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

FINDINGS

in Complaint

by

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

against

THOMAS H MURRAY, Canelecchia, Location 1, Molazzama, Brucciano, Lucca, 5020, Italy
Respondent

1. A Complaint dated 26 February 2014 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that, Thomas H Murray, Canelecchia, Location 1, Molazzama, Brucciano, Lucca 5020, Italy (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. The Complaint was made on behalf of the Secondary Complainer, Mrs Sarah P Young, Flat 12, 83 High Street, Tillicoultry.

3. In accordance with the Rules of the Tribunal, the Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent together with a motion requesting that a preliminary hearing be fixed to consider a number of preliminary issues.

4. Having considered the motion for the Respondent, the Tribunal ordered that the case call for a procedural hearing on 12 June 2014, in order to ascertain what procedure would be required to deal with the preliminary issues raised by the Respondent. At this hearing, the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented himself.

5. The Fiscal for the Law Society confirmed that he was in a position to deal with matters at a diet of debate and that he would not require to lead any evidence. The Respondent indicated that he considered he would require to lead evidence. In particular, he indicated he would require a recording of the BBC broadcast complained of to be available to play to the Tribunal in order to further his argument. Accordingly, a preliminary hearing was ordered to take place on 19 August 2014 at 12 Noon.

6. At the hearing on 19 August 2014, the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented himself. Detailed submissions were made on behalf of both parties in relation to preliminary matters raised by the Respondent. After carefully considering all submissions and the documentation lodged by parties, the Tribunal refused the Respondent's motions to dismiss the Complaint and ordered that a full hearing take place on 28 October 2014 at 10:30am. Separate Findings giving detailed reasons for the refusal were issued with an Interlocutor dated 19 August 2014.

7. At the hearing on 28 October 2014, the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and was represented by Campbell Deane, Solicitor, Glasgow. A Joint Minute between the parties and a Third Inventory of Productions for the Respondent were lodged with the Tribunal. No evidence was required to be led on behalf of the Complainers. The Respondent gave evidence. Submissions were made.

8. The Tribunal found the following facts established:-

8.1 The Respondent's date of birth is 13 December 1962. He was admitted as a Solicitor on 29 July 1992 and enrolled as a Solicitor in the Register of Solicitors in Scotland on 12 August 1992.

From 17 July 1995 until 18 May 2001 he practised as a sole practitioner as T H Murray, Solicitor, 13 Upper Craig, Stirling FK8 2DG.

8.2 By an Order of the Sheriff of Tayside, Central and Fife at Stirling, the Respondent was sequestrated with the effective date of the sequestration being 18 May 2001. Mr A of Company 1, Property 1 was appointed permanent Trustee on the Respondent's sequestrated Estates. As a result of his sequestration, the Complainers suspended the Respondent's Practising Certificate on 18 May 2001.

8.3 The Respondent was the subject of a Complaint to the Tribunal, case number DC/08/78. In respect of that Complaint, a continued Hearing of the evidence was fixed for 8 and 11 June 2010.

8.4 If a party before the Scottish Solicitors Discipline Tribunal wishes to formally cite a witness to attend the Tribunal, the appropriate procedure is contained in the Solicitors (Scotland) Act 1980 Schedule 4, paragraph 12. (hereinafter referred to as "the 1980 Act")

In terms of paragraph 12, the party requires to make a Petition to either the Court of Session or the Sheriff Court with the relevant jurisdiction and satisfy the Court that it would be proper to compel the giving of evidence by any witness. The Court may then grant Warrant for the Citation of witnesses, etc.

The party applying to the Court requires to lodge certified copies of various documents, including the Complaint and Answers.

8.5 On or about 26 March 2010, Mrs B, an official of the Accountant in Bankruptcy's Office, received a "Citation" from the Respondent in respect of her attendance as a witness on 11 June 2010. The "Citation" advised inter alia that failure to attend might result in a Warrant being issued for Mrs B's arrest and that she might render herself liable to a penalty not exceeding £250. On 8 April 2010 Mrs B issued correspondence to the Respondent regarding the Citation she received on 26 March 2010. The letter indicated that she had been advised by the Accountant in Bankruptcy's Solicitor that the Citation was not binding on her to attend the disciplinary Tribunal and that she would not be attending on the 11 June 2010.

On 15 April 2010 Mrs B received a letter from the Respondent dated 11 April 2010 referring to the "Citation" requiring her attendance as a witness and asking whether or not she was willing to attend the Hearing to give evidence on the Respondent's behalf. No mention was made in terms of said correspondence to any penalties as a consequence of failure to attend.

On 15 April 2010 Mrs B wrote to the Respondent in response to the Respondent's letter of 11 April 2010 in particular as to the matters on which her evidence would be required.

8.6 On or about 26 March 2010 the Law Society of Scotland received a "Citation" addressed to Mrs C, a former employee who was no longer in employment with the Law Society as at March 2010.

The "Citation" advised inter alia that should she fail to attend, a Warrant might be issued for Mrs C's arrest and she might render herself liable to a penalty not exceeding £250.

On 27 April 2010 the Law Society of Scotland received a letter from the Respondent addressed to Mrs C. Said letter referred to the "Citation" requiring her attendance as a witness and asked whether or not Mrs C was willing to attend a Hearing of the Tribunal on 11 June 2010. No mention was made in terms of said letter to any penalties as a consequence of failure to attend.

8.7 On or about 15 or 16 April 2010, two employees of the Law Society of Scotland, Mr D and Mrs E, received letters from the Respondent dated 11 April 2010. Neither Mr D nor Mrs E had received "Citations".

The letter sent by the Respondent to Mr D referred to a "Citation" requiring his attendance as a witness allegedly sent to Mr D and asked whether or not he was willing to attend the Hearing on 11 June 2010 to give evidence on the Respondent's behalf.

The letter sent to Mrs E by the Respondent referred to a "Citation" requiring her attendance as a witness which he said he had sent to her and outlined the evidence which he required her to speak to at the Tribunal Hearing. No mention was made in terms of either letter to any penalties as a consequence of failure to attend.

On 19 April 2010 Mr D wrote to the Respondent thanking his for his letter of 11 April and indicating he has not received any Citation. On 21 April 2010 Mrs E wrote to the Respondent thanking him for his letter and regretting to advise that she had not received the Citation referred to in his letter.

8.8 On or about 18 March 2010 Sarah P Young wrote to the Respondent in relation to the affairs of the former firm of T H Murray.

On 26 March 2010 Ms Young received a "Citation" which appeared to require her attendance at a Tribunal Hearing on 11 June. The "Citation" advised that a failure to attend might result in a Warrant being issued for her arrest and that she might render herself liable to a penalty not exceeding £250.

On 11 April 2010 the Respondent wrote to Mrs Young referring to this Citation sent to her requesting her attendance as a witness. No mention was contained in this said letter of any penalty for failure to attend.

8.9 On 29 April 2010 the Respondent submitted a Petition to Glasgow Sheriff Court in terms of paragraph 12 of Schedule 4 of the 1980 Act requesting a warrant to cite a number of witnesses, including those mentioned above.

8.10 The Complainers became aware of the "Citation" addressed to Mrs C, as averred above, and the letters received by the two employees, Mr D and Mrs E. They were advised by Mrs B that she had received a "Citation".

8.11 On 30 August 2011, the Complainers wrote to the Respondent enclosing a Summary of Complaint which advised,

The Law Society of Scotland complains that Thomas Hugh Murray may be guilty of professional misconduct or unsatisfactory professional misconduct in that he,

1. Issued purported, unsigned Citations ordering attendance as witnesses at a Hearing of the Scottish Solicitors Discipline Tribunal to Mrs B of the Accountant in Bankruptcy Office and Mrs C, formerly of the Society, to induce them to believe that he had the appropriate statutory authority to do so when, in truth, he had failed to make the appropriate applications under Rule 12 of Schedule 4 to the Solicitors (Scotland) Act 1980 and relevant Court Rules.

2. Issued signed letters to Mr D and Mrs E of the Society, making reference to Citations which he claimed to have sent them, ordering them to attend as witnesses at a Hearing of the Scottish Solicitors Discipline Tribunal when in truth he had not made the appropriate applications under the aforesaid Rule and Court Rules.

8.12 The Respondent replied on 27 September 2011. Inter alia he admitted sending out the "Citations" and to being aware of the provisions governing the Citation of witnesses to the Tribunal. He admitted sending the letters to Mr D and Mrs E.

8.13 In November 2010 the Scottish Legal Complaints Commission referred to the Complainers a complaint from Sarah Young in respect of the issue of a Witness "Citation" issued to her by the Respondent.

8.14 By letter dated 31 March 2011 and by email, the Complainers wrote to the Respondent advising that they were obliged to investigate the complaint and enclosing Summary of Complaint as agreed with Sarah Young as follows,

I, Mrs Sarah Young, wish to complain about Mr Thomas Murray, formerly of T H Murray, who has acted for me previously. The main points of my complaint are,

1. On 26 March 2010 I received a "Citation" to attend as a witness at Mr Murray's SSDT Tribunal Meeting on 11 June 2010, which I have since found out to be a Fabricated Citation. The Citation arrived in an envelope addressed to me in Mr Murray's handwriting. The Citation quotes that "I must attend the above Tribunal" and then goes on to quote in bold type under the heading "Failure to Attend" that, "It is very important that you attend Court and you should note that failure to do so may result in Warrant being granted for your Arrest". By referring to the SSDT Tribunal as a "Court" Mr Murray confirms the official nature of the Citation. The Citation continues with a reference to a potential further financial penalty, this could only be the result of a legal Citation with the authority of the Court and the SSDT. Mr Murray's Fabricated Citation was a copy of the Court of Session's legal form for the Citation of a Witness and included two legal penalties for non-compliance, however, Mr Murray did not specify himself as a Party Litigant but instead portrayed himself as the Principle to contact.

2. In citing me, Mr Murray dishonestly passed himself off as a practising solicitor, notwithstanding he has been suspended, does not hold a practising certificate and does not work with a firm of solicitors. The Citation states that Mr Murray is the Principle contact at 100 Pendeen Road, Glasgow, passing himself off as the Solicitor, which is the registered office of his limited company, Employment Matters.

8.15 On 15 April 2011 the Respondent replied. Inter alia he admitted sending a "Citation" to Sarah Young.

8.16 At its meeting held on 28 June 2012 the Professional Conduct Sub Committee considered the complaint made by Sarah Young and decided that the Respondent's conduct in respect of purporting to cite Sarah Young without having the appropriate warrant or authority of the court to do so could amount to professional misconduct. The Sub Committee noted that the Respondent was not identified as a solicitor on the face of the citation and decided to take no further action in relation to this part of the complaint.

9. After giving careful consideration to the established facts, Productions lodged for the Respondent and the submissions from both parties, the Tribunal found the Respondent not guilty of professional misconduct.

10. Thereafter, having heard further submissions from both parties in relation to expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

> Edinburgh 28 October 2014. The Tribunal in respect of the Complaint dated 26 February 2014 at the instance of the Council of the Law Society of Scotland against Thomas H Murray, Canelecchia, Location 1, Molazzama, Brucciano, Lucca 5020, Italy; Find the Respondent not guilty of professional misconduct; Make no award in relation to expenses; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent and may but has no need to include the names of anyone other than the Respondent.
>
> **(signed)**
>
> **Malcolm McPherson**
>
> **Vice Chairman**

11. 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

Malcolm McPherson
Vice Chairman

NOTE

When the Complaint called for the hearing on 28 October 2014 the Fiscal for the Complainers indicated that he wished to raise certain preliminary matters before proceeding with the hearing. Mr Lynch indicated that he had lodged a certificate with the Tribunal in terms of Rule 5(3)(vi) in relation to his dealings with the Secondary Complainer. He explained that he had been in touch with the Secondary Complainer and advised her by letter of 2 September 2014 of the date, place and time of the hearing and enquiring of her what evidence she would intend to lead. The Secondary Complainer had responded to that letter. He had not however forwarded to her a copy of the actual Notice of Hearing. Mr Lynch asked the Tribunal to exercise its discretion in terms of Rule 47 with regard to the failure to forward an actual copy of the Notice of Hearing to the Secondary Complainer.

Mr Lynch went on to confirm to the Tribunal that he had received a fax message from the Secondary Complainer indicating that she would not appear today. He had had a telephone conversation with the Secondary Complainer in which she had confirmed she had a chest infection. He indicated that the Secondary Complainer sounded unwell. The Secondary Complainer had intimated to him that if there was a finding of professional misconduct she wanted another hearing fixed for consideration of her claim for compensation.

The Fiscal lodged with the Tribunal a Joint Minute and indicated that it was not his intention to lead any evidence given the terms of the Joint Minute.

The solicitor for the Respondent confirmed that he had no objection to the preliminary matters raised by the Fiscal and proceeded to call the Respondent to give evidence, whilst confirming that he would be the only witness.

EVIDENCE OF THE RESPONDENT

The Respondent confirmed that his full name is Thomas Hugh Murray, that he lives at the address given in the Complaint and has resided in Italy since October 2001. His

current employment was as an estate agent and he had last practised as a solicitor some time in 2000.

He accepted that as a solicitor on the Roll he would be expected to know the rules governing the conduct of solicitors. He was referred to Production 3.1 and confirmed that this was an exchange of emails between himself and the Clerk to the Tribunal. He confirmed that his attention had been drawn to paragraph 12 of Schedule 4 to the 1980 Act. He confirmed that Production 3.5 was a copy of paragraph 12 and he accepted that he was bound to follow that.

Mr Murray referred back to Production 3.1, to an email from the Clerk to the Tribunal indicating that paragraph 12 sets out the procedure where there is difficulty in having witnesses attend the Tribunal. He confirmed that it was his understanding that the Schedule 4 procedure only required to be used if a witness had indicated he would not attend for any reason. At that stage he had no concerns whatsoever that any of his witnesses would be difficult.

Mr Murray confirmed that Production 3.2 was a letter from him dated 17 February 2010 which asked the Tribunal to cite witnesses for him. He had submitted a list of witnesses to the Tribunal and assumed that the Tribunal would cite the witnesses for him. He confirmed Production 3.3 was a letter from the Clerk to the Tribunal to him dated 19 February 2010 in which it was stated that paragraph 12 would normally only be employed when it is anticipated that a witness will be reluctant to attend. He thought that there had to be some method of contacting witnesses and establishing if they were going to attend and if they indicated that they would not attend then he would have used Schedule 4 of the 1980 Act. He did not anticipate that he would have any difficulty with the witnesses as the majority of the witnesses had previously been helpful to him. There were a couple of witnesses he had not had any real contact with. One of the witnesses had worked for the Office of the Accountant in Bankruptcy and had been involved in a number of procedures in relation to his case. In particular, she had been involved in procedures to do with Mr F, who was the person who had complained in the original Complaint proceedings before the Tribunal. Mr F had suggested that the Respondent had embezzled money from him resulting in the Respondent being charged by the police. Criminal proceedings had been stopped. Mr

F had gone on to make a claim in Mr Murray's bankruptcy for the same sums he had alleged to have been embezzled. When this claim was refused in the bankruptcy, Mr F had gone on to raise an action in Stirling Sheriff Court for the same sums. This action had resulted in a finding against Mr F saying that he had received all the funds due to him. Mr Murray considered this evidence significant showing that his firm had paid all sums due to Mr F but it also gave insight into Mr F's character in relation to his persistence in raising the proceedings in Stirling Sheriff Court. In relation to the witnesses from the Law Society the most useful witness would have been Mrs C who had given a statement during the criminal proceedings confirming that she had examined Mr Murray's firm's accounts and satisfied herself that all sums due to Mr F had been accounted for. He did not think any of these witnesses would be difficult given the information previously given to him.

Mr Murray was asked by his solicitor if at the time he sent the citations to the witnesses he was trying to follow paragraph 12 of the 1980 Act. Mr Murray responded that he was not doing so at that stage. He confirmed that he was aware of the rule at the time these items were sent but he was not attempting to implement the rule as at that stage he had no suspicion that anyone would not attend. He was not disregarding the rule. The Tribunal Rules do not give any particular style for asking a non-reluctant witness to appear. The Respondent referred back to Production 3.1 and 3.3 and confirmed it was his understanding that paragraph 12 would only be used where witnesses were reluctant or there was a difficulty in getting witnesses to attend. He stated that it was not a case of him choosing not to go to court for a warrant. At that stage it was his view that it was not necessary. These were the witnesses that he wanted to attend and he decided to send the citation and write to them asking them to come along. It was his position that he could ask witnesses to attend in any way he wanted and that the provisions indicated that he "may" apply to the court for a warrant but did not say that it was absolutely necessary.

Mr Murray thereafter referred to Production 2.2 of his First Inventory of Productions and confirmed this was the Gateway Recommendation of the Scottish Legal Complaints Commission where the Commission had originally rejected the Complaint against Mr Murray. The conclusion in paragraph 1.3 of that document he said was self-explanatory and indicated that it was open to him to cite witnesses in whichever

way he chose and that he was not obliged to follow Schedule 4 of the 1980 Act in citing witnesses. He believed he could ask witnesses to attend in whatever manner he chose. He did accept that he could not issue a citation that had the effect of pretending to be a formal citation. He accepted that it was the Complainers' position that he had issued these documents in a deceitful manner with a penalty clause making out this was a formal citation. That was not what he intended. He simply followed a style he had always used previously in the Sheriff Court. He denied that he was attempting to deceive the witnesses in any way.

He confirmed that Production 23 of the Third Inventory of Productions was the citation he sent to the witness Mrs C. He confirmed that Production 22 of the same Inventory was a style citation for the Sheriff Court. He confirmed that was the template that he had used. He had taken out the part of the heading saying that it was a form of citation. He had taken out the part relating to the Sheriff Court and had also amended the designation of his signature as Defender. Effectively he had topped and tailed the template to fit the bill. He regretted, in hindsight, leaving in the penalty clause. He denied putting the penalty clause in deliberately to intimidate the witnesses. He denied trying to mislead or deceive the witnesses. Mr Murray explained that he had used this template as a style that he had used when he was in practice and he had thought it would be appropriate in the circumstances. His recollection of his previous practice was that if witnesses did not attend in response to these citations then nothing happened. He was careful to design himself in the document as a Defender and had indicated that he was defending a case against the Law Society. He confirmed that he had sent citations to the witnesses, Mr D, Mrs E, Mrs B, Mrs C and Young. He did not in the slightest suspect that any of these witnesses would be reluctant. He confirmed that Production 3.21 was a letter to him from one of the witnesses in direct response to the citation sent. This was the only response he could recall receiving to the citation itself. Productions 6, 7, 8 & 9 on the Third Inventory were all copies of letters sent to the witnesses by him on 11 April 2010. He also sent one to the witness Mrs E. In these letters he had used the term "request" in relation to the witnesses attendance. He had also asked if the witnesses would confirm if they were willing to attend. As far as he was concerned the original citation was a notification that the hearing was coming up and that he had wanted the witness be there and that witness had an option to attend or not. In the letters he had outlined the

evidence that he expected to take from the various witnesses. In none of the letters was there a reference to any penalty if the witness chose not to appear. In all of the letters he had invited the witnesses to give details to allow for a possible meeting with him. He did not get any response from the witness Young. He did get a response from the witness Mrs B and that was his Production 3.20. He thought he had received responses from two of the witnesses indicating that they had not received any citation. He then confirmed that Productions 3.10 and 3.11 were copies of these responses. The witnesses had not given any assistance regarding a meeting with him as requested in the letters. He did not suspect however that the witnesses were reluctant. Neither of the witnesses Mr D or Mrs E indicated that they would not be attending. Given that they were both members of the Law Society he had no reason to think that they would not appear given what he had outlined in his letter regarding the evidence to be led. Following receipt of the letter Production 3.20 from witness Mrs B where she said that if he had wanted to compel her to attend he had apply to the court for a warrant he had concluded that she wanted a formal citation to appear. This was the catalyst for him to formally cite the witnesses. He confirmed that Production 3.12 was a letter from him to the Sheriff Clerk enclosing a petition and various documents. Production 3.13 was the petition itself. The petition was refused on the basis that the Clerk of the Sheriff Court had no jurisdiction as at that point he did not have a place of business in the Sheriffdom. Production 3.14 was a letter from the Sheriff Clerk dated 5 May 2010 intimating this to Mr Murray and he confirmed that he had accepted that decision. He was aware that he could petition the Court of Session in the same way as the Sheriff Court. He had previously tried to petition the Court of Session in connection with another matter and the petition had been refused on the basis that it needed to be signed by an advocate. He could not afford to instruct an advocate in relation to the previous Compliant before the Tribunal and so he had not proceeded with the petition to the Court of Session. Production 3.16 was a letter to Mr Murray from the Court of Session in relation to this previous petition.

CROSS EXAMINATION

The Respondent confirmed that he had taken no steps to contact the witnesses prior to issuing the citations. The citation was the first item that he had sent followed by the letters referred to. He was asked by the Fiscal why he had not simply written to the

witnesses given that he had not anticipated any difficulty in them attending. Mr Murray responded that the rules referred to citation of the witnesses and so he had sent a citation followed up by a letter two or three days later explaining why. He had used this procedure when he was in practice.

He was asked if he was aware that only certain classes of person were authorised to issue citations and he confirmed he was. These classes he believed to be Sheriff Officers and Solicitors. He also confirmed that in certain circumstances Sheriff Clerks had the authority. The Fiscal asked the Respondent if it was not the position that he had embarked on the procedure in the knowledge that he had no power to cite the witnesses. Mr Murray indicated that he had embarked on the procedure as a party litigant and that as a party litigant he had considered that he had authority to cite the witnesses. He had very little experience of dealing with party litigants from his previous practice. He did not accept that he had done these things knowing that he had no authority to do so.

The Fiscal asked Mr Murray to have before him the exchange of emails that were Production 3.1. He confirmed that the date on the third email was the date his system had allocated to it and was in Italian. The email was dated 9 July 2009 at 18:46. He confirmed that by that stage he was aware of paragraph 12 but that the advice given was that this procedure be used where there was a difficulty in getting witnesses to attend the Tribunal. He accepted a proposition that the court, on receiving the petition in terms of paragraph 12, might want to know what steps had been taken to secure the witnesses made sense but he could not speak for the court. Mr Murray emphasised that in Production 3.3 the Clerk says he "may" apply for a warrant. No other form of citation was suggested. The Fiscal asked Mr Murray if by the date of the letter that was Production 3.3 he was in no doubt as to the correct procedure to be used. Mr Murray indicated that it was his understanding that he could apply to court but that that would normally only be done when a witness was reluctant to attend. He confirmed that Production 2.2, the Gateway Recommendation, concurred with his understanding of the position. He indicated that this Complaint was originally rejected by the SLCC but then re-opened. When it was re-opened he wrote to the SLCC asking why and referring to the Gateway Recommendation. Mr Murray was asked to look at Production 3.23 and confirmed that the document was headed "citation" and then

went on to say "you must attend". He explained that this was a style that he had always used. He stated that he had not paid particular attention to the wording other than to change the heading to try and show it was not a formal citation and to change his designation so that he was not acting as a solicitor. He accepted in hindsight that he should have removed the paragraph to do with penalty but that it was never his intention to threaten or intimidate anyone. It was his experience absolutely nothing happened to a witness who failed to respond to such a citation. He had no intention of seeking any such procedure. He wanted these people to attend on his behalf and had no intention of angering them in any way.

The Fiscal asked Mr Murray to look at Production 3.19 which included a copy of the citation to the witness Young who was a lay person. Mr Lynch asked Mr Murray what he thought would go through the mind of a lay person on receiving this document. Mr Murray indicated that he could not comment on what someone would think. He was asked if he hoped that the witness would think that she was compelled to attend and he responded that that was not the purpose of the document and he referred to the letter he later sent to the witnesses. He conceded that perhaps he should have sent the letters before the citations but that was a mistake on his part. He did not accept that the recipients of the documents would know of him as a solicitor. It was his position that each of the witnesses would be well aware that he was not practising as a solicitor. Four of the witnesses were members of the Law Society, one of the witnesses worked for the Accountant in Bankruptcy and dealt with his particular case.

He was not aware which of the witnesses were solicitors and which have any legal knowledge. He insisted that Mrs Young would have known that he was not a practising solicitor. He emphasised that he was not holding himself out as a solicitor in any of these documents. The documents made it quite clear that he was acting as a defender in an action brought by the Law Society.

Mr Murray insisted that he had sent citations to the witnesses Mr D and Mrs E, despite their letters indicating that they had not received citations. He was asked if it was suspicious that the two legally qualified witnesses were the ones who did not receive the citations. He said he could not explain why these witnesses had not received them and believed it was a matter for the Law Society's mailing system. He

said it was completely wrong to suggest anything sinister about it. He had never denied sending citations to these witnesses. He insisted that he was not attempting to mislead the witnesses and was not attempting to force people to attend. He said he had no reason to suspect that these witnesses would not attend. The majority of the witnesses were from the Law Society and he could not think of any reason why they would not be prepared to attend the Tribunal. It was never his intention to mislead or deceive anyone. He did not take precognitions from the witnesses but he did explain in his letters to them the evidence he intended to take from them. Basically the witnesses were being asked to attest to documents that he had and so there was no specific reason to take a statement from them.

He was asked if he was aware of the procedure in cases involving party litigants and that a Sheriff Clerk could cite witnesses on their behalf but the party litigant would require to find caution for the witnesses' expenses. Mr Murray indicated that he had no recollection of this having not practised for 14 years.

RE-EXAMINATION

Mr Murray confirmed that paragraph 12 of Schedule 4 to the 1980 Act made no reference to steps requiring to be taken to secure voluntary attendance.

He also explained that the template at 2.22 had the penalty section in bold print and that the bold print was not something that he had changed.

He also referred to the Sub Committee finding at page 5 which was Production 3.17 where it was accepted that he had not held himself out as a solicitor.

With regard to the two citations that the witnesses say they did not receive, he could not explain this. He had referred to the citations in his letters to these witnesses. He had never denied sending citations to these witnesses and this was the first suggestion that the citations were not actually sent.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal invited the Tribunal to make findings in fact in accordance with the Joint Minute.

He asked the Tribunal to find that Mr Murray was familiar with the general scheme for the citation of witnesses in Scotland and that by the date of the emails that were Production 3.1 or at the latest 19 February 2010 the date of Production 3.3 the Respondent was aware that the only competent method of citation was by following the procedure in Schedule 4 of the 1980 Act. Mr Lynch submitted that Mr Murray put together these citations in that knowledge and he issued them with the knowledge that he had no authority to do so.

Mr Lynch submitted to the Tribunal that the citation of witnesses at all levels is governed by the court in one form or another. Only officers of court have the delegated authority to cite witnesses i.e. Sheriff Officers, Messengers at Arms, Solicitors and in some cases the Sheriff Clerk. In the case of the Tribunal authority to cite is by way of a petition to the Court of Session or relevant Sheriff Court.

There are good reasons for the rules relating to the citing of witnesses as the receipt of a citation is a significant interference in an individual going about his daily business. He submitted that Mr Murray must have been aware of that. The notices were notices that Mr Murray had no authority to sign. The idea that party litigants could sign citations was fanciful. The actions of Mr Murray as a solicitor on the Roll, known to people as a solicitor, fell far below the standard to be expected of a solicitor and were serious and reprehensible. He invited the Tribunal to find Mr Murray guilty of professional misconduct.

SUBMISSIONS FOR THE RESPONDENT

Mr Deane indicated that he had three submissions, which to some degree overlapped.

1. The service of the citations was not a breach of paragraph 12.

2. If the Tribunal does not accept submission 1, although the citations were a breach of paragraph 12 the actions don't amount to professional misconduct when looking at the whole circumstances
3. Whilst inclusion of the penalty clauses was wrong, when considering the whole circumstances, the inclusion of the clauses was not meant as a method of deceit or misrepresentation so as to amount to professional misconduct.

With regard to submission 1, it is always the position that any witness can be requested to attend in any form. The citations here were nothing more than a notice that attendance was required. The post citation actions of the Respondent made it clear that these items were not meant to be treated as formal citations. He did not hold himself out as a solicitor. This latter issue was no longer before the Tribunal having already been struck out by the Sub Committee.

The Respondent accepted that a solicitor is expected to know the rules. He had sought clarification and went to the Tribunal website. Thereafter he wrote to the Clerk who advised that paragraph 12 of the 1980 Act set out the procedure where there is difficulty in having witnesses attend the Tribunal. The Respondent wrote to the Tribunal to make appropriate arrangements for the witnesses to attend and was advised that paragraph 12 would normally only be employed when it was anticipated that witnesses were reluctant. After that advice the Respondent set out the citations. He took a template for a Sheriff Court citation and topped and tailed it. This was not meant to be a formal citation. They were not meant to be deceitful. Nothing was said that indicated they were served with the authority of the court. These were simply meant as styles of notification of request to attend a hearing. It was deeply unfortunate that they included references to a penalty for non-attendance. The Respondent accepted there was no such power. This was not a breach of paragraph 12 of the 1980 Act. The Respondent was not aware that witnesses were reluctant until the witnesses blanked him and the witness Mrs B refused to attend.

Two points supported the submission that these were not meant to be treated as formal citations. Firstly he followed them up with letters where the wording clearly made no suggestion of compulsion and simply requested attendance. The letters asked the

witnesses if they were willing to appear and made no threat of any penalty if they refused.

Why would the Respondent have sent letters asking the witnesses if they were willing to attend if the witnesses had already received a formal citation compelling them to attend?

The second factor was that following the indications of reluctance, the Respondent had gone on with the paragraph 12 procedure. Why would the Respondent have done that if the original correspondence had been meant to lead the witnesses to believe that they had been formally cited?

Until the Respondent became aware that the witnesses were reluctant, there was no rule to tell him how to tell a witness to attend.

Including the penalty notices in the documents had been a procedural failure by the respondent. He submitted that the inclusion of the penalty notices was not a breach of paragraph 12.

Mr Deane lodged a list of authorities which he said were relevant to the test of professional misconduct. He intended to run arguments 2 and 3 concurrently.

He submitted that even if the inclusion of the penalty clause was a breach of paragraph 12 it was his submission that in the whole circumstances this did not amount to professional misconduct.

The test for professional misconduct he submitted was set out in Sharp-v-Law Society of Scotland 1984 SC129 where it was said that a breach of the rules should be treated as professional misconduct dependant on whether it would be regarded as serious and reprehensible by competent and responsible solicitors and on the degree of culpability. The court in the case of Sandeman-v-Council of the Law Society of Scotland [2011] [CSIH24] at paragraph 14 indicated that whether a failure to comply with a rule should be treated as professional misconduct must depend upon the gravity of the failure and the consideration of the whole circumstances in which the failure

occurred, including the part played by the individual solicitor in question. The test in Sharp draws attention to the importance of the gravity of the misconduct and the degree of culpability of the solicitor in question.

He submitted that the sending of the citations in this case, including the penalty clauses, which were inapplicable in the circumstances, was not so grave and culpable that the conduct amounted to professional misconduct. The Tribunal was dealing with a solicitor who had not practiced for some 9 years before the sending of the citations. The chronological steps taken by him e.g. visiting the Tribunal website etc were relevant. The Respondent had used a form of notification that he had used before when in practice. He had topped and tailed a Sheriff Court citation adding in reference to the Tribunal and removing any suggestion that he was a solicitor. The Respondent was not aware who of the witnesses would be reluctant. The notification was not meant to be a formal citation but simply a request or notification. If he had intended these citations to mislead the witnesses then why had be followed them up with letters that simply requested the witnesses attendance? Why would he have spelt out the information needed and attempted to engage with the witnesses if he had been seeking to be deceitful? Why not mention the penalties in the letters? Then when he discovered that the witnesses were unwilling, why did he not continue with the deceit but rather tried to implement paragraph 12?

In essence the Respondent had "cocked up". There was no deliberate planned deceit. This was an error. Whilst he accepted the impact of the citations on the witnesses was not a defence, Mr Deane directed the Tribunal to consider that two of the witnesses did not receive citations and from the tone of the correspondence from the witness Mrs B she was not at all fazed by it.

The Tribunal was dealing with a man who had not practised for 10 years, who had topped and tailed a style and then followed it up with a letter. Thereafter when he was aware that the witnesses were not going to play ball, he attempted to engage paragraph 12. This case demonstrated the inherent difficulties in trying to tailor a style or template to fit any situation. Mr Deane quoted a passage from Smith and Barton at page 161 where it said "However, in a case where a solicitor had misdirected himself on the statutory interpretation of "matrimonial home," the

Tribunal had to consider whether the solicitor's course of action amounted to professional misconduct. The Tribunal said it would be slow to find that a solicitor who had misdirected himself on a question of law and had acted on that basis of misdirection had been guilty of conduct falling within the definition of professional misconduct".

In response to these submissions, Mr Lynch suggested it was not helpful to look at this case as a breach of a rule given that paragraph 12 is an enabling provision. He indicated that he accepted that the Tribunal had to have regard to all of the facts and circumstances.

DECISION

It was clear that the Respondent did not dispute sending the documents complained of. Nor did he deny knowledge of paragraph 12 of Schedule 4 of the 1980 Act.

The question for the Tribunal was whether or not the conduct admitted by the Respondent was sufficiently grave and culpable so as to be regarded by competent and reputable solicitors as serious and reprehensible. Both parties accepted that the Tribunal had to have regard to the whole circumstances in which the conduct occurred.

The standard of proof in allegations of professional misconduct is proof beyond a reasonable doubt.

In other words, had the Complainers proved beyond reasonable doubt that the Respondent was guilty of conduct that reached the high standard set out in the cases of Sharp and Sandeman?

In considering the whole circumstances of this case, the Tribunal reached a view that the simple act of sending these documents to the witnesses was not in itself sufficient to meet the required standard of conduct. Rather, the motive or intent in sending these documents was crucial.

The question was whether the Respondent had deliberately issued documents that were meant to appear to be formal and enforceable citations with penalties which could flow from non-compliance in an attempt to mislead the witnesses or whether the Respondent had issued these documents simply as notices, but in hindsight in an improper form.

In considering the weight to be given to the Respondent's evidence the Tribunal had particular regard to the copy correspondence produced. In particular, the letters issued to the witnesses dated 11th April were clearly in tone requests or invitations. The Fiscal had raised in cross-examination the suggestion that adverse inferences could be drawn from the fact that the only two legally qualified witnesses had not received citations. The clear suggestion was that that was because the Respondent knew that these witnesses would be aware that the citations were not lawful and therefore did not send them to these witnesses. This suggestion however did not appear to the Tribunal to sit well with the content of the letters of 11th April. Why refer to citations that you had not sent if you did not want the witnesses to be aware of the supposed citations?

The Tribunal also considered that the lodging of the petition with the Sheriff Court on 29th April 2010, following the letter from Mrs B could be taken to support the Respondent's position.

In the whole circumstances, the Tribunal did not accept that it had been established beyond reasonable doubt that the Respondent had sent documents that he knew he had no authority to send with intent to deceive the witnesses. In these circumstances, the Tribunal found the Respondent not guilty of professional misconduct. Nor did the Tribunal consider it appropriate to remit the Complaint back to the Council of the Law Society in terms of Section 53ZA.

The Tribunal heard submissions from the parties with regard to the expenses of proceedings. The Respondent moved the Tribunal to award expenses in favour of the Respondent. The Fiscal for the Complainers submitted that the Respondent was the author of his own misfortune and that it was his conduct that had brought him before the Tribunal. He asked that no award of expenses be made to either party. He also

asked the Tribunal to have regard to a debate that had taken place at the instance of the Respondent, which had been entirely unsuccessful.

Having considered the submissions made by both parties, and in particular having regard to previous procedure, the Tribunal concluded that no award of expenses was appropriate. The Tribunal made the usual order in relation to publicity.

Malcolm McPherson
Vice Chairman