with Production 20, being the email sent to the Law Society she acknowledged that this referred to her working with Marshall Wilson from 5 December and ceasing to be a partner of Hutcheson McLean as at 2 December. She explained that she had told Mr C that she could not cope and he said that he would assist and help her out if it made things easier and she could go and work from a desk in their offices and go through everything. Ms McLean explained that she went home about 6 o'clock and decided that that was it and she would walk away. This was the time when she sent the email at Production 20 to the Law Society. She said she did not know why she had put her

legal aid code in the email. She spoke to Mr C again about 8 o'clock that evening when he phoned her on her mobile at home to ask if she was ok and whether or not she had made a decision. Mr Marshall objected to this line of questioning as it was not included in the Record. Mr Neilson stated that it was relevant as to whether or not the Respondent regarded herself as having resigned.

The Chairman indicated that he thought the questions were important to show the thought process the witness went through before taking the files. Mr Marshall indicated that he had concerns about fair notice. The Chairman pointed out that the Record mentioned the Respondent's intentions with regard to whether or not the partnership had dissolved.

The Chairman indicated that the questioning would be allowed as it was one of a number of references that the Tribunal had heard about during the course of the proceedings in respect of the interaction between Mr C and the Respondent for example reference had been made to Mr Hutchinson seeing them speaking at court. The Chairman indicated that it was important that the Tribunal was able to make findings on the thought process of the Respondent after she saw the fax.

Ms McLean said that she had decided that she was going to try and fight to save the business and she was going to start going through the finances and the files and work out exactly what was outstanding by looking at these files and the court diary. She indicated that her plan was to make sure that she was up to speed with all the files in case of the worst outcome which would result in her being left on her own. She wanted to save the partnership because she enjoyed her job and wanted to make it work. She accepted that it would be logical to think given what had happened that she could not go on working in partnership with Mr Hutchinson but she indicated that dissolution of the partnership was not her preferred option. Mr C told her that he could get a room and desk and a chair at their offices where she would be able to work and go through all the files. She was going to start doing that that weekend. Ms McLean indicated that she did not feel that she would be able to go through all the files without interruption at the offices of Hutchinson Mclean and she would also be

scared. She indicated that she had so many emotions going on at that time and her world was collapsing.

One of the Directors of Marshall Wilson met her at Marshall Wilson's offices to allow her entry that night. She and her husband took as many files as they could get in the car to Marshall Wilson. Ms McLean however stated that she left the trial files that Mr Hutchinson would be dealing with on the Monday on his side unit with the court sheet list. She took the rest of Monday's files with her. She did not tell Mr Hutchinson that she had taken the files. She also took copies of the month end financial sheet which did not give specific breakdowns but gave an indication of the transactions.

Ms McLean advised that on the Saturday she went to the office at 1:40pm. She sent an email to the Law Society to say that she was going to try and sort matters out. This email was sent either later on the 2 December or over the weekend and was sent from her laptop at home. She had tried to retrieve a copy of the email and had asked a computer expert to see if they could retrieve it but they could not find it. Ms McLean stated that she had no communication with Mr Hutchinson on Saturday although he phoned her twice. He had left a message saying that he had gone into the office and seen that the files were gone and told her in the message that she had to phone him back within 30 minutes if she wanted matters to be dealt with in a humane way. She said it was clear from his message that he was very angry, he was gulping and she could hear anger in his voice. He also threatened to call the police. She did not phone him back because she knew that it would not get them anywhere and she was scared. Half an hour later Mr Hutchinson phoned again but she did not answer and he left a similar message.

Ms McLean advised that she was at the offices of Marshall Wilson until about 5pm. Her priority was to deal with the trials for the following week. Whilst she was working at the offices of Marshall Wilson, she heard a smash. Her mother was also with her and they then heard footsteps and panicked and phoned the police. When the police arrived they searched but there was nobody in the building and no sign of a broken window. Ms McLean explained that her brother then phoned her to say that Mr Hutchinson and his fiancée had just left her mother's house at around 5pm and he had also spoken to Ms McLean's fiancé who had said that a letter had been delivered

through the door for her attention. The letter stated that Mr Hutchinson accepted her resignation and he gave her until 4 December to return her mobile, laptop, credit cards and all the files etc. Ms McLean stated that she did not consider that she had resigned and considered she had no obligation to return these items. The files belonged to the partnership which was still ongoing. She phoned Mr Hutchinson at 4:55pm on 4 December and left a message. He phoned back at 5:25pm. She told him that she had not resigned but she was fed up with his lies and him not talking to her and withholding information from her. She advised him that she was now doing what she had threatened to do and she was going through everything. He kept asking for the return of all the files and the partnership property. Ms McLean stated that she asked him to meet her at 9am on the Monday prior to the court to discuss matters. He said he would be there when he got there but he wanted the files and asked her what she thought Sheriff Gallagher would say at the court on Monday.

Ms McLean advised that she arrived at the court at 9am on the Monday but Mr Hutchinson did not come until 9:15/9:20am. There was no opportunity for discussion. As she was going along the court corridors, he followed her calling her a thief. Ms McLean stated that she requested a chance to speak to the Sheriff and spoke to Sheriff Caldwell in chambers to advise him of the issues between herself and Mr Hutchinson and state that she hoped it would not affect the running of the court. Mr Hutchinson gave the Respondent about 20 mandates that morning. Ms McLean stated that she went to look at the files and linked the mandates with them. Mr Hutchinson was breathing down her neck and telling her clients that they did not want to go with her and that she was a thief and told the clients they had no option and they should come with him. Some of the mandates were for files where Ms McLean was the nominated solicitor. Mr Hutchinson was shouting and swearing.

Ms McLean advised that she phoned Bruce Ritchie at the Law Society to say things had got out of control and she did not know what to do. His advice was to phone Mr Hutchinson and try and come to an arrangement. She accordingly phoned him after lunch and they agreed that she would get time to go through all the files that she had and any where Mr Hutchinson was the nominated solicitor would be returned to him by the Thursday. He then sent a text saying that thinking things over he was going by his lawyer's letter. She had not received a lawyer's letter.

On the Tuesday just after 9am, Mr Hutchinson asked if she had received the lawyer's letter and Ms McLean stated that she had not had her mail before she had left home. He accordingly produced a copy of the letter and gave it to her. It was not on headed paper. Ms McLean was referred to Production 7 being the letter to her from Levy & McRae. This letter stated that the files should be returned by 6 December and was in identical terms to the one given to her by the Respondent. She did not receive a letter in those terms from Levy & McRae. She did however receive a letter on 7 December which was dated 6 December and was Production 4 for the Respondent. She got it after 5pm on 7 December. Ms McLean was referred to Production 8 where the letter says that the deadline was approaching and no files had been made available. Ms McLean stated that she thought Mr Hutchinson had altered the file copy that he gave her on 6 December. The meeting arranged for 5pm on Thursday did not take place. Ms McLean confirmed that in connection with the court action, there was agreement between the parties with regard to the termination of the partnership date.

CROSS-EXAMINATION OF MS MCLEAN BY MR MARSHALL

Ms McLean confirmed that she took 180 files on the Friday evening. She indicated that this was done by one run in the car and her husband helped her. She put the files in an empty room at Marshall Wilson on the first floor. A Director of Marshall Wilson, Ms V, let them in the door at around 9.45pm that evening. Ms McLean confirmed that the partners of Marshall Wilson had approved that this could be done. She did not tell Mr Hutcheson that she was taking the files and took them when he was not there. She indicated that she did not know what she was going to do when she left the office at 5pm and she had no intention to deceive. Most of the files related to legal aid. Ms McLean accepted that she did not apply to the Scottish Legal Aid Board for transfers before taking the files. She took the files to ascertain the true financial position of the firm and to work out the current position. She explained that the files were in a filing cupboard. She accepted that on the face of it she could have reviewed the files in the office but she indicated that she wanted to be in a position to be able to sit and look through the files in her own time. She confirmed that she was located in Marshall Wilson's offices the following week, working out of one of their offices but she insisted that she was still at that time a partner in Hutcheson McLean.

Ms McLean stated that it was possible to appear for a client without the file, although it was difficult. In response to a question from the Chairman, Ms McLean stated that in the real world a file would be prepared for trial either the night before or the morning of the trial. Usually the information required would be available by the time of the intermediate diet. Ms McLean accepted that some of the files she took included cases calling the following week and that this would make it more difficult to prepare cases for court. Ms McLean however stated that she took the files to protect her client's interests. In response to another question from the Chairman, Ms McLean confirmed that she left the trial files for the Monday at Mr Hutcheson's office. Trials for the rest of the week she took but she did not anticipate that Mr Hutcheson would be doing any work on them until the day before, when it was decided between herself and Mr Hutcheson who would do what. She indicated that she would not have allowed there to be a risk to clients. She instructed Fagans to represent her interests on the Tuesday.

Mr Marshall referred her to Production 1 which indicated that 180 files were taken and 100 were returned. Mr Marshall submitted that the second page of this letter showed that clients' interests were put at risk. Ms McLean did not agree. Ms Mclean stated that Mr Hutcheson accepted in his evidence that when he gave her a mandate she gave him the file. Mr Marshall referred Ms McLean to Production 17, being a letter of 4 January 2012 which referred to a number of clients being prejudiced by the Respondent's failure to return the files. Ms McLean stated that she did not agree that this had the potential to put clients' interests at risk. She stated that it was clients' choice who appeared for them. Ms McLean stated that she did not agree that clients were affected by the dispute between her and Mr Hutcheson and did not agree that it was not in their best interests that she took the files. She also did not accept that she put her own interests first. She indicated that she hoped to bring Mr Hutcheson to his senses and she had no intention of holding on to the files. Ms McLean stated that she told clients what was happening a few days later because they were asking. Mr Marshall referred Ms McLean to Production 19. Mr Neilson objected on the basis that this production had been objected to and had not been allowed. The Chairman pointed out that it was Production 20 that Mr Neilson had objected to and that Production 20 had in any event been allowed to be lodged by the Tribunal. Ms McLean confirmed that Production 19 was a letter to one of the clients of Hutcheson

McLean. She accepted that the letter stated that she was no longer with Hutcheson McLean Solicitors and was now located within the offices of Marshall Wilson. Ms McLean stated that the letter could have been drafted better but she still considered herself to be part of Hutcheson McLean. She indicated that she wrote to clients on Marshall Wilson note paper because she did not have any other note paper. She asserted that being located within their offices was not the same as working with them. She indicated that she did not agree that her actions were those of someone who had left and moved on to another firm.

In connection with Production 20 Ms McLean stated that she did not take the files to her new employer. Mr Marshall pointed out that the email indicated that she had ceased to be a partner of Hutcheson McLean as at 2 December and that she would be working for Marshall Wilson Law Group from 5 December 2011. Ms McLean stated that she was not dissolving the partnership and that is why she did not follow the Law Society's guidance. She took the files as a partner and she was not sure that she required SLAB's authority to take the files out of the office. She indicated that she returned the files that were requested. Mr Marshall referred her to the Joint Minute where it was accepted that not all the files were returned when requested. She indicated that there were some files that were no longer active and they were not returned until after the court case. Ms McLean stated that there was nothing to show any prejudice or any risk to clients and there was no deceit involved in her plan. Mr Marshall put it to Ms McLean that the evidence from the witness from the Legal Aid Board suggested that she was registered with the Scottish Legal Aid Board as being within Marshall Wilson on 6 December. Ms McLean said that this did not happen until 19 December and it was because Mr Hutcheson had terminated her legal aid so she asked the Scottish Legal Aid Board if she could register with Marshall Wilson.

In response to questions from the Chairman, Ms McLean stated that the cashier was only in once a fortnight and accordingly she did not think to ask the cashier to give her a breakdown of the firm's financial position. Ms McLean stated that she did not know if the bank returned paid cheques to the firm. She did not ask the cashier to give her the paid cheques. Ms McLean accepted in response to further questions from the Chairman that she took almost no direct steps to obtain information on what Mr Hutcheson was taking out of the firm. Ms McLean stated that she tried to get the

information from Mr Hutcheson. She indicated that she was only aware from July, when the cashier was in tears, that there were month end statements. She got these for July, August, September, October and November 2011 which showed drawings of Mr Hutcheson. She indicated that in one month his drawings were £12,000. In connection with the credit card, it was usually sent to the firm but this time it was sent to his home address and she considered this to be underhand. Ms McLean indicated that she did not look at the statement in detail because she was tired and stressed. She indicated that she would have had to go through every cheque and bank statement and that all the information was on the cashier's computer. She however accepted that there would be ledger cards for clients and firm ledgers and one would be for partner's drawings. Ms McLean stated that she was very busy and the computer was password protected and she did not know the password. She did not access Mr Hutcheson's ledger through the cashier to ascertain the position with regard to his drawings. Ms B stated that her awareness of the cheque for £14,000 made her want to protect her position. She wanted to have knowledge of the files so she could attempt to go it alone. She indicated that she was not thinking clearly. It was into the second week, ie 7 December 2011 that she found out that Mr Hutcheson was not to be sequestrated. She accepted that by then she knew that clients' interests would not be affected by Mr Hutcheson's sequestration. She accepted, that she did not return the files but indicated that this was due to Mr Hutcheson being bullying and abusive. In connection with the 180 files, she accepted that she could have gone through them in a couple of days to ascertain who was the nominated solicitor, but she did not do this. She indicated that she was very busy and it was hard and she was trying to keep up. Ms McLean accepted in response to questions from the Chairman that by the Wednesday she would have had sufficient time to identify which files were in Mr Hutcheson's name, however she had trials to deal with at the same time. She advised that each file was organised with the Complaint first and then the legal aid certificate underneath it. Ms McLean stated she could not give a specific reason for holding on to the files.

It was confirmed that neither Mr Marshall nor Mr Neilson had any further questions to ask. The matter was accordingly adjourned to 28 November 2014 and parties were asked to lodge written submissions with the Tribunal no later than 24 November.

The case then called on 28 November 2014.

SUBMISSIONS FOR THE COMPLAINERS

Mr Marshall referred to his written submissions which are set out as undernoted.

Introduction

The test for professional misconduct is as set out in the decision of *Sharp v The Council of the Law Society of Scotland* 1984 SC 129 at 134:-

"There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of rules or some other actings or omissions the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is made."

I ask you to find the Respondent, Lynsey McLean guilty of misconduct as defined in *Sharp*, for the reasons set out in the complaint.

The relevant circumstances are that approximately 180 files of the partnership of Hutchison McLean were removed suddenly and without warning by the Respondent. She gave her partner, Simon Hutchison no notice and did not discuss her plan with him. The files were removed from the partnership's office on a Friday evening when the office was empty. They were taken directly to the offices of another firm of solicitors where the Respondent began working the following week, and where she still works. The files were removed in such a way as to give rise to a risk to clients' interests. In all the circumstances the removal of the files satisfies the test in Sharp.

The Respondent has made claims to justify the removal of the files. I have two submissions to make about these claims. First, these claims are not supported by the evidence we've heard. Second, even if these claims were supported by evidence, they would not in any way justify the removal of the files, and the removal of the files

is professional misconduct. At best her claims might be mitigation, but not a defence to the question of whether or not she is guilty of misconduct.

In this submission I will:-

1. review the facts which are agreed or proved.
2. identify the professional duties which I submit have been breached on these facts
3. refer to the Respondent's claims justifying removal of the files and explain why these should be dismissed
4. submit why the breach of duties amounts to professional misconduct

1 Facts which are agreed or proved

There was a partnership where Lynsey McLean and Simon Hutchison were the two partners.

The partnership had approximately 200 open files at the start of December 2011.

With no prior warning, and with no prior discussion about her intentions, on the evening of 2 December the Respondent removed approx. 180 of these files from the partnership office.

Prior to removal of the files, on the afternoon of 2 December 2011 the Respondent telephoned the Law Society. During that call she advised the Law Society that she had had enough and was going to leave the firm of Hutchison McLean. That evening, at 6.50pm the Respondent sent an e-mail to the Law Society stating:-

"Further to my telephone conversation today I can advise that as at 5th December 2011 I will be working with Marshall Wilson Law Group, 2 High Street, Falkirk. I will cease to be a partner of Hutchison McLean Solicitors as at the 2nd December 2011…." (production 20).

The files removed included legal aid files were Simon Hutchison was the nominated solicitor, legal aid files where the Respondent was the nominated solicitor, and files where the clients were paying privately.

The files removed by the Respondent included files that Simon Hutchison had been working on that day and in relation to which he had completed dictation.

The Respondent removed the files after 9pm in the evening when the office was empty.

She arranged to deliver the files directly to the offices of another firm of lawyers Marshall Wilson – at around 9.45pm on the Friday evening.

From the start of the following week she was working out of Marshall Wilson's offices.

By Wednesday 7 December she was writing to a client of Hutchison McLean to say that she was "no longer with Hutchison McLean Solicitors and was located within the offices of Marshall Wilson Law Group". (production 19/2). Today she continues to work with Marshall Wilson.

The Respondent confirmed that by Wednesday 7 December she had no reason to hold onto the files where Simon Hutchison was nominated solicitor.

Mr Hutchison had discovered the files had been taken when he went to the office on Saturday 3 December. When he discovered that the files had been taken he contacted the Respondent to demand the return of all of the partnership files she had removed.

He took legal advice from Levy & McRae who wrote to the Respondent on 5 December 2011 requesting return of all of the partnership's files she had removed. Levy & McRae noted that her resignation from the partnership was accepted and noted that her acts clearly indicated that she had no intention of remaining a partner in the firm. (Production 7).

Levy & McRae subsequently wrote to the Respondent's solicitors on a 7 December 2011 requesting return of all of the partnership's files. (Production 8).

In the week commencing 5 December 2011 the Respondent met the Secondary Complainer at Falkirk Sheriff Court each day and handed over the files required for that day's court. This is agreed.

Thereafter, from the week commencing 12 December 2011 onwards, the Respondent left bundles of files requested by the Secondary Complainer on the table in the agent's room at Falkirk Sheriff Court. This is agreed.

In the course of December 2011 the Respondent arranged to return to the Secondary Complainer a number of the files removed from the partnership's office. This is agreed.

It is a matter of agreement that as the Levy & McRae letter reports, as at 20 December approximately 100 out of 180 files had been returned to the Secondary Complainer.

On 20 December Levy & McRae wrote again to the Respondent's solicitors requesting return of the partnership's files (Production 1).

It is a matter of agreement that as at 10 January 2012 a number of the files which had been removed from the partnership's offices and in which the **Secondary Complainer was the nominated solicitor** had not been returned. The Secondary Complainer arranged for a list of these files to be prepared. That list is contained at Production 5.

Levy & McRae sent that list to the Respondent's solicitors seeking return of those files on 12 January 2012.

It is a matter of agreement that as at 27 January 2012 a number of the files which had been removed from the partnership's offices and in which the Secondary Complainer was the nominated solicitor, had not been returned. The Secondary Complainer arranged for a list of these files to be prepared. The Secondary Complainer instructed Levy & McRae to raise a Court of Session action to secure return of these files. The summons was served on 31 January with the list of outstanding files attached. (Production 6 and cf Production 22 which Alison Craig of the Legal Aid Board has confirmed is an accurate list of files where Simon Hutchison was the nominated solicitor as at 2 December 2011. That is a list of approximately 80 files.) It is a matter of agreement that following the service of the summons the files which had been listed in the summons were returned by on or around 29 March 2012.

It is a matter of agreement that at that time parties agreed to end the action, and agreed the partnership had been dissolved on 3 December 2011 which was the date that Simon Hutchison learned of the removal of the files. (Production 3 is a copy of the Court interlocutor confirming dissolution of partnership on 29 March 2012).

In the current matter, if there is any dispute that the partnership was dissolved on 3 December 2011 I would ask you to find that the Respondent's actions caused the partnership to be dissolved on that date. (See 2.5 below).

Summary on facts – credibility and reliability

In my submission the key facts in connection with the taking of the files are agreed. However where the Tribunal considers that facts relevant to the misconduct are in dispute, I ask you to prefer Mr Hutchison's version of events to those of Ms McLean. In connection with the taking of the files the actions of the parties are in sharp contrast. Ms McLean by her own admission took client files suddenly and without warning out of hours. When Mr Hutchison learned of the position he immediately sought legal advice. He took legal advice. He also contacted the Scottish Legal Complaints Commission and the Scottish Legal Aid Board to seek advice. I would submit that the actions of Mr Hutchison in the aftermath of discovering the files had been taken support his credibility and reliability in connection with the taking of the files. The actions of Ms McLean in suddenly and secretly taking the files call her credibility into question.

I would also submit that there is a substantial gap between the Respondent's claims about her motivation for removing the files and the position as borne out by the evidence. She gives various different reasons for removing the files which are contradicted by evidence. By way of example:-

- She maintained throughout her written answers that the removal of the files was only ever intended to be a temporary measure and that she had no intention to resign from the firm at that time. However prior to removing the files, on Friday 2 December, she sent an e-mail to the Law Society saying she had resigned from Hutchison McLean.

- She stated that she removed the files because she feared Mr Hutchison's sequestration but when she learned that the threat of sequestration has been lifted she did not return the files.
- She stated that she removed the files to better understand the finances of the firm but she had access to financial information which would give her a good understanding of the finances and she could have taken other steps to investigate the finances but by her own admission failed to do so.

2 Duties which applied to the Respondent and which she has breached

In the complaint I have set out the various duties which I submit have been breached in the circumstances. These can be broadly viewed as the professional duties of integrity generally expected of a solicitor, professional duties owed to clients, and professional duties of a partner when a partnership dissolves.

I will consider each duty in the order it appears in the complaint.

1. Trust and personal integrity (para 4.2 of the complaint)

The 2011 Practice Rules at B1 Standards of Conduct provide:-

1.2 You must be trustworthy and act honestly at all times so that your personal integrity is beyond question. In particular, you must not behave, whether in a professional capacity or otherwise, in a way which is fraudulent or deceitful."

In this matter the Respondent removed the majority of the partnership's files without any warning, notice or discussion with her fellow partner. She did so out of hours. Her partner had no knowledge of her intentions or actions until it was too late and the files had been removed.

I would submit that this is a clear breach of the duty to act in a trustworthy and honest manner. Indeed there is an element of deceit in the manner in which she arranged and executed the removal of the files out of hours. It was planned with the cooperation of solicitors in the firm of Marshall Wilson who gave her access to their offices to deliver files at around 9.45pm on the Friday night.

We have heard the Respondent's motivation for removing the files but in my submission her motivation is not relevant to the judgment that she has breached the duty which requires her to be trustworthy and act honestly **at all times** so that her personal integrity is beyond question.

She was not trustworthy and honest at all times. The fact of the removal of the files and the manner in which she executed the removal of files demonstrates a fundamental lack of integrity. There was an element of planning and deceit in her removal of the files without warning, when the office was empty and with the assistance of others.

In my submission the Respondent's claim that she removed the files in order to understand the financial position of the firm is not relevant to the question of misconduct. If you consider she did have concerns with the finances of the partnership – whether justified or not – that did not suspend her duty to be trustworthy and act with honesty. She failed in that duty.

2. Mutual trust and confidence (para 4.3)

The 2011 Rules also provide:-

"1.14.1 You must act with other regulated persons in a manner consistent with persons having ***mutual trust and confidence*** *in each other. You must not knowingly mislead other regulated persons or, where you have given your word, go back on it."*

For our purposes other regulated persons means other solicitors. The Respondent's conduct in removing the files from the partnership in which she was a partner, and without any warning to her fellow partner, is a fundamental failure to meet this duty. Her actions are completely contrary to the standard of conduct required by this duty and removed any possibility of mutual trust and confidence with her fellow partner.

3. Acting in clients best interests (para 4.6)

In the circumstances of this matter the Respondent had duties to clients which she breached at the time she removed the client files from the office.

The 2011 Practice Rules provide:-

"The interests of the client 1.4.1 You must act in the best interests of your clients subject to preserving your independence and complying with the law, these rules and the principles of good professional conduct.

1.4.2 You must not permit your own personal interests or those of the legal profession in general to influence your advice to or actings on behalf of clients."

The Respondent's conduct in removing the files demonstrates a fundamental failure to act in the best interests of her clients. We have heard from the Secondary Complainer that the removal of files created the risk of prejudice to clients whose criminal cases were calling in court during that time.

The Secondary Complainer gave evidence that the trial of Mr D which was scheduled to run on the Friday following the taking of the files (see Production 11.5) required to be postponed because he did not have the file taken by Ms McLean in good time to prepare. He was asked about his ability to represent clients at trial without the client file. He advised that "every summary trial requires preparation of some sort. There may be action to take. That all requires the file". He gave evidence that the absence of files created difficulties and that he advised Levy & McRae of the difficulties created by the absence of files. Levy and McRae wrote to the Respondent's solicitors on 20 December 2011 (Production 1) and 4 January 2012 (Production 17) setting out the potential prejudice to client interests as a result of Ms McLean's failure to return files. I would ask the Tribunal to rely on this evidence to find that there was a risk to client interests.

Beyond these specific risks, the Respondent must have known that the manner in which she removed the files from the office had the potential to risk prejudicing client interests either because her fellow partner would not have access to files or because the dispute between the Respondent and her fellow partner would impact on the progress of cases. In either event there was potential risk to clients. I will say more about that under my submission on misconduct below.

We have heard the Respondent's motivation for the removal of the files. She states that she was concerned that Mr Hutchison may be sequestrated but continued to hold files after she understood the risk of sequestration had been lifted. She gave no other reason why it was in clients' interests for the files to be removed. There was no

suggestion prior to the removal of the files that she had concerns with the advice or representation being provided to clients by her partner. She had failed to explain how the removal of client files to the offices of another law firm without their permission could have been in the clients' interests. She was concerned with the finances of the partnership. She was also concerned with her drawings. In removing the files she was placing her own interests and concerns above those of clients.

4. Failure to communicate with clients (para 4.9 and 4.10) and

In connection with client communication the Practice Rules 2011, at B1 Standards of Conduct, provide:-

"1.9.1 You must communicate effectively with your clients and others. This includes providing clients with any relevant information which you have and which is necessary to allow informed decisions to be made by clients. It also includes accounting to clients for funds passing through your hands. Information must be clear and comprehensive and, where necessary or appropriate, confirmed in writing.

1.9.2 You must advise your clients of any significant development in relation to their case or transaction and explain matters to the extent reasonably necessary to permit informed decisions by clients regarding the instructions which require to be given by them…."

The Respondent's evidence is that she decided suddenly on the Friday evening to remove files to Marshall Wilson's offices and that "I took as many files as she could…I grabbed whatever I could take into the car".

She had no discussions with clients before removing the files. She did not seek the permission or instructions of any client before removing their file. The Respondent removed client files without agreeing with her partner to obtain the necessary authority of clients in advance to do so. She failed to provide the partnership's clients with sufficient information in advance of her removal of the files – as required by the Law Society's guidance on dissolving partnerships – to allow clients to choose which solicitor would represent them going forward. Clients were not given the opportunity to make an informed decision. Instead the Respondent simply removed all client files without any discussion. Ms McLean's actions are a clear failure to comply with the duty to communicate with clients.

5. Professional duty to ensure proper arrangements made in connection with client files (para 4.12 and 4.13)

The Respondent's evidence is that she took 180 files on 2 December 2011 without notice or warning. In my submission her actions caused the partnership to be dissolved. Parties agreed this was a partnership at will entered into by Simon Hutchison and the Respondent in August 2010. The Partnership Act 1890 states that where there is no fixed term for a partnership that any partner can determine the partnership at any time by giving notice of his intention to dissolve (sections 26 and 32 of the Act). However there is clear authority that dissolution can be inferred although no notice has been served:-

"A dissolution of a partnership at will may be inferred from circumstances e.g. a quarrel, although no notice to dissolve may have been given." (see Lindley and Banks on Partnership para 24-25).

In my submission the actions of the Respondent in taking the files without notice, as discovered by Simon Hutchison on 3 December 2011, caused the partnership to be dissolved on that date.

In submitting that the Respondent's actions caused the partnership to be dissolved I also rely on the case of *Bothe v Amos* which concerned a husband and wife partnership. The wife left her husband and abandoned the business in August 1971. After that time she rendered no further services and contributed nothing to the business. The Court of Appeal held that by her conduct she had voluntarily renounced the partnership at that time.

The relevance of the question of dissolution is that partners have a duty to make proper arrangements in connection with client files when a partnership dissolves. The Law Society provides guidance on what is expected of partners where, as here, a partnership dissolves and there is no agreement between the partners on taking client files with them. The Guidance provides:-

"In the odd situation where there is no agreement between the partners the proper course is for the client to be advised of the position, told the new business addresses of all the relevant partners and asked to choose which, if any, to instruct to hold files

etc. ***All of the partners of the dissolving practice unit have a duty to ensure proper arrangements are made for the retention of all necessary files and documents****."*

The Respondent's actions in removing the partnership's files are a clear failure to comply with the duty to make proper arrangements for the retention of client files. There was no agreement with Mr Hutchison in connection with client files. Clients should have been given the option to choose which partner to instruct going forward. The actions of the Respondent denied clients that opportunity.

6. Professional duties in connection with legal aid in criminal cases (para 4.15-4.17)

The vast majority of the files removed from the office were criminal court cases funded by way of legal aid. As a result there were **additional duties** on the Respondent.

In each criminal court matter the Scottish Legal Aid Board has a record of a nominated solicitor who is responsible for that matter. It is admitted by the Respondent that she took a number of files where Simon Hutchison was the nominated solicitor. We have evidence to assist the Tribunal to understand in broad terms that the Respondent took a substantial number of files where Simon Hutchison was the nominated solicitor. The matters in which Simon Hutchison was the Nominated Solicitor were listed by Levy & McRae in the correspondence sent to the Respondent on 12 January 2012 and listed in the Court Summons served on 31 January 2012. (cf production 22 which Alison Craig of the Legal Aid Board stated was an accurate list of those cases where the Respondent was Nominated Solicitor as at 2 December 2011.)

The Criminal Legal Aid (Scotland) Regulations 1996 at Regulation 17 set out the only way in which the nominated solicitor in a case can be properly changed**:-**

"17.— Changes of solicitor

(2) Where an assisted person has required the solicitor nominated by him to cease to act for him, the solicitor shall notify the Board accordingly and shall supply the Board with a statement of the circumstances, so far as they are known to him, in which he was required to cease to act.

(3) Where an assisted person desires that a solicitor other than the solicitor presently nominated by him shall act for him, he shall apply to the Board for authority to nominate another specified solicitor to act for him, and shall inform the Board of the reason for his application; and the Board, if it is satisfied that there is good reason for the application may grant the application."

In connection with criminal legal aid cases, the Law Society's guidance to its Code of Conduct for Criminal Work dated May 2010 makes the position clear:-

"It seems clear from a plain construction of this Regulation that changes of agency where the client is legally aided in a criminal case ***can only take place if the Board gives the client authority*** *to nominate another specified solicitor. Until the Board gives its authority the client cannot instruct another solicitor unless he wishes to do so without the benefit of legal aid, which fact should be notified to the Board.*

Therefore the chronology of transfers of agency in criminal cases should be (1) the client approaches his proposed new solicitor to ascertain if he is willing to act; (2) client applies to Board for authority to transfer the agency; (3) Board grants authority; (4) client instructs new solicitor; (5) new solicitor serves mandate on previous solicitor.

The Board's authority to transfer must ante-date any mandate……."

In the current matter for those cases **where Simon Hutchison was the nominated solicitor** the Respondent removed and retained client files without first (a) obtaining clients instructions to change the nominated solicitor and (b) applying to the Board for authority to transfer the nominated solicitor to Ms McLean.

Instead Ms McLean simply removed files where Simon Hutchison was the nominated solicitor to the office of Marshall Wilson and the evidence shows she continued to hold many of these files even after Mr Hutchison requested their return. As a result of the Respondent's conduct in unilaterally removing client files she failed to follow the requirements for transfer. No applications were made for transfer of agency from Mr Hutchison to Ms McLean **before** the files were removed.

For the avoidance of doubt the **removal of files where Simon Hutchison was the nominated solicitor** in breach of the Criminal Legal Aid (Scotland) Regulations 1996 is an **additional breach** of professional duty by the Respondent.

As to the matters where the **Respondent was the nominated solicitor:** there is no dispute that as was said in *McKinstry v Council of the Law Society* 1997 SLT 191 that a nominated solicitor remains under a duty to act on behalf of the accused until a transfer of nominated solicitor is approved by the legal aid board. The criticism is not that the Respondent continued to act in those cases.

The criticism, made above at 2.1 and 2.2, is of her **removal all of the partnership's files** without warning. It submitted that this was a **breach of the professional duties of honesty, integrity, trust and confidence** that she owed to her partner**.** Her duties as a nominated solicitor have no bearing on the judgement that her actions in removing the files suddenly and without warning was in breach of these duties of honesty, integrity, trust and confidence. These actions also had the effect of breaching her duty not to place her clients' interests at risk (2.3 above).

7. Refusal or delay in return of files (para 4.19)

It is a matter of agreement that after discovering the removal of the files on 3 December 2011 the Secondary Complaint sought their return. Initially he sought return of all files. This was reduced to seeking return of those files where he was the nominated solicitor. The Respondent started to return files in December and the process of return of files carried on through to March 2012. The return of requested files was only completed once a Court of Session action had been raised against the Respondent.

In evidence the Respondent accepted that it would take "a day or two" to review the 180 files she had removed and establish who was the nominated solicitor in each case. She gave evidence that the legal aid certificate setting out whether she or Mr Hutchison was the nominated solicitor was kept at the front of each file. She was unable to explain why having removed the files she did not carry out a review to identify those files where she was the nominated solicitor and those matters where Simon Hutchison was the nominated solicitor.

In my submission the delay in the return of requested files – being the files **where Simon Hutchison was the nominated solicitor** – was unacceptable and exacerbated the original breaches of duty of honesty, integrity, trust and confidence, committed by the removal of all of the partnership's files suddenly and without warning. The delay in returning files also had the effect of exacerbating the breach of duty not to place her clients' interests at risk.

3 The Respondent's claims about the removal of the files

In her pleadings and in her oral evidence Ms McLean made a number of claims about her justification for removing virtually all of the partnership's files without warning.

1. She was concerned with the prospect of Mr Hutchison being sequestrated and acted in the interests of the partnership's clients (Answer 3.2)
2. She wanted to better understand the financial position of the firm (Answer 3.2).
3. She wanted to "bring Mr Hutchison to his senses" (Answer 3.4).

In the first instance in my view these claims are not relevant to the question of whether or not the Respondent is guilty of misconduct. They should not distract you from making the judgement that the Respondent owed professional duties which she breached by removing the partnership's files, and that in all the circumstances she is guilty of professional misconduct.

The essence of the misconduct is a lack of integrity, breach of trust with her partner, and failure to consider the best interests of clients. In my submission the duties to act with honesty and integrity are fundamental and apply at all times. They are not suspended in special circumstances.

In this case, if the Respondent had genuine concerns with the partnership then, after making reasonable attempts to address these, the appropriate action was to dissolve the partnership in a way which protected the clients' interests. That would be in accordance with the Law Society Guidance on dissolving partnerships which requires the dissolving partners to write to all clients advising of the position and giving the clients the choice of who to follow.

The Respondent did not take the appropriate action. Instead, she took the files without warning and without discussion with her partner. She took the files when the office was empty and with the assistance of the firm she was delivering the files to. This wholesale removal of files placed client interests at risk. In my submission her claims as to why she removed the files are not borne out by the evidence and are in any event not relevant.

1. Claim of acting in the interests of the partnership's clients

Ms McLean advised that one of the reasons she removed the files related to her concern that Mr Hutchison was under the threat of sequestration. She gave evidence that on the Thursday before the files were removed she learned of a £14,000 payment made by Mr Hutchison to HMRC. On the Friday she deduced that this related to Mr Hutchison's potential sequestration. In my submission even if it was the case that Mr Hutchison was facing sequestration that would not have justified the Respondent's actions in removing the files from the office out of ours and without any warning.

And even if the Tribunal accepted Ms McLean's position that the fear of sequestration was the reason for removing the files, she gave evidence that by the Wednesday of the following week she was aware that the HMRC action had not called as it was scheduled to. She accepted that at that stage she considered the threat of sequestration was lifted. However she did not return the files to the office at that time. And yet she admitted that she had no reason for continuing to hold the files.

In my submission, it was clear from the evidence that the interests of clients of the firm were placed at risk by the Respondent's actions in removing the files.

However I would also ask the Tribunal to consider the broader point which is that in removing the files in the way that she did the Respondent must have understood that this would give rise to a potential dispute with her partner, and that that dispute had the potential to harm the interests of clients of the firm. In my submission the fact that Ms McLean's actions created **potential** risk to clients is sufficient to establish that the removal of the files was misconduct. This is established in the case of Law Society v Michie which I will refer to in my submission on misconduct below.

2. Respondent wanted to understand the financial position of the firm

In my submission **whatever the financial performance of the firm and the reasons for that, there was no evidence from the Respondent to demonstrate that it was necessary to remove the entire cohort of files from the office to understand the financial position**. Indeed the Respondent did not make it clear how the wholesale removal of the partnership's files was going to assist her to understand the financial position. She made reference to "going through everything" but was no clearer than that on what a review of the files would reveal. In my submission she was similarly unconvincing on why the files required to be **removed from the office** to carry out the review. She made reference to needing peace to review the files and explained that was the reason for their removal to Marshall Wilson's offices on the Friday night. However if peace and quiet was what she was looking for there was nothing to stop her going into the Hutchison McLean office over that weekend to review the files. Or indeed to review files during one of the many occasions when Mr Hutchison, on her evidence, was not in the office.

The Respondent's position was that she needed the files to understand the financial position of the firm. However there was evidence that she had access to financial information. The Respondent gave evidence that the cashier advised her of payments being made to Mr Hutchison's former wife and his current partner. On that occasion she had a copy of a bank statement and challenged Mr Hutchison. This evidence demonstrates two points – (1) the cashier was able to draw concerns with finances to the Respondent's attention and (2) the Respondent had access to bank statements, as Mr Hutchison maintained in his evidence. She knew that the firm's overdraft was £35,000 and that it was "maxed out". She was able to access mini trial balances showing the financial position of the firm in the period July to October 2011 **prior** to taking the files. She also accepted that she was in a position to take further direct steps to investigate the financial position of the firm but could give no explanation as to why she failed to do so. For example she accepted she had access to the firm's computerised ledger but failed to take steps to review this.

The Respondent already had access to financial information about the firm and if she genuinely wanted to better understand the financial state of the firm she could have taken further steps to do so. In these circumstances I would ask you to reject the claim that she required to remove 180 of the partnership's files on a Friday night and

without her partner's knowledge in order to understand the financial position of the firm.

And of course the telephone call and e-mail to the Law Society on Friday, 2 December casts severe doubt on the credibility of the claim that the Respondent was removing the files to understand the financial position. The Respondent wrote to the Law Society to advise that she ceased to be a partner at Hutchison McLean that day. And that from the following Monday she would be working with the Wilson Law Group.

3. The removal of the files was intended to "bring Mr Hutchison to his senses"

Again this claim in the Respondent's pleadings is in contrast to the e-mail of 2 December which shows that the Respondent considered that she had ceased to be a partner with Hutchison Law at that date and would commence work with Marshall Wilson from 5 December. That is consistent with the fact that the files were immediately taken by the Respondent to the offices of Marshall Wilson, from where she began working the following week. And we know that on 7 December she was writing to clients of Hutchison McLean to advise she was now working with Marshall Wilson. In my submission this evidence demonstrates that the Respondent's claim that the removal of files was temporary and to bring Mr Hutchison to his senses is not credible.

The real reason for the removal of the files

In my submission the evidence supports a different reason for the removal of the files. The evidence that I rely on is as follows:-

- On the Friday afternoon she spoke with a director of the law firm Marshall Wilson – Brian Travers
- On the Friday afternoon she spoke with the Law Society and advised that she was leaving the firm of Hutchison McLean
- On the Friday evening at 6.50pm the Respondent sent an e-mail to the Law Society confirming the position (production 20) "Further to my telephone conversation today I can advise that as at 5th December 2011 I will be working with Marshall Wilson Law

Group, 2 High Street, Falkirk. I will cease to be a partner of Hutchison McLean Solicitors as at the 2nd December 2011…."

- On the Friday evening the Respondent proceeded to remove approx. 180 files (of approx. 200 open files) of the partnership of Hutchison McLean to the offices of Marshall Wilson – "I took as many files as I could…I grabbed what could be taken into the car…"
- She was given access to Marshall Wilson's offices by another director of Marshall Wilson (Ms V) at around 9.45pm
- Directors of Marshall Wilson had agreed in advance to the Respondent bringing the Hutchison McLean files to the Marshal Wilson offices
- The Respondent's removed the files without giving any warning or having any discussion with Simon Hutchison
- On the following Wednesday 7 December the Respondent sent a letter to client of Hutchison McLean advising "Please be advised that I am no longer with Hutchison McLean Solicitors and I am now located within the offices of Marshall Wilson Law Group Limited. I can now be contacted using the details below [the Marshall Wilson office details] or on my mobile and should you require any assistance in the future, please do not hesitate to contact me."

In my submission this evidence clearly supports the conclusion that on the Friday the Respondent made the decision to leave Hutchison McLean. Therefore in my submission the Respondent's claims in connection with the taking of the files are not supported by the evidence before the Tribunal.

However even if the Tribunal does not agree with me and considers that Ms McLean's claims are supported by evidence, in my submission **these claims are not relevant to the question of misconduct**, and should not distract you from a finding that she is guilty of professional misconduct as a result of the breach of the duties I have identified at heading 2 above.

4 The breach of duties amounts to professional misconduct

In my submission the removal of the partnership's files suddenly and without warning or discussion from the partnership's office and, separately the subsequent refusal or delay in returning files where Simon Hutchison was the nominated solicitor, amounts to professional misconduct.

Complaint against Paul Jardine and Gordon Phillips – removal of the files

In this case the two respondents were partners in a partnership together with a third partner, Elizabeth Watt. The partnership was called Guild & Guild WS. In that matter Mrs Watt had been a partner in the firm for a number of years. The two respondents had joined the firm as trainees and had been assumed as salaried partners in 2001 and 2004. There was no written partnership agreement between the three partners.

On 31 July 2006 the respondents delivered a letter to the offices of the partnership giving notice of dissolution of the partnership "from today's date".

The respondents, while still partners in the partnership, removed documentation, including files, from the partnership's offices. They had no permission from Mrs Watt to do that. They had no permission from any of their clients to do that. Neither Mrs Watt nor the clients were consulted or in any other way advised of the proposed removal. **The conduct of the respondents in that matter mirrors the conduct of Ms McLean in this matter.**

In that case the Law Society Guidance on Mandates and the particular guidance on dissolution of partnerships was considered. The guidance is the same as applying in the current matter, namely that the proper course is for the client to be advised of the position, told the new business addresses of the relevant partners and asked to choose which, if any, to instruct to hold the files.

In that case there had been no discussion between the respondents and Mrs Watt in respect of the removal of the files. The question of removal of the files had never been raised by the respondents with Mrs Watt. The respondents simply removed the files. **That is the position in the current matter.**

The respondents were found guilty of misconduct for among other things:-

- failure to act in best interests of client and not permit personal interests influencing their actings (Rule 2 of the then Conduct Rules)
- failure to act honestly at all times and in such a way as to put their integrity beyond question (Rule 7 of the then Conduct Rules)

- failure to act with fellow solicitors in a manner consistent with persons having mutual trust and confidence in each other (Rule 9 of the then Conduct Rules)
- failure to follow the Law Society Guidance on mandates in the case of dissolution of partnerships

I am inviting the Tribunal to find Ms McLean guilty of misconduct for the same reasons in the present matter. Even if you do not consider the partnership was dissolved you should still find that Ms McLean is guilty of misconduct for the first three reasons given in Jardine and Philips.

Complaint against Mark Victor Michie – risk of prejudice is sufficient

I also rely on the case of Michie in support of a decision that the Respondent is guilty of professional misconduct. This case followed on from the decision in Jardine and Philips because Mark Michie was the solicitor who advised Jardine and Philips on their course of action. Specifically he advised:- "Walk away with as much as we can – strictly we should not take the client files without a client mandate, however I would and would immediately contact the clients and request that they give a mandate to the new firm". The Tribunal decided that the respondent was guilty of professional misconduct in respect of the advice given to Jardine and Philips.

The relevance of Michie for the current matter is on the question of prejudice. In Michie:-

"The Tribunal noted that the advice given by the Respondent ultimately led to a series of events taking place which ***gave rise to a huge potential for client to be put at risk****. There was a risk that large numbers of clients in the firm of Guild and Guild* ***could have found themselves caught up in a protracted legal dispute between the former partners through no fault of their own and that their transactions might not have able to be progressed because of this****. However, the Tribunal noted that due to the actions of Mr Jardine and Mr Phillips in acting quickly and returning all documentation the inconvenience to clients was in fact minimal."*

The important point here is that the Tribunal considered that action **which gave rise to risk** was sufficient for misconduct. It did not consider that clients' interests

required to actually be prejudiced for misconduct to follow. It was sufficient that the respondent's actions put clients' interests at risk. I would submit that this decision is of assistance to the Tribunal in the current matter.

I would submit that it would be sufficient to find that the actions of the Respondent, Ms McLean, had the potential to put clients' interests at risk to support a finding of professional misconduct. In my submission she must have appreciated that the removal of client files for ongoing court matters may have meant that clients, to borrow the language in Michie, "*could have found themselves caught up in a protracted legal dispute between the former partners through no fault of their own and that their [cases] might not have been able to be progressed because of this….*". In my submission Ms McLean's actions created this risk to clients' interests. Indeed Mr Hutchison required to raise a court action to secure recovery of client files.

I would submit that there is also specific evidence of client interests being prejudiced because Mr Hutchison gave evidence that in the first week after the removal of the files the Mr D trial required to be adjourned. However I submit that the case of Michie makes clear that you do not require to find there was actual prejudice to find misconduct – conduct giving rise to potential risk is sufficient.

Conclusion

I do not consider that the parties are in dispute on the key facts which establish that the Respondent is guilty of misconduct. Where the parties' evidence is in dispute, and you consider that evidence to be material, I have asked you to prefer Mr Hutchison's version of events.

In my submission you should find that Ms McLean left the partnership on the Friday evening, and that when Simon Hutchison learned of the removal of the files on Saturday the partnership was dissolved. However even if you do not consider that the partnership was dissolved on Saturday 3 December that should not impact on your judgement that Ms McLean is guilty of misconduct given the manner in which she removed the 180 files and her failure to return the files where Simon Hutchison was nominated solicitor.

Ms McLean removed the files suddenly and secretly. Ms McLean claimed she took the files to understand the financial position and that it was always intended to be a

temporary measure. The evidence demonstrates that she had access to financial information and that she retained files until compelled to return them by a court action. She admitted that even on her version of events from Wednesday 7 December she had no good reason to retain files but continued to do so with matters not resolving until March 2012.

The e-mail to the Law Society Registrar shows she was leaving to join Marshall Wilson. That is consistent with what happened next. She took the files to Marshall Wilson and started working from their offices the following week. She continues to work there.

When he discovered the files had been taken Mr Hutchison immediately sought legal advice. He contacted the SLCC and SLAB. He raised a court action to recover the files.

The facts which establish misconduct are proved or agreed.

In my submission none of the Respondent's claims about the financial position of the firm even if established should distract you from reaching the conclusion that she is guilty of misconduct in secretly taking the partnership's files to the offices of another law firm. If she had concerns with the partnership she should have taken the appropriate steps to dissolve the partnership in an orderly and responsible fashion. She could have served notice on the Secondary Complainer to do that and sought to reach agreement in relation to client representation.

If no agreement could be reached the proper action would have been to write to clients advising them of the position and giving them a choice on whom to instruct going forward. That is the Law Society's guidance and is also in the clients' best interests. Let the clients decide.

In arranging and executing a wholesale removal of the client files without warning, when the office was empty, and without obtaining the permission of clients to do so in advance, the Respondent is guilty of professional misconduct.

In submitting that the Respondent is guilty of professional misconduct I have considered various rules the purpose of which is to:-

- Ensure that solicitors act with integrity and that there is mutual trust between solicitors
- Ensure that solicitors act in their clients' best interests and put their clients' interests before their own
- Ensure that when partnerships break down that partners act responsibly, sensibly and appropriately with one another and with clients

These rules are in place precisely to protect against the type of behaviour seen by Ms McLean in this matter. If all unhappy or concerned partners secretly removed files to another firm as Ms McLean has here that would have a serious and detrimental impact on clients and the profession.

I ask you to find the Sharp test met, and the Respondent guilty of misconduct for the reasons I have given, and in accordance with para 5.1 of the Complaint.

Mr Marshall made additional oral submissions. He indicated that the manner in which the Respondent removed the files and the delay in returning the files where Mr Hutchinson was the nominated solicitor amounted to professional misconduct. He pointed out that certain facts were agreed:-

1. That the Respondent contacted the Law Society on the Friday to say that she had resigned and that she was now working for Marshall Wilson.
2. She removed the files secretly and with no warning.
3. She took the files to Marshall Wilson late in the evening.
4. She wrote to a client the following Wednesday saying that she was now with the firm of Marshall Wilson.
5. She had no good reason to hold onto the files where Mr Hutchinson was the nominated solicitor after she learnt that his sequestration was not to proceed on 7 December.
6. She delayed in returning all the files until after a court action had been raised.

Mr Marshall stated that the Respondent had given evidence to suggest her reasons for taking the files but the reasons given did not accord with the evidence. The Respondent stated that she intended to take the files as a temporary measure and had not intended to resign which was in conflict with the email that she sent to the Law

Society. She stated that she needed the files to find out the financial position of the firm. However Mr Marshall pointed out that the Respondent had access to information with regard to the finances of the firm and also had admitted that she did not acquire all the information that she could have in this regard.

In connection with clients' interests, she did not return the files even once she knew the sequestration had been lifted. Mr Marshall submitted that even if the Tribunal accepted the Respondent's reasons, her conduct still amounted to professional misconduct because of the manner in which she removed the files. He indicated that this demonstrated dishonesty and a lack of integrity and a lack of concern with regard to clients' interests which put clients at a potential risk. It was also a breach of the obligation to have mutual trust and confidence between fellow professionals.

He referred to the Findings against Mr Michie and the Findings against Jardine and Phillips. Mr Marshall's submission was that the Respondent's reasons were more by way of mitigation. He emphasised that in this case there were additional elements being a breach of the Law Society's guidance on dealing with clients' files where partnerships terminated and a breach of the Legal Aid Rules.

In response to a question from the Chairman, Mr Marshall stated that taking 180 files late at night and not telling her partner without clients' authority put her integrity in question. The Chairman put a scenario to Mr Marshall that if a partner acts in a way that has already breached the trust and confidence, what should the other partner do? The Chairman enquired as to whether this would mean that it was ok for the other partner to breach the mutual trust and confidence obligation as the mutual trust and confidence had already gone. The Chairman put it to Mr Marshall that in this case it appeared to be a situation where Mr Hutchinson had changed the credit card statement address, had made an agreement to pay his wife without the consent of the other partner etc which were destructive of the trust and confidence of the partnership. He enquired of Mr Marshall as to how this situation would change how the other partner reacted. Mr Marshall stated that even taking account of all this, it did not remove the duty which applied to the Respondent. He stated that it was not a race to the bottom and that if a partner lacked honesty and integrity, this did not suspend the other partner's duties.

In respect of the Respondent's submissions, Mr Marshall stated that the Respondent's conduct demonstrated a lack of integrity. He pointed that the Sharp quote included in the Respondent's submissions missed out *"including the part played by the individual solicitor in question."*

In this case, the part played by the Respondent was at the heart of the matter. Mr Marshall stated that misconduct required *mens rea* or recklessness. In this case the Respondent recklessly took the files without thinking about the risk to clients and then continued to act recklessly by the delay in returning the files.

Mr Marshall stated that he was relying on the case of Jardine and Phillips. The Chairman pointed out that there was a difference between fixed share partners who had no right to claim an entitlement to the file and full equity partners. Mr Marshall stated that his submissions did not rely on ownership. Mr Marshall stated that whether or not there was mutuality, a solicitor must be honest and trustworthy at all times. He indicated that he did not accept that the need to act with others with mutual trust and confidence was suspended by the actions of the other party.

Mr Marshall quoted from the case of Law Society-v-Michie, where the Tribunal stated that the actions of the Respondent in that case gave rise to a huge potential for clients to be put at risk and he submitted that it was similar in this case.

SUBMISSIONS FOR THE RESPONDENT

Mr Neilson referred to his written note of argument as undernoted.

The Complaint

The complaint in this case alleges that the Respondent has been guilty of acts or omissions which, singly or *in cumulo*, constitute professional misconduct on her part within the meaning of the Solicitors (Scotland) Act 1980 (as amended), Section 53. in particular it is averred that as a consequence of the Respondent's actions in removing files from the office of the firm of Hutchison McLean she is guilty of professional misconduct in respect that:-

- without prior notice or discussion with the Secondary Complainer in breach of Practice Rule B1 1.2 and B1 1.14.1

- when she was not entitled to do so, either because the Secondary Complainer was the Nominated Solicitor, or because she had failed to obtain the necessary authority of the client to do so in breach of Practice Rule B1 1.4.2 and 1.4.2

- without obtaining the necessary authority of clients to do so in breach of Practice Rule B1 1.9.1 and 1.9.2

- without ensuring proper arrangements were made for the retention of all client files and documents as required by the Law Society Guidance on Mandates in connection with Practice Rule B3

- otherwise than in accordance with Regulation 17 of the Criminal Legal Aid (Scotland) Regulations 1996 and Article 7 of the Law Society's Code of Conduct for Criminal Work dated May 2010 and

- her subsequent refusal or delay to return the files

The Rules and Regulations said to have been breached are in the following terms:-

The Law Society of Scotland Practice Rules 2011, at B1 Standards of Conduct, provide:-

"Trust and personal integrity
1.2 You must be trustworthy and act honestly at all times so that your personal integrity is beyond question. In particular, you must not behave, whether in a professional capacity or otherwise, in a way which is fraudulent or deceitful."
Separately, the Law Society of Scotland Practice Rules 2011, at B1 Standards of Conduct, provide:-
"1.14.1 You must act with other regulated persons in a manner consistent with persons having mutual trust and confidence in each other. You must not knowingly mislead other regulated persons or, where you have given your word, go back on it." [Emphasis added]
Failure to act in best interests of client
The Law Society of Scotland Practice Rules 2011, at B1 Standards of Conduct, provide:-
"The interests of the client12

1.4.1 You must act in the best interests of your clients subject to preserving your independence and complying with the law, these rules and the principles of good professional conduct.

1.4.2 You must not permit your own personal interests or those of the legal profession in general to influence your advice to or actings on behalf of clients.

The Law Society of Scotland Practice Rules 2011, at B3 Advertising and Promotion provide:

"3.2 You shall not make a direct or indirect approach whether verbal or written to any person whom you know or ought reasonably to know to be the client of another regulated person with the intention to solicit business from that person." [Emphasis added]

Failure to comply with requirements for transfer of legally aided matters

The Criminal Legal Aid (Scotland) Regulations 1996 at Regulation 17 provide:-

"17.— Changes of solicitor

(2) Where an assisted person has required the solicitor nominated by him to cease to act for him, the solicitor shall notify the Board accordingly and shall supply the Board with a statement of the circumstances, so far as they are known to him, in which he was required to cease to act.

(3) Where an assisted person desires that a solicitor other than the solicitor presently nominated by him shall act for him, he shall apply to the Board for authority to nominate another specified solicitor to act for him, and shall inform the Board of the reason for his application; and the Board, if it is satisfied that there is good reason for the application may grant the application."

The Law Society's Code of Conduct for Criminal Work dated May 2010 provides at Article 7:-

"Article 7-Legal Aid Mandates

(7) All legal aid mandates requesting the transfer of papers and legal aid relating to a criminal matter shall be completed and executed by the assisted person in the form agreed by the Scottish Legal Aid Board and the Law Society of Scotland.

GUIDANCE NOTE14

The matter is governed by the Criminal Legal Aid (Scotland) Regulations 1996, paragraph 17(3), which states "where an assisted person desires that a solicitor, other than the solicitor presently nominated by him shall act for him, he shall apply to the Board for authority to nominate another specified solicitor to act for him and shall inform the Board of the reason for his application; and the Board, if it is satisfied that there is good reason for the application, may grant the application.

It seems clear from a plain construction of this Regulation that changes of agency where the client is legally aided in a criminal case can only take place if the Board gives the client authority to nominate another specified solicitor. Until the Board gives its authority the client

cannot instruct another solicitor unless he wishes to do so without the benefit of legal aid, which fact should be notified to the Board.

Therefore the chronology of transfers of agency in criminal cases should be (1) the client approaches his proposed new solicitor to ascertain if he is willing to act; (2) client applies to Board for authority to transfer the agency; (3) Board grants authority; (4) client instructs new solicitor; (5) new solicitor serves mandate on previous solicitor.
The Board's authority to transfer must ante-date……."

The Law Society Guidance related to the Rule B3, contains the following specific guidance relating to Mandates:-
"Obtaining Mandates:
Since you cannot approach another solicitor's client other than as part of a general circulation, mailshot or advert, the initial approach must come from the client. The exception to this, the situation of practice units breaking up, is considered below. There may be a variety of reasons why a client may wish to change solicitors….
Dissolution of Practice Units:
Occasionally a practice unit may be dissolved completely with various partners going in various directions. If the practice unit ceases to exist then it can only be the personal relationship between an individual partner and the client which is important. In most cases arrangements would be made for each partner to take certain files etc. and the client would be advised of this and given an opportunity to instruct otherwise.
In the odd situation where there is no agreement between the partners the proper course is for the client to be advised of the position, told the new business addresses of all the relevant partners and asked to choose which, if any, to instruct to hold files etc. All of the partners of the dissolving practice unit have a duty to ensure proper arrangements are made for the retention of all necessary files and documents."

The Law - The Standard of proof.
It is established that professional misconduct requires to be proved beyond reasonable doubt. (see S. v B, unreported decision of the Court of Session 25/2/1981).
The test.
In Sharp v Council of the Law Society of Scotland, 1984 S.C. 129 Lord President Emslie opined that:-

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

> professional misconduct. Whether or not the conduct complained of is a breach of rules or some other actings or omissions the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is made."

The formula adopted by Lord Emslie resembles an English Court of Appeal decision on the meaning of misconduct in relation to a Doctor. In Allison v General Council of Medical Education and Registration [1884] 1 Q.B. 750 where it was said that:-

> "if [a particular] in the pursuit of his profession has done something with regard to it which would reasonably be regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the Disciplinary Committee to say that he had been guilty of professional misconduct".

It is submitted that there is little if any real difference between the two formulae. What is clear is that the Sharp dictum has been routinely followed.

What is clear is that for a solicitor's conduct to be categorised as professional misconduct it requires to be something that would be regarded by competent and reputable solicitors as being, in the whole circumstances, serious and reprehensible. It is clear to that the Tribunal in considering the whole circumstances must also consider the degree of culpability which ought properly to be attached to the solicitor complained against.

What is also clear is that for any particular conduct to be categorised as misconduct it requires to have about it a serious degree of moral turpitude.

It is submitted that looking at all the circumstances can entail looking at not just each charge in turn but, in certain circumstances also looking at some or all of the charges *in cumulo*. However for the aggregate of charges to amount to misconduct it has been held by the Tribunal that "by implication there requires to be some connection or *eiusdem generis* relationship before such charges can be taken together (see 1996 Annual Report of the Scottish Solicitors Discipline Tribunal).

In approaching its task it is relevant and now routine for the Tribunal to have regard to relevant Codes of Conduct and Practice Guidelines promulgated by the Law Society's Professional Practice Committee.

It is submitted that there is also room in arriving at its decision for the Tribunal to rely on members' experience, Intuition and commonsense.

The power to make Practise Rules is now contained in Section 34 of the Solicitors (Scotland Act 1980).
Subsection (4) thereof reads:-

> "If any solicitor fails to comply with any rule made under this section that failure may be treated as professional misconduct for the purposes of Part IV."

It is established that breach of Practice Rules ***may*** be professional misconduct. However it is also established by the Inner House that the statutory provision means precisely what it says. Thus the breach of even the most central or sacrosanct rule is ***never*** automatically misconduct. It only ***may*** be misconduct (see Sharp and the Council of the Law Society of Scotland v J, 1991 S.L.T. 662).

Accordingly it is submitted that the Discipline Tribunal has a discretion in every case as to whether the breach of a Practice Rule, even were it to be deemed flagrant, constitutes misconduct.

Accordingly in assessing whether conduct or a course of conduct amounts to professional misconduct it is not just a matter of whether a Practice Rule or Practice Rules of a Common Law Standard has been breached but also the degree of culpability of the solicitor's actings in all the circumstances.

Culpability

Given that the standard of proof is the criminal standard and given the severity of sanctions and consequences which can flow from a finding of professional misconduct and the seriousness with which solicitors view professional misconduct proceedings it is submitted that "culpable" should be treated analogously to its use in the criminal law. That is to say "culpable" should be taken to require a form of moral blameworthiness which is recognised by the law. As Lord President Emslie observed in Sharp, any failure in conduct has to be judged by the "gravity of the failure and consideration of the whole circumstances in which the failure occurred ….".

It is submitted that in determining whether a solicitor's degree of culpability is such as to drive a finding of professional misconduct the Discipline Tribunal has frequently focused on the honestly of the Respondent. Honesty it is submitted has both subjective and objective

elements as the Privy Council observed in Royal Brunei Airlines v Tan [1995] 2 A.C. 378 at p389:-

"[Honesty] … is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent, conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour"

Credibility and Liability

In my submission where their accounts differed in the evidence given the Respondent's evidence should be preferred over that of the Secondary Complainer.
The Respondent was impressive in her recollections and able to be precise including as to dates and times. She gave her evidence in a straight forward manner.

The Secondary complainer in contrast was in turns vague, imprecise, muddled and obfuscatory.

The facts
In addition to the matters agreed in the Joint Minute the Tribunal is invited to make the following findings in fact:-

1. The Respondent trained as a solicitor firstly with Messrs Russel and Aitken from May 2003 until November 2004 when her traineeship was assigned to Secondary Complainer. She qualified in June 2005. She worked with the Secondary Complainer as an assistant until March 2008 when she became an Associate until entering into partnership with him.

2. Parties entered into partnership in August 2010 by way of oral agreement under the partnership Hutchison McLean. The partnership office was located at 5 Manse Place

3. That the decision that the partnership had dissolved on 3rd December 2011 was a matter of retrospective agreement to that effect in terms of a Joint Minute entered into between the parties in the Court of Session action condescended upon by the complainers (in paragraph 3.16 of the Complaint).

4. The Respondent entered into a partnership with the Secondary Complainer in August 2010 by way of oral agreement. The partnership was given the name Hutchison McLean. The partnership office was located at 5 Manse Place, Falkirk ("the partnership's office").

5. Around March/April 2010 the Secondary Complainer invited the Respondent to enter into partnership with him. His stated position was that he was starting to wind down with a view to retiring in 10 years.

6. The Secondary Respondent put a value on the business of £400,000 and said he was looking to sell the Respondent a half share on the business at a price of £200,000. The Respondent was not prepared to proceed on that basis though negotiations between them continued. About 4 to 5 weeks into their discussions, the Secondary Complainer advised the Respondent that he was in financial trouble, was panicking about a debt owed to HM Revenue & Customs in respect of personal income tax.

7. The Respondent discovered that in fact there was a pending sequestration petition in respect of the Secondary Complainer before Falkirk Sheriff Court.

8. By then the Respondent was employed by the Secondary Complainer. She had a young child dependent on her and a new house with a significant mortgage that required paid.

9. The Secondary Complainer repeatedly emphasised that if there was not an injection of funds into the business upon which he could draw to meet his debts the firm would in all probability cease to trade.

10. The Respondent fearful that she would lose her employment and under pressure from the Secondary Complainer arranged borrowings with her bank in order to make a capital contribution to the firm upon her becoming a partner.

11. It was agreed that they would commence partnership on 1st August 2010. In September 2010.

12. With a benefit of a bank loan she made a capital contribution to the firm of £100,000. At the insistence of the Secondary Complainer that was paid from the Respondent's bank account to the HMRC of £77,000 and by the balance of £23,000 being transferred to the Secondary Complainer's bank account with Bank of Scotland.

13. As result of these transfers the Secondary Complainer's sequestration was avoided.

14. Respondent also agreed that during the currency of the partnership she would contribute from her profit share further capital on a monthly basis until a maximum of a further £100,000 had been paid**.**

15. It was agreed between the parties that they would share profits equally. It was initially agreed that the Respondent would take drawings of £4,000 with the Secondary Complainer drawing £5,000 per month, his additional £1,000 being taken as payments on account by the Respondent to the agreed additional agreed capital injection by the Respondent.

16. They also agreed that £2,000 per month for each of them would be set aside for the payment of personal taxation.

17. They also agreed that no personal expenditures would be put through the business and that the business monies would be used solely for business purposes.

18. In particular it was agreed that various mobile phones used by the Secondary Complainers son, daughter, wife and new partner would no longer be paid through the firm.

19. It was also agreed that the Secondary Complainer would no longer pay money on a monthly basis out of the firm to his wife.

20. He was at that time separated and in the course of divorce proceedings.

21. The Secondary Complainer assured her that no such payments were being made or would be made.

22. That was all untrue and those such payments continued to be made by the Secondary Complainers facts only discovered only later by the Respondent.

23. At all times the Secondary Complainer was the designated cash room partner.

24. From 1st August to November the firm was busy and the Respondent was receiving her drawings as agreed though monies were not being put aside for tax as agreed.

25. Without any prior warning on Christmas Day 2010 the Respondent noticed that her drawings had not been paid.

26. Upon phoning the Secondary Complainer he indicated that there were insufficient funds to pay.

27. Around the second week of January Respondents received drawings of £3,000. That reduced sum was not the subject of any discussion between the partners**.**

28. Similar pattern developed with the Secondary Complainer instructing the cashier from time to time as to what, if any drawing's, were to be paid out to the Respondent.

29. The Respondent repeatedly took this up with the Secondary Complainer

30. Agreed in or around June 2011 it came to the Respondent's attention that money was being paid out per month to one Ms A in the sum of £2,000. That later increased to £2,500.

31. Ms A was the Secondary Complainers then partner/fiancée. She did not work in the firm.

32. The Respondent challenged the Secondary Complainer about this and was assured that the money being paid to her was coming out of his drawings.

33. From July 2011 onwards the Respondents drawings were not paid timeously and were erratic in amount.

34. It was a matter of chance whether after payments to the Secondary Complainer and his Fiancée and wife there were sufficient funds to pay the firm's outlays including the staff salaries.

35. For the financial year 2010-2011 the firm accrued approximately £12,000 in bank charges.

36. Various cheques were not being met.

37. The Respondent continually sought to have the Secondary Complainer engage with her and give a detailed account of the firm's incomings and outgoings. She indicated that she wanted to more fully understand the financial position of the firm and for them to be in a position to agree if possible any cut backs or savings that might be made.

38. Over the next several months there was brought to the Respondents attention by the firms cashier that the Secondary Complainer was charging monies to his credit card and making Direct Debit/Standing Order for matters nothing to do with the firm's expenditure.

39. By way of example in August a car repair bill had been charged through the firm for a vehicle not used by either of the partners. These outgoings taken with the Secondary Complainer's drawings were grossly excessive compared with drawings agreed between the parties.

40. Insofar as they were paid Respondent received August drawings in September, September drawings in October and October drawings in November.

41. During all of this time the Respondent continued to press the Secondary Complainer for explanations and for a meeting at which matters could be properly explained by him and, hopefully resolved between them.

42. On 31st October 2011 the Secondary Complainer texted the Respondent to advise her that again her drawings would not be in her account. In response she indicated to him that she had had enough of his behaviour and obfuscation and on return from holiday she would be going through every receipt and payment to find out what money was coming in and where it was going.

43. On 7th November Upon returning from a 2 week holiday and seeking again to engage with the Secondary Complainer he continued to ignore and avoid her.

44. Around that time the firm's cashier and the Respondent discussed a credit card statement that had been misplaced but payment for which had come out of the firms account. It transpired that the missing statement had been redirected to the Secondary Complainer's home address.

45. On 29th November the Respondent finally had an opportunity of discussing matters with the Secondary Complainer. She indicated to him that matters could

not continue as they had been and that they required to go through the firms whole records and look to cut back.

46. He indicated that he had no intentions to cut back, that he was driving the cheapest car that he had ever driven and that she had to decide what she was going to do. At that time the firm's overdraft was again at its limit.

47. That was not mentioned by the Secondary Complainer. Nor did he say anything to the effect that her drawings would again not be getting paid. On Thursday 1st December Respondent discovered that nothing had been paid into her account by way of her drawings.

48. Just before 5pm that day the Secondary Complainer ran past the Respondent leaving the office and indicating that he was in trouble and had to do a transfer of funds before 5pm that evening. That news alarmed the Respondent.

49. On Friday 2nd December a message was received from HMRC at the office looking for the Secondary Complainer to respond to them by 4pm that evening and making reference to a fax that had been sent to him that morning.

50. That fax had confirmed that £14,000 had been transferred the previous evening to them and that on that basis court action would cease.

51. The Secondary Complainer at that time was subject to fresh sequestration proceedings by the HMRS which action had been continued to 7th December.

52. None of this had been disclosed by the Secondary Complainer to the Respondent. She was left to discover this herself.

53. It transpired that the sequestration petition was dismissed on 7th December.

54. Respondent also discovered around October 2011 that the firm had entered into a compromise agreement with Mrs B the Secondary Complainer's ex-wife.

55. The fact that this agreement had been entered into was brought to the Respondent's attention by the cashier.

56. Prior to that she knew nothing about it or about any liabilities incurred by the firm there under.

57. Upon discovering on Friday 2nd December the existence of these further sequestration proceedings the Respondent decided that in the interests of the

firm's clients, creditors and staff and in the light of the Secondary Complainer's failure to engage with her and his lack of disclosure of material information (including the fact of the fresh sequestration petition) that she would require to take measures to ascertain the true position of the firm and the position in regard to work in progress.

58. The Respondent had in mind the possible consequences for the clients of the firm and for her of the Secondary Complainer being sequestrated. She was aware that if sequestrated he would be unable by operation of the Law to practice as a solicitor unless and until allowed to do so by the Law Society subject to such controls/supervision as they might impose. She was concerned about her ability to cope in running the business and properly attending on her own to the affairs of the clients. She was worried about the financial impact on the firm and upon herself of his possible sequestration. She was worried about her ability, going forward to repay the business loan secured over her mother's house.

59. In the circumstances she wanted to better understand the financial position of the firm and to get a grasp of what work in progress there might be. She wanted to have a detailed understanding of all the clients' files and their state of preparation.

60. She was in a heightened emotional state crying, upset and confused as to what to do for the best. She suffered a measure of panic. On the afternoon of 2nd December the Respondent telephoned the Law Society to enquire as to whether payment had been received for her practicing certificate and asking where her practicing certificate was. She was told it had been sent out. At that time she felt she had had enough of working with Mr Hutchison and was minded to give it all up. That evening at around 6:50pm she sent an email to the Law Society advising that as at 5th December 2011 she would be working with Marshall Wilson Law Group and that she would cease to be a partner in Hutchison McLean on 2nd December. She had spoken to Mr C, a partner of Marshall Wilson who had agreed that she could use office space there as a temporary measure. Later that evening Mr C cautioned her not to do anything precipitant. That evening she removed a proximately 180 files from the partnership office.

61. The Respondent did not at that time intend to dissolve the partnership. She considered that dissolving the partnership might prove to be an option but it was not her preferred one. She harboured the hope that in removing the files she might bring the Secondary Complainer to his senses and encourage him to

engaged with her in relation to the financial position of the firm and to agree necessary cutbacks in expenditure.

62. The Court of Session action raised by the Secondary Complainer against the Respondent was settled by Joint Minute it being agreed for purposes of that action only that the partnership between the parties had dissolved as at 3rd December 2011.

63. Despite having become a partner in August 2010 the Respondent had no access to firm's banking records. The Respondent on several occasions pressed the Secondary Complainer to take steps to have the bank accounts under which the firm was operated changed from the Secondary Complainers Sole Trader Accounts to the name of the new firm and to have the Respondent as a signatory. In the event that did not happen until August 2011 even thereafter the Respondent was unable to directly access the firm's banking records.

64. On 3rd December 2011 and in the weeks following that the Secondary Complainer or others acting on his behalf contacted client's of the firm for whom the Respondent acted and was the Nominated Solicitor for Legal Aid purposes and procured mandates from them.

65. Clients were not prejudiced by any acting's of the respondent.

66. The Respondent throughout her time as a partner with the Secondary Complainer was very competent in her field and carried a heavy workload.

The foregoing suggested findings in fact are justified by the Pursuer's credible and reliable evidence and/or matters agreed in evidence by the Secondary Complainer.

The following facts are agreed by Joint Minute

67. On Friday 2 December 2011 the partnership had approximately 200 open client files. On Saturday 3 December the Respondent attended at the partnership's office and removed all but approximately 20 open client files. The Respondent did not give the Secondary Complainer any prior notice of her intention to remove the client files from the office.

68. The Respondent arranged to deliver the files removed from the partnership's office to the offices of Marshall Wilson Law Group Limited, 2 High Street, Falkirk on 3 December 2011.

69. The Secondary Complainer discovered that the files had been removed from the partnership's office on Saturday 3 December 2011.

70. The Secondary Complainer made attempts to contact the Respondent to request the return of the files to the partnership's office on 3 December. He instructed Levy & McRae solicitors to seek the recovery of the files removed by the Respondent. On 5 December Levy & McRae wrote to the Respondent seeking return of the files removed from the partnership's office. On 7 December 2011 Levy & McRae wrote to the Respondent's solicitors Fagans advising that the Respondent must return all files removed to the Secondary Complainer.

71. Document number 11 in the Law Society's List of Documents is a copy of pages from the Hutchison McLean court diary for the period 5 to 15 December 2011. These pages are a true and accurate note of the court appearances in which Hutchison McLean were instructed to appear during the period 5 to 15 December 2011. In the week commencing 5 December 2011 the Respondent met the Secondary Complainer at Falkirk Sheriff Court each day and handed over the files required for that day's court. Thereafter, from the week commencing 12 December 2011 onwards, the Respondent left bundles of files requested by the Secondary Complainer on the table in the agent's room at Falkirk Sheriff Court. In the course of December 2011 the Respondent arranged to return to the Secondary Complainer a number of the files removed from the partnership's office.

72. As at 20 December 2011 approximately 100 of the 180 files removed by the Respondent had been returned to the Secondary Complainer. On that date Levy & McRae wrote to the Respondent's solicitors, Fagans Solicitors, with a list of the files that had still to be returned at that time. That letter is lodged as Production 1 in the Law Society's List of Documents. The list of outstanding files attached to the letter is an accurate list of the files still to be returned by the Respondent as at 20 December 2011.

73. On 12 January 2012 the Respondent continued to hold a number of the files that had been removed from the partnership's offices and which the Secondary Complainer had requested to be returned. On that date Levy & McRae wrote to Fagans Solicitors by e-mail with an up to date list of those files where the Secondary Complainer was the nominated solicitor, where the Respondent had received mandates from those clients, and where she had failed to return the files as at 10 January 2012. That e-mail together with list of files is lodged as

Production 5 in the Law Society's List of Documents. The list of outstanding files attached to that e-mail is an accurate list of the files still to be returned by the Respondent as at 10 January 2012.

74. On 31 January 2012 the Respondent continued to hold a number of files that had been requested by the Secondary Complainer. On that date Levy & McRae served a Court Summons on the Respondent by way of Sheriff Officer. Appended to the Summons was a list of the files removed from the partnership's office by the Respondent and which the Respondent had failed to return to the Secondary Complainer as at 27 January 2012. A copy of the Court Summons together with the list of files is lodged as Production 6 in the Law Society's List of Documents. The list of outstanding files attached to the Summons is an accurate list of the files still to be returned by the Respondent as at 27 January 2012.

75. Following the service of the Court Summons the files listed in the appendix were returned by the Respondent to the Secondary Complainer over a number of weeks. The return of the outstanding files was complete by on or around 29 March 2012 at which time the Court of Session pronounced an interlocutor allowing a Joint Minute to be received in settlement of the action, and in terms thereof finding and declaring that as from 3 December 2011 the partnership of Hutchison McLean was dissolved.

Conclusion

I ask the Tribunal to consider that there is no evidence of dishonesty or of any lack of integrity on the Respondents part. She was very much the Junior Partner in the firm. The Secondary Complainer was the Cashroom Partner throughout. He substantially controlled the finances of the firm throughout, made all material decisions in relation to payments from the firm to himself, the Respondent and others. He ran the firm's finances without reference to or consideration for the Respondent. He failed to change the firms banking arrangements. He repeatedly failed to engage with the Respondent when she sought to discuss the firm's finances with him. He not once but twice came close to sequestration. At the time the partnership was entered into he was desperate for money and was safe from sequestration by the Respondent's injection of capital. The Respondent was left to discover for herself his second pending sequestration. He did not disclose that to her. That betrayed a lack of integrity on his part and was a failure calculated to induce a lack of trust in him on the part of the Respondent. It is my submission that in the whole circumstances even if certain rules were

breached the Sharp test is not made out in the whole circumstances. A young woman, a competent solicitor in her field with a heavy work load confronted with the circumstances that faced her in December 2011 may be thought to have made a misjudgement as to how she handled matters. However her acting's either singly or *in cumulo* have about them the degree of culpability or the taint of serious reprehensibility required to constitute professional misconduct.

Mr Neilson also made oral submissions. He pointed out that the finding by the Tribunal had to be made beyond reasonable doubt. He emphasised that if the Tribunal was caused to hesitate before deciding then this would be reasonable doubt. He stated that there had to be a degree of moral turpitude that was serious and reprehensible and that a breach of a rule would not necessarily amount to professional misconduct. He referred to Paterson & Ritchie at paragraph 1.11 which states that a finding of misconduct is of a quasi-criminal nature. Professional misconduct seems to require *mens rea*, recklessness or negligence. The Chairman suggested that an act may have consequences and if someone proceeded and did not take steps to guard against these consequences, it could be reckless. Mr Neilson stated that there required to be a wicked disregard for the consequences and that the Tribunal could only deduce that if they thought that the Respondent was wickedly reckless to the interests of her clients or dishonest in her dealings with Mr Hutchinson. Mr Neilson submitted that the Respondent was not fraudulent or deceitful. Mr Neilson stated that the reasons the Respondent took the files were that she wanted to bring Mr Hutchinson to his senses and get him to confront the financial difficulties of the firm and to assist her to get to grips with what the true financial position was. To do this she needed to get a grasp of what the work in progress was. This was because Mr Hutchinson was facing sequestration and she was aware of the impact that could have on her firm and the clients. It was quite proper for her to want to have a good look at the files in case the worst case scenario occurred. This did not display any lack of dishonesty or integrity.

In respect of the manner in which she took the files, she had told Mr Hutchinson that she was going to be going through everything if he would not talk to her. Mr Neilson suggested that the Tribunal would have to pause to ponder that the Respondent intended when she took the files to be tackling him and to see if she could save the

partnership. She was young and on a reasonable profit share and had invested heavily and there was a potential cost to her mother. She had to retain a source of repaying her mother's mortgage.

Mr Neilson stated that he would not go so far as to say that the requirement to act with mutual trust leaves no duty if the other partner does not act with the same trust. He submitted however that if the Tribunal considered that the Respondent had reason to consider that she lacked having mutual trust with Mr Hutchinson it was difficult to see how the Sharp Test could be met. If the Respondent had a lack of trust and confidence in Mr Hutchinson and this led to her breaching the rule, this could not be serious and reprehensible.

Mr Hutchinson generally failed over the months to confront the firm's financial difficulties. There was the agreement with his ex-wife, the credit card, not telling the Respondent about the sequestration, the cashier having to tell the Respondent about the things that Mr Hutchinson was paying, all in contravention of what they had agreed would occur. Mr Hutchinson did not dispute that he did not tell the Respondent of the Compromise Agreement or his pending sequestration. The Respondent had good cause not to have mutual trust and confidence in Mr Hutchinson and Mr Neilson suggested that her actions had to be measured against his deceit and a lack of mutual trust.

In response to a question from the Chairman, Mr Neilson stated that he did not concede that the removal of the files was deceitful. The Respondent intended to confront Mr Hutchinson with the files but he discovered this on the Saturday before she could do so. Mr Neilson stated that the files did not belong to Mr Hutchinson any more than they did to the Respondent. Mr Hutchinson had mandates signed up and this was not the proper course of action and was a breach of the rules and guidelines and Legal Aid Regulations. Mr Neilson stated that the Respondent was confronted with the unilateral action by Mr Hutchinson approaching clients in breach of the rules in connection with mandates which did not give the Respondent a chance to dissolve the partnership in accordance with the guidance.

The Chairman questioned whether it was the case that because of the paramount need

to act with integrity, solicitors must sacrifice business interests on the altar of professional integrity. Mr Marshall stated that the rules were there for a reason and if all unhappy partners acted the way the Respondent did, it would be detrimental to the reputation of the profession.

The Chairman pointed out that by the Wednesday, the sequestration action had been dismissed but the Respondent still held onto the files and the Chairman asked Mr Neilson to address why this did not amount to professional misconduct. Mr Neilson indicated that Mr Hutchinson had said in evidence that when he was asked for a particular file back it was delivered timeously. Mr Neilson stated that there was no evidence of prejudice to the clients. The Respondent tendered her resignation by 31 January 2012 but up until then she regarded herself as a partner in the firm.

In response to a question from the Chairman, Mr Neilson conceded that prior to this date the conduct which had occurred could only lead to the conclusion that the firm had been dissolved prior to 31 January but when looking at the Respondent's culpability, account had to be taken of the fact that she was still attempting to resolve matters without any real risk of prejudice to clients.

Mr Neilson stated that the case of Michie was distinguishable because the advice to act in breach of the Regulations was blatantly outrageous and could have involved clients in a dispute between partners. In the case of Jardine and Phillips they were acting solely with the view to protecting their own interests against the interests of another solicitor who was faultless and caused them no reason not to trust her.

Mr Neilson stated that risk of prejudice was only one element and that there was only one case of a client being prejudiced here. The Respondent always ensured that Mr Hutchinson had the files on time and therefore there was no prejudice to clients.

The Chairman enquired as to whether there was any evidence as to what the Respondent did after she had examined the files, Mr Neilson stated that the files almost prepared themselves. He also stated that Mr Hutchinson was looking for improperly mandated files and therefore there was a dispute between them with regard to what files ought to be going back to him.

In response to a question from the Chairman, Mr Neilson stated that it was not known exactly when the Respondent realised that it would be impossible to bring Mr Hutchinson to his senses and have the partnership continue. By 31 January 2012 she did know this.

In response to a further question from the Chairman, Mr Neilson stated that it was accepted that there was nothing between December 2011 and 31 January 2012 to show that the Respondent had discussions with Mr Hutchinson about the partnership continuing apart from the fact that there must have been discussions in connection with the Joint Minute which disposed of the Court of Session action. Mr Neilson stated that there was a meeting arranged between the Respondent and Mr Hutchinson for discussion on the Thursday but then Mr Hutchinson changed his mind and wanted all the files returned in terms of the solicitor's letter. Mr Neilson pointed out that the Respondent spoke to Mr Hutchinson on the Sunday to say that she had not resigned. Mr Neilson submitted that there were significant unusual features about the case because of the extraordinary conduct of the senior partner. This led to the Respondent taking extreme and ill-advised measures that could not amount to professional misconduct.

In response to a question from one of the Tribunal members, Mr Marshall stated that if a partner removed a file to review the work of one of his employees, because he had a duty of supervision, this would not be inconsistent with mutual trust and confidence. In this case it was the manner in which the Respondent removed the files, the fact that she told the Law Society she had resigned and then took the files to another solicitor's firm which was contrary to the duty to have mutual trust and confidence.

In response to a question from another Tribunal member, Mr Neilson accepted that there was no evidence that the Respondent made an individual assessment of the risk relating to each file removed. He however indicated that it could be inferred that clients were not likely to be prejudiced.

In response to a further question from the Chairman, Mr Neilson confirmed that after the Wednesday when the Respondent had had an opportunity to assess the work in

progress and knew that the sequestration action was not to continue, the only reason for keeping the files was to bring Mr Hutchinson to his senses.

DECISION

The Tribunal commenced its deliberations on 17 November, 2014 and concluded these on 18 December, 2014.

The Tribunal found the evidence of the Secondary Complainer to be evasive and lacking in credibility. On numerous occasions when asked questions, he indicated that he was unable to recall and the Tribunal could not accept that he would have no memory with regard to matters that should have been within his knowledge.

The Tribunal accordingly did not accept the Secondary Complainer's evidence unless it was confirmed by other primary evidence. Where the evidence of the Secondary Complainer differed with that of the Respondent, the Tribunal preferred the evidence of the Respondent whose evidence was mainly consistent with the answers lodged on her behalf.

The Tribunal was unable to determine when the partnership was dissolved as a matter of law. The agreement with regard to the date of 3rd December, 2011 was purely for the purposes of the Court action. The Respondent could not resign merely by telling the Law Society that she was to resign. The Tribunal found that as at 2 December, 2011 the Respondent was disorientated and concerned about her personal and professional future and was in an emotional state. The Tribunal accepted that an email was sent indicating her intention to resign but there was no communication to that effect made to her partner. The Tribunal was also not able to make a finding in fact on what the purpose of the £200,000 put into the business by the Respondent was i.e. was it a purchase price or capital contribution or part one and part the other.

On the basis of the Respondent's evidence, which was not contested, the Tribunal accepted that the Respondent and the Secondary Complainer agreed to have set aside £2,000 each for personal tax purposes but that this did not occur until March, 2011. The Respondent stated in her evidence that during one month, the Secondary

Complainer's drawings were £12,000. Although this was not put to the Secondary Complainer in cross examination there was no objection taken to the question and the Tribunal accepted this evidence. The Tribunal did not consider that it was likely that the Secondary Complainer would use the words "he was in trouble" and accordingly did not make this as a finding in fact. In connection with Article 3.6 of the Complaint, the Tribunal did not consider that there was satisfactory evidence to include this in the findings in fact. The Secondary Complainer accepted in his evidence that he could perhaps have been able to deal with the trials without the files as he had significant experience. From the evidence it appears that there was only one case that had to be adjourned. Having regard to the Tribunal's view of the Secondary Complainer's credibility, the Tribunal could not be satisfied that the reason for the adjournment of this trial was the lack of the client file.

The Tribunal made a finding in fact to the effect that the Secondary Complainer caused others to carry out an act calling on clients at their residences and presenting them with mandates in his favour to be signed without any indication that such clients could exercise their right to nominate the Respondent or any other solicitor to act. This is in breach of the Law Society's guidance on mandates on the dissolution of practice units particularly Rule B3 of the Standards of Conduct.

The Tribunal accepts that the Respondent thought when she removed the files that this would be temporary depending on the outcome of the sequestration proceedings against the Secondary Complainer.

The Tribunal notes that the Respondent held on to the files even after she knew that the sequestration of the Secondary Complainer was not going to happen. The Tribunal also accepts that Levy and Macrae sent letters to the Respondent's solicitor asking for the return of files. The Tribunal however was not satisfied beyond reasonable doubt, on the evidence, that the Respondent failed to return the files within a reasonable time in response to mandates. The Respondent's evidence was to the effect that when she received a mandate she implemented it. That also was the tenor of the Secondary Complainer's evidence

The Tribunal cannot find the Respondent's conduct in taking the files to be reckless given that if the Secondary Complainer had been sequestrated there might have been immediate difficulties in getting access to the office premises and the client files. The Tribunal accepts that the Respondent took the files covertly and without the knowledge of her partner but the Secondary Complainer by his actings had breached the duty to communicate with other members of the profession and was himself in breach of B1 of the Standards of Conduct and in particular Rule 1.14.1. In these circumstances the Tribunal was unwilling to find that the Respondent's action in taking the files was dishonest.

The Tribunal considered this to be a very exceptional case which is distinguishable from the cases of Jardine and Phillips and of Michie.

The Tribunal also consider, given that there was no act directly inconsistent with the Partnership continuing, that as an equity Partner, the Respondent had no lesser right to the files and the papers in the client's file that were the property of the firm. There may have been a risk to clients but this was appreciated, managed and controlled by the Respondent delivering up files where she knew there was a Court appearance and by her responding within a reasonable time to the mandates. The assertions in the Levy Macrae letters about the files being kept in defiance of mandates was not supported by the evidence.

The Tribunal wish to emphasise that it is not indicating that it is in order for solicitors to embark on a course of removing files from partnership offices either before or during the dissolution of a partnership. The Tribunal recognise that in terms of giving guidance, most solicitors will implement the Law Society guidance because the partnership dissolution, even if not amicable, will not be acrimonious. Where a partner through their conduct indicates that he is not prepared to be bound by his obligations as a partner and this destroys the required trust and confidence that must exist in a partnership, it is difficult to expect that the innocent partner should act with propriety to the benefit of the partner who acts improperly, provided always that the client's interests are protected and any real risk to clients is properly managed and controlled. Non-observation by solicitors of Law Society guidance will not automatically result in a finding of professional misconduct but any individual partner

contemplating removing files from an office in such a situation will remain at risk that his/her individual conduct will pass the Sharp Test and be found to be serious and reprehensible and to amount to professional misconduct.

In the whole circumstances of this particular case the Tribunal did not find that the Respondent's conduct was sufficiently serious and reprehensible to amount to professional misconduct. The Tribunal however found that the Respondent's conduct may amount to unsatisfactory professional conduct and accordingly remit the case in terms of Section 53ZA of the Solicitors (Scotland) Act 1980 to the Law Society of Scotland. The Tribunal would suggest that when the Law Society is considering the issue of whether the Respondent is guilty of unsatisfactory professional conduct, they may also wish to consider the Tribunal's findings in fact in relation to the actings of the Secondary Complainer.

The Tribunal invited written submissions from parties on expenses and publicity.

The Tribunal received written submissions from the Complainers and from the Respondent. The submissions from the Respondent asked for an award of expenses to be made against the Complainers and the Secondary Complainer. Accordingly a copy of the interim Findings were intimated to the Secondary Complainer who was asked for any submissions that he wished to make on expenses and publicity. The Secondary Complainer lodged written submissions on expenses.

The Tribunal reconvened on 4 June 2015 to hear from parties in connection with publicity and expenses. The Law Society were represented by Paul Marshall, Solicitor, Edinburgh. The Respondent was present and represented by Mr Neilson, Solicitor, Paisley. The Secondary Complainer had lodged written submissions but did not attend the hearing and was not represented.

SUBMISSIONS FOR THE COMPLAINERS

Mr Marshall referred to his written submissions:-

Expenses

The decision of *Baxendale-Walker v Law Society* 2008 1 WLR 426 considers the importance of the role of a solicitors' professional disciplinary tribunal such as the SSDT and the role of a professional regulator such as the Law Society of Scotland, in the brining of complaint of professional misconduct.

That decision makes clear that there are fundamental reasons as to why a professional body such as the Law Society is in a wholly different position to a party in ordinary litigation and that it is inappropriate for the traditional approach to the award of expenses which usually operates in litigation to be carried over into complaints brought by a professional body before a disciplinary tribunal. That decision makes clear that to apply the traditional litigation approach to expenses could serve to hinder the proper regulation of the profession.

At paragraphs 34, 38 and 39 of that decision the Court provides:-

"34 Our analysis must begin with the Solicitors Disciplinary Tribunal itself. This statutory tribunal is entrusted with ***wide and important disciplinary responsibilities for the profession****, and when deciding any application or complaint made to it, section 47(2) of the Solicitors Act 1974 undoubtedly vests it with a very wide costs discretion. An order that the Law Society itself should pay the costs of another party to disciplinary proceedings is neither prohibited nor expressly discouraged by section 47(2)(i) . That said, however, it is self-evident that when the Law Society is addressing the question whether to investigate possible professional misconduct, or whether there is sufficient evidence to justify a formal complaint to the tribunal,* ***the ambit of its responsibility is far greater than it would be for a litigant deciding whether to bring civil proceedings****.* ***Disciplinary proceedings supervise the proper***

discharge by solicitors of their professional obligations, and guard the public interest, *as the judgment in Bolton's case [1994] 1 WLR 512 makes clear, by ensuring that high professional standards are maintained, and, when necessary, vindicated. Although, as Mr Stewart maintained, it is true that the Law Society is not obliged to bring disciplinary proceedings, if it is to perform these functions and safeguard standards, the tribunal is dependent on the Law Society to bring properly justified complaints of professional misconduct to its attention. Accordingly,* ***the Law Society has an independent obligation of its own to ensure that the tribunal is enabled to fulfil its statutory responsibilities. The exercise of this regulatory function places the Law Society in a wholly different position to that of a party to ordinary civil litigation. The normal approach to costs decisions in such litigation—dealing with it very broadly, that properly incurred costs should follow the "event" and be paid by the unsuccessful party—would appear to have no direct application to disciplinary proceedings against a solicitor.***

38 In R (Gorlov) v Institute of Chartered Accountants in England and Wales [2001] ACD 393 , a panel of the Appeal Committee of the Institute of Chartered Accounts refused to award a chartered accountant the costs of disciplinary proceedings in which he was ultimately successful. Jackson J accepted that given the regulatory nature of the institute, a professional body, acting in the public interest, Mr Gorlov's success before the appeal panel was a factor in his favour, but not decisive. He identified the obligations vested in a professional body as "a factor which points against any automatic award of costs in disciplinary proceedings which fail". We need not address the eventual outcome of the proceedings in Gorlov's case which was fact specific.

39 In our judgment Jackson J was right to equate the responsibilities of the institute in Gorlov's case [2001] ACD 393 with the regulatory actions of ****437*** *the licensing authority in Booth's case [2000] COD 338 . As Bolton's case [1994] 1 WLR 512 demonstrates, identical, or virtually identical, considerations apply* ***when the Law Society is advancing the public interest and ensuring that cases of possible professional misconduct are properly investigated and, if appropriate, made the subject of formal complaint before the tribunal. Unless the complaint is improperly brought,*** *or, for example, proceeds as it did in Gorlov's case [2001] ACD 393 , as a "shambles from start to finish",* ***when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event.*** *The "event" is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow.* ***One crucial feature which should inform the tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage. Accordingly, Moses LJ's approach to this issue did not go further than the principles described in this judgment.*****"**

No question of expenses being awarded against the Law Society

In my submission the decision in Baxendale Walker makes clear that the Tribunal should not be contemplating any award of expenses against the Law Society.

There is no suggestion that the complaint was improperly brought – as the Tribunal notes the conduct of the Respondent may amount to unsatisfactory professional conduct. In my submission that is a decision which the Tribunal has arrived at having carefully considered the evidence before it, and having made judgements on the credibility and reliability of witnesses.

The outcome of the proceedings follows from those judgements. The role of the Law Society is to present a complaint and the relevant evidence for the Tribunal to consider. In those circumstances the Law Society was entirely justified in bringing the complaint against the Respondent.

In my submission it would be wholly inappropriate and indeed impractical for the Law Society to engage in an exercise of making fine judgements on the credibility and reliability of witnesses before a hearing has been convened and evidence given.

The Tribunal notes that this is a "very extraordinary" case where the credibility and reliability of the primary witnesses is key. In those circumstances in my submission the Law Society was entirely justified in bringing these proceedings to allow the Tribunal to weigh the evidence of the parties.

Expenses should be awarded in favour of the Law Society

In my submission the Tribunal should make an award of expenses in favour of the Law Society.

This case deals with extremely important matters for the profession in connection with the duties of personal integrity, mutual trust in the profession and client interests

where partners in that firm are in dispute. It was an important matter to bring before the Tribunal.

Crucially the Tribunal notes that the Respondent took the files "covertly and without knowledge of her partner". In those circumstances the Respondent's actions in the removal of the files caused an investigation and complaint to be brought. I have already noted the reasons why the Law Society was fully justified in bringing the complaint.

Having carefully assessed the evidence of the Respondent, the Tribunal considers that she may be guilty of unsatisfactory professional conduct. In the circumstances in my submission the complaint was properly brought, and was brought as a result of the covert actions of the Respondent in removing the files.

In making this submission the Law Society also relies on the decision of *Law Society v Allan Scott* (11 July 2014) where it was noted that the Respondent was before the Tribunal as a result of his own conduct and an award of expenses was made in favour of the Law Society.

In all the circumstances of the current matter the Law Society should be awarded the expenses of the hearing which commenced on 23 June 2014 and concluded with submissions on 28 November 2014.

Publicity

There is no reason to depart from the usual rule that publicity be given to the decision. The Tribunal may consider it appropriate to anonymise the identities of other parties beyond the Respondent and Secondary Complainer.

Mr Marshall orally emphasised that the Law Society had a statutory duty to prosecute cases and that Tribunal Judgements, which were published were a key resource and provided guidance for the profession. Mr Marshall stated that it was very important that the Law Society was not constrained in bringing cases to the Tribunal by a risk of expenses being awarded. Mr Marshall emphasised the quotes from Baxindale and Walker, as set out in his written submissions. Mr Marshall indicated that success was not the starting point as was made clear by Baxindale Walker. He indicated that in this case the Complaint was properly brought. Mr Marshall asked the Tribunal to award expenses against the Law Society and referred the Tribunal to paragraph 121 of the Interim Findings, where the Tribunal had indicated that any individual partner contemplating removal of files from an office in such a situation would remain at risk that his or her individual conduct would pass the Sharp Test. Mr Marshall accordingly submitted that the fact that the Respondent covertly removed the files gave rise to a risk that she would meet the Sharp Test and accordingly there was a proper basis for raising the Complaint and he asked for an award of expenses against the Respondent. Mr Marshall indicated that he had no further submissions to make in connection with publicity.

SUBMISSIONS FOR THE SECONDARY COMPLAINER

The Secondary Complainer adopts all the submissions on behalf of the Law Society that have been already tendered to the Tribunal and doesn't consider it necessary to repeat these herein.

It is submitted that the Complaint against Miss McLean was made in the first instance to the Scottish Legal Complaints Commission and they identified two areas of complaint. These were that the files belonging to the partnership and the clients thereof were taken without the knowledge of the Secondary Complainer and secondly that the Respondent did not return files when mandated to do so. It is submitted that these facts were accepted and found as facts by the Tribunal and is still an ongoing case in respect of unsatisfactory professional conduct, The Tribunal will remember that there were numerous other ways the Respondent could have dealt with any disputes in the Partnership but despite this, she chose to take the action she did.

In both these respects therefore the complaint originally lodged by the Secondary Complainer, endorsed by the Scottish Legal Complaints Commission and prosecuted by the Law Society of Scotland has been upheld and shown by the Tribunal's decision to be justified.

It is submitted that the Respondent's personal circumstances are completely irrelevant in the consideration of expenses. The Respondent's Agent mentions something about the Respondent's personal circumstances but doesn't mention what the Respondent's income is at present. That as stated is completely irrelevant to the question of award of expenses and is not something that the Tribunal should take into account.

The Secondary Complainer's complaint to the SLCC was endorsed by them and then endorsed by the Law Society of Scotland in that they prosecuted the Respondent. The Secondary Complainer is little more than a witness in these proceedings and became a Secondary Complainer on the advice and guidance of the Fiscal for the Law Society and his Solicitors Levy McRae. As already stated, it is submitted in any event that the Secondary Complainer did not "lose the case" and neither did the Secondary Complainer at any time "cause or materially contribute to the expenses of the litigation".

The Tribunal in any event will recall that several adjournments were the fault directly and entirely of the Respondent and/or her instructed Agent and there has already been an award of expenses in respect of these Hearings.

In conclusion the Secondary Complainer joins with the submission of the Law Society for expenses in favour of the Law Society and in favour therefore also of the Secondary Complainer.

SUBMISSIONS FOR THE RESPONDENT

Mr Neilson referred to his written submissions.

Expenses, as ever, are in the discretion of the Tribunal. That is in accordance with general principles of Scots Law in the matter of expenses. Reference is made to McLaren on expenses.

In chapter II paragraph 1 thereof under the heading "DISCRETION OF COURT" it is said that;-

"(1) *Generally*. – Expenses being merely accidental to a cause the terms of an award of expenses lie in the discretion of the Judge before whom the cause has been heard. That statement is made under footnoted reference to a range of decided cases.

In the same textbook at chapter VII under the heading "PRINCIPLE AND GENERAL RULE" it is stated that:-

"The old principle that the expenses of a successful party are not awarded against his successful (sic) opponent where the latter has acted reasonably and in good faith, but are only laid upon the latter as a penalty of his rash litigation has now been abandoned, and the principle upon which expenses are awarded is, that if any party is put to expense in vindicating his rights, he is entitled to recover it from the person by whom it was created, unless there is something in his own conduct that gives him the character of an improper litigant, in insisting on things which his title does not warrant."

That statement is also referenced in the footnotes to case law.

The paragraph continues:-

"As Lord President Robertson has said, "The principle upon which the Court proceeds in awarding expenses is that the cost of litigation should fall on him who has caused it. The general rule for applying this principle is that *costs follow the event*, the *ratio* being that the rights of parties are to be taken to have been all along such as the ultimate decree declares them to be, and that whosoever has resisted the vindication

of those rights, whether by action or by defence, is *prima facie* to blame. In some cases, however, the application of the general rule would not carry out the principle, and the Court has always, on cause shown, considered whether the conduct of the successful party, either during the litigation or in the matters giving rise to the litigation, has not either caused or contributed to bring about the law-suit".

That quotation too is referenced to case law.

Chapter VIII of the same publication under the heading "SUCCESS" starts with the proposition that:-

"A party who is successful and whose conduct is not open to adverse comment is entitled to his expenses as taxed according to the Table of Fees….. "

It is also said that "Success is a relative term, and great latitude is allowed in defining it".

It is submitted that on any view the respondent in the present case has been successful in this prosecution having been acquitted of professional misconduct.

The above statements of principle in relation to expenses are broadly consistent with the well known case of Baxendale-Walker –v- Law Society

An award of expenses against her would be disproportionate in its effect upon her given her acquittal.

The point is made in Baxendale-Walker is that the regulatory function of the Law Society puts it in a different position to that of an ordinary civil litigant. It is no doubt right that the Society's regulatory function is one of the many factors which the

Tribunal ought to take into account in the exercise of its discretion on the matter of expenses.

The general practice of the Tribunal on the matter of expenses is reflected in various recent Annual Reports where under the heading "Expenses" it is stated that:-

"Expenses are usually awarded to the successful party and include the expenses for the Tribunal".

In my submission the Tribunal is right in taking the approach that expenses in general should follow success. On any view in this case the respondent has been successful in being acquitted of all the charges of professional misconduct.

There are of course some cases in which the successful acquitted respondent nevertheless finds expenses awarded against hm. These cases still are rare and in my submission rightly so. Tribunal expenses awarded in the usual scale of solicitor and client paying are very significant and for many solicitors daunting in prospect. The prospect of a significant adverse award of expenses no doubt properly discourages the mounting of a frivolous defence to a complaint. But the Respondent's defence in the present case was of substance and mounting a defence was necessary for the vindication of her rights.

Whilst it cannot be said that it was unreasonable for the Law Society to bring the prosecution, nor can it be said that the respondent was before the Tribunal wholly as a result of her own conduct (as has been said in some decisions of the tribunal where the acquitted respondent is found liable in the Society's expenses).

As the Tribunal has heard the respondent was a young comparatively inexperienced woman in partnership with someone considerably senior to her. The complaint arose out of their partnership dispute. Without labouring the point it would be fair to say the Secondary Complainer does not come well out of the findings of the Tribunal as to his

credibility and reliability and, importantly, as to aspects of his conduct which caused a materially contributed to the actions of the respondent that led to this prosecution .

The Secondary Complainer elected to become such. He did so seeking to pursue compensation from the respondent. He was not obliged to conjoin himself to the prosecution and could have elected simply to leave it to the Law Society. He therefore is a party to the action. He of course does not share the statuary responsibilities of the Law Society and does not in my submission fall to be treated in a significantly different way from any other losing litigant in the matter of expenses.

Nelson –v- Nelson 1969 SLT323 is often cited as supporting an award of expenses against a co-defender who by his misconduct has caused or materially contributed to the expense of litigation. It is said that there is a strong basis for awarding expenses against such a co-defender. That of course was in the context of an adultery divorce case but the principle is sound enough, in my submission.

In the present case incidental expenses have already been awarded against the respondent and that will no doubt represent a significant burden to her on top of her own solicitor's fees.

The Tribunal is aware that she still has a significant personal business loan to pay arising out of her partnership with the Secondary – a loan secured on her mother's house. She is the main bread-winner in her family (her husband being in modest occupation as a Chef with Tesco. As the Tribunal also knows she and her husband have 1 child and a significant mortgage to pay.

It is accordingly my submission that there should be no further award of expenses against the respondent and that the Complainer and the Secondary Complainer should be found liable to the respondent in the expenses of the respondent jointly and severally 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 of £14.

Such a decision is consistent with the principles outlined above and takes due account of Baxendale-Walker.

It is open to the Tribunal as in any ordinary civil case to apportion expenses awarded as between complainers and my client is content to leave that to the discretion of the Tribunal.

Publicity

It is appreciated that whether a decision is given publicity is also a matter upon which the Tribunal has some discretion. It is appreciated too that there is a general inclination towards openness and transparency in the justice system of which this Tribunal forms part. Publicity therefore, of generally follows a finding. The usual practice is for the publicity not to involve the naming of any party other than the respondent. It is submitted that given the particular findings in this case if there is to be publicity that publicity should then include the name of the Secondary Complainer. It would be artificial and inequitable for any publicity to do otherwise, in my submission.

This, as the Tribunal has observed, was an exceptional case on its particular facts. One good public policy reason for publication of Tribunal decisions is for the education and guidance of the profession. It may be thought that in that connection there is little to be gained in the public interest or of the profession for this particular decision to be given publicity. It however is to be given publicity which should include the Second Complainer's name.

Future procedure

The Tribunal reserved the question of expenses sought at an earlier stage by the Secondary Complainer. That was no doubt wise and appropriate and based on a preference that before determining expenses as between the Secondary Complainer and the respondent the outcome of the substance of the case should first be known.

It is my submission that given the determination by the Tribunal there should certainly by no award of incidental expenses in favour of the Secondary Complainer. However, that matter having been reserved, he should, I think, be given the opportunity to say whether he is insisting on his earlier motion.

Given the submission now made on behalf of the respondent in relation to expenses the Tribunal, I think, will want to give the Secondary Complainer an opportunity to make representation himself on the matter of expenses. It is my respectful submission he should be invited to provide written submissions in the first instance to which, if so advised advised myself and the Fiscal might respond in writing - with the matter being determined by the Tribunal without the need for a further hearing.

Mr Neilson added to his written submissions by referring the Tribunal to McLaren on expenses and submitted that there was no qualification in the statute which would prevent the Tribunal making an award of expenses as it saw fit, including making an award of expenses against the Law Society. Mr Neilson pointed out that the Tribunal had preferred the evidence of the Respondent to that of the Secondary Complainer, where their evidence differed. Mr Neilson submitted that the Respondent was not an improper litigant and referred the Tribunal to page 21 of McLaren on expenses. He submitted that it was the Secondary Complainer's conduct that had caused a lot of what had happened. Mr Neilson also referred the Tribunal to the terms of its own annual report where it stated that expenses would usually be awarded to the successful party. Mr Neilson then referred the Tribunal to the Tribunal cases of Williamson, Murray and Lingard. The Chairman pointed out that each case turned on its own facts and circumstances.

Mr Neilson stated that in this case the Secondary Complainer had made it clear that he wanted to be a Secondary Complainer and claim compensation. He chose to do this, there was no need for him to do it. Mr Neilson accepted that until there was a finding of professional misconduct the Secondary Complainer was putative. Mr Neilson however pointed out that the Secondary Complainer had sought expenses for one of the procedural hearings in respect of the matter at an early stage in the proceedings. The Chairman pointed out that it would be only after a finding of professional misconduct that the Secondary Complainer would be entitled to look for compensation.

Mr Marshall referred to the Tribunal to the Tribunal case of Allan, where he narrowly escaped misconduct, but there was an award of expenses made against him, despite the Tribunal finding him credible. Mr Marshall pointed out that in terms of Section 51 of the 1980 Act, the Law Society had power to bring the Complaint and the 2008 Tribunal Procedural Rules set out that the Law Society was responsible for keeping the Secondary Complainer up to date with progress of the proceedings and that the Law Society had complied with Rule 5 in this case. In terms of Rule 5b(v), there was a duty on the Law Society to include a note of the Secondary Complainer being entitled to appear at the hearing. Mr Marshall agreed with the Chairman that there was only one prosecutor.

DECISION ON PUBLICITY AND EXPENSES

The Tribunal had already made an award of expenses against the Respondent for the expenses of the Tribunal and the Complainers in respect of preparation for and attendance at the procedural hearings on 14 February 2014 and 26 May 2014. The Secondary Complainer had made a request for expenses in respect of the procedural hearing on 14 February 2014 which was reserved by the Tribunal. Mr Neilson had asked the Tribunal to make an award of expenses against the Secondary Complainer. The Tribunal Refuse as incompetent the Secondary Complainer's motion for expenses of the procedural hearing on 14 February 2014 and Mr Neilson's motion for expenses to be awarded against the Secondary Complainer as the Secondary Complainer is not a party to the proceedings. The Secondary Complainer only becomes a party to the proceedings if and when a finding of professional misconduct is made.

So far as expenses as between the Complainers and the Respondent, in this case, although the Respondent was found not guilty of professional misconduct the case has been remitted to the Law Society because the Tribunal consider that her conduct may amount to unsatisfactory professional conduct. The Respondent's conduct accordingly did result in the prosecution being brought to the Tribunal. However, given the whole circumstances of the case including the actings of the Secondary Complainer, the Tribunal considered that the best course of action was to make no finding of expenses due to or by any party. The Tribunal note the case of Baxendale Walker but it is not bound by it as it is an English case. Each case will be considered on its own circumstances which may include an award of expenses against the Law Society in appropriate circumstances.

The Tribunal saw no reason to depart from the usual practise of ordering publicity to include the name of the Respondent and the Secondary Complainer. There were no submissions made asking for any departure from the usual practise.

Alistair Cockburn

Chairman