

**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, formerly at 26 Drumsheugh
Gardens, Edinburgh and now at Atria One, 144
Morrison Street, Edinburgh**

against

**JANE ELIZABETH STEER, Messrs Allan
McDougall, 3 Coates Crescent, Edinburgh**

1. A Complaint dated 31 May 2016 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that Jane Elizabeth Steer, Messrs Allan McDougall, 3 Coates Crescent, Edinburgh (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. The Secondary Complainer is Sharon McAllister, 3 Michael Bruce Court, Forestmill, Clackmannanshire.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
4. In terms of its Rules the Tribunal appointed the Complaint to be heard on 16 August 2016 and notice thereof was duly served on the Respondent.
5. The hearing took place on 16 August 2016. The Complainers were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. The Respondent was present and represented by her solicitor, Hugh Neilson, Solicitor, Airdrie.

6. The Fiscal moved to amend the Complaint by deleting the second sentence of paragraph 3.8, namely "*The affidavit returned by the Secondary Complainer consisted of two pages of sworn evidence and four pages of appendices*" and the words "*consisting of two pages of sworn evidence*" where they appear in lines five and six of paragraph 3.8. Mr Neilson did not oppose the motion to amend the Complaint. The Tribunal allowed the amendments to the principal Complaint.
7. Mr Neilson indicated that the Complaint as amended was admitted. It was clarified by Mr Neilson that the Respondent was pleading guilty to the averments of fact, the averments of duty and the averments of professional misconduct which were contained in paragraphs 5.1(a) and (b) of the Complaint. However, the Respondent was pleading not guilty to the averment of misconduct contained at paragraph 5.1(c) of the Complaint. It was accepted by the Respondent that whether the facts amounted to professional misconduct in terms of paragraph 5.1(a), (b) or (c) was a matter for the Tribunal.
8. The Tribunal found the following facts established:-
 - 8.1 The Respondent is Jane Elizabeth Steer. Her date of birth is 28 November 1970. She was enrolled as a solicitor on 8 December 2003. She was a partner with the firm of RMS Law LLP during the period 1 November 2011 to 10 January 2014.
 - 8.2 The Secondary Complainer's former partner raised an action for contact in relation to their child in January 2010 at Alloa Sheriff Court ("the contact action"). The former partner subsequently made a motion asking the court to find the Secondary Complainer in contempt of court as a result of failure to obtemper court orders for interim contact in relation to their child. The former partner was ordered to lodge a minute in relation to the contempt motion on 4 March 2011. The Secondary Complainer instructed the firm of RMS Law LLP in connection with the contact action and contempt procedure on 26 August 2011. The Respondent became the principal solicitor in connection with the contact action and contempt procedure on 1 November 2011. She remained the principal solicitor in connection with the contact action and contempt procedure until she withdrew from acting on 6 November 2013.
 - 8.3 On 6 July 2012 the contact action and contempt procedure were both sisted. On 15 August 2012 the former partner's solicitors enrolled a motion to recall the sist

in respect of the contempt procedure. The Secondary Complainer provided the Respondent with instructions to oppose that motion at a meeting on 20 August 2012. On 4 October 2012 the Respondent sent an e-mail to the Secondary Complainer advising that she had been ordered to appear at Alloa Sheriff Court on 12 October 2012. At that hearing the Court ordained the Secondary Complainer to disclose to the court within 7 days the present address of the Secondary Complainer and her child.

- 8.4 On 24 October 2012 the Respondent made a digital recording of dictation which was subsequently typed by Lee McNie, the office manager at RMS Law LLP. The dictation instructed the preparation of affidavit in the name of the Secondary Complainer. Ms McNie prepared the affidavit in accordance with the dictation. At the outset of the dictation the Respondent advised *“This is quite an urgent thing. I need to get an affidavit done...”*
- 8.5 The Respondent’s dictation of the affidavit went on to state, among other things, the following information:-

“in causa Craig Robert Middleton residing at 23 Queen Street, Alva, Clackmannanshire, Pursuer against Sharon Marie Reynolds or McAllister residing at 3 Michael Bruce Court, Forestmill, Clackmannanshire, Defender .”

“At Falkirk, on the blank day of October 2012 in the presence of Jane Elizabeth Steer, Solicitor, Notary Public, 8 Lint Riggs Falkirk, compeared Sharon Marie Reynolds or McAllister who being solemnly sworn deponed as follows...”

“I am Sharon Marie Reynolds or McAllister. I am blank years of age and formerly resided at 3 Michael Bruce Court, Forestmill, Clackmannanshire. I am the Defender in this action. When my case called for a child welfare hearing on Friday 12th October 2012 the sheriff made an order whereby I was to disclose my current whereabouts and that of my child...As I explained through my solicitor to the Sheriff I have relocated to England.”

“I also provide to the Court for the Court’s information alone a current copy of my tenancy agreement which provides an address for me and for my son as requested by the Court . I therefore hereby confirm to the court that my address is 5 Ransom Yard, Bancroft, Hitchin, Hertfordshire.”

“All of which is true as the Deponent will answer to God”

At the conclusion of the dictation the Respondent stated *“And somewhere for me to sign and somewhere for her to sign.”*

- 8.6 Ms McNie asked the Respondent what was to be done with the prepared affidavit. The Respondent instructed Ms McNie to send an e-mail to the Secondary Complainer attaching the affidavit. The Respondent instructed Ms McNie that the e-mail should ask the Secondary Complainer to sign and return the affidavit. Ms McNie asked the Respondent if RMS Law should be arranging a notary public to attend on the Secondary Complainer to allow the affidavit to be sworn by the Secondary Complainer. The Respondent replied no, that it would be ok just to send to the Secondary Complainer for signing. Accordingly Ms McNie sent an e-mail to the Secondary Complainer on behalf of the Respondent attaching an affidavit disclosing her present address and those of her child. The e-mail contained the following instructions:-

“I attach herewith Affidavit which I would be grateful if you could sign and return to us as soon as possible the attached Affidavit”. [sic]

- 8.7 The e-mail of 24 October 2012 and the attached affidavit are referred to for their whole terms which are held as incorporated herein *brevitatis causa*.
- 8.8 On or around 29 October 2012 the Secondary Complainer signed the affidavit and returned it to the offices of RMS Law LLP. On receipt the Respondent purported to complete the affidavit by signing the affidavit as a Notary Public and by certifying the attachments as true copies. As a result of the Respondent’s actions the affidavit purported to have been deponed by the Secondary Complainer and notarised by the Respondent at Falkirk on 29 October 2012. The four pages of appendices purported to have been certified as true copies of the originals by the Respondent at Falkirk on 29 October 2012. The completed affidavit dated 29 October 2012 is produced and referred to for its whole terms which are held as incorporated herein *brevitatis causa*.
- 8.9 On 5 November 2012 the Respondent dictated a letter to send the affidavit to the Court for lodging. The Respondent dictated *“On the Sharon McAllister file we need to get this affidavit away to the Court because it is a bit late already. Could*

you please do me a letter to the Court.” The Respondent proceeded to dictate a letter dated 5 November 2012 which is produced and referred to for its whole terms which are held as incorporated herein *brevitatis causa*. At the end of the dictation of the letter the Respondent dictated the following instruction “*And if you could put the attachments at the back of it and keep me a copy for the file thanks*”. Accordingly on 5 November 2012 the Respondent sent the affidavit to Alloa Sheriff Court for lodging.

8.10 Following further court procedure the contact action and contempt procedure proceeded to proof and evidence was heard at both Alloa Sheriff Court and Perth Sheriff Court over the course of eight days, namely on 10 January, 2, 3, 4, and 5 July and 7, 8 and 9 August all 2013. A hearing on submissions took place on 19 August 2013. Sheriff Tait pronounced two separate judgments in connection with the contact action and contempt procedure respectively at Perth Sheriff Court on 24 October 2013.

8.11 In her judgement in the contact action Sheriff Tait opined:-

8.12 “*Further, I did not find convincing the Defender’s evidence about the timing of her relocation to Hertfordshire, her return trips to Clackmannanshire and her future intentions in respect of where she will live, work and where she will send the child to school. I accept the terms of the affidavit of Katie Stewart wherein she spoke to meeting the Defender at a rugby match at Dollar Academy in late 2012. Despite not having challenged the affidavit when called upon to admit it, claiming not to have seen it, the Defender termed Mrs Stewart’s position as lies. Similarly, the Defender was adamant that she only returned to Scotland between September and December 2012 on one occasion when ordained to appear at Alloa Sheriff Court on 12 October 2012. I observe that there is lodged in process her affidavit bearing to be sworn at Falkirk on 20 October 2012. The Defender, it seems to me, treated the proof as a contest at which it was unfortunate if her actions or intentions were discovered.*” [emphasis added]

8.13 On 30 October 2013 the Respondent met with the Secondary Complainer. The Respondent prepared a handwritten attendance note of that meeting. In that attendance note the Respondent recorded “*It was not in [the Secondary Complainer’s] interests for me to continue to act for her given Sh Tait’s criticisms*

in the judgement.” On 6 November 2013 the Respondent sent an e-mail to the Secondary Complainer. The Respondent advised the Secondary Complainer that she required to withdraw from acting on her behalf. The Respondent noted that Sheriff Tait had made comments about the Secondary Complainer’s credibility in her judgement and this included commenting upon the affidavit which bore to have been sworn by the complainer in Falkirk. The Respondent noted:-

“As you know in her decision and in concluding that you were not credible nor a reliable witness the sheriff appears to have taken into account the date and place of signing of an affidavit. As you are aware that was not a matter raised by the sheriff at the hearing nor an argument raised by my opponent. Rather the sheriff has just come up with it in her judgment without hearing submissions on the matter. The fact of the matter is that I made a mistake in relation to that affidavit which was not of course signed by you in Falkirk. You will readily appreciate that had any issue been taken with that by the sheriff or in submissions at the hearing I would have clarified that this was a mistake made by me”.
[emphasis added]

8.14 On 20 June 2014 RMS Law LLP wrote to the Scottish Legal Complaints Commission to advise inter alia:-

“We are aware that Miss Steer notarised an affidavit without the complainer being present or placed under oath. As far as we are aware, the content of the affidavit was not controversial, but the time and place of execution was a significant factor in the sheriff’s analysis of Miss McAllister’s credibility. At face value the affidavit suggested that the complainer had been in Falkirk on a day that, in her sworn testimony, she denied being in Scotland. We are somewhat surprised that this obvious discrepancy was not brought out in the proof by the opponent. However, it was not and it was left to the Sheriff to mention it in her judgement. On reading the judgement our Mr Mallon reviewed the file and the status of the affidavit became known. Action was taken to bring this to the attention of the sheriff. It is our position that Miss Steer was acting so far out with what could reasonably be expected of a solicitor that she was off on a frolic of her own. RMS Law LLP has behaved appropriately in dealing with the situation.”

- 8.15 The Respondent provided an initial response to the complaint on 29 June 2014 stating inter alia:-

“...I have to confess to having made a mistake and at an earlier procedural stage in the case Ms McAllister was required to produce certain information to the court. She was not required to produce this by way of an affidavit. A simple statement would have done. For some reason the statement was drawn in the form of an affidavit and sent to Ms McAllister for signing but without instructions as to how an affidavit should be signed and sworn. I, of course had it in mind that an affidavit was not required. When it came back signed I foolishly adhibited my signature as Notary Public. Clearly, I should not have done so. It is correct to say that the date and place of the apparent signing of the affidavit was taken into account in assessing Ms McAllister’s credibility. But the fact is I made a mistake in relation to that. At the next hearing after the proof and after I had withdrawn from acting I was represented at the hearing and ensured that my error in relation to the affidavit was fully and frankly explained to the court with a view to ensuring that any damage done by the affidavit was mitigated and not taken into account in relation to any penalty to be imposed on the [complainer] in respect of her contempt of court.”

- 8.16 The Respondent expressly instructed the preparation of an affidavit and that it be sent to the Secondary Complainer for signature. Accordingly the Respondent’s response to the Law Society was lacking in candour.

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

- 9.1 Failure to act with trust and personal integrity in connection with the preparation of an affidavit which she purported to notarise on 29 October 2012;
- 9.2 Submission to the court for lodging an affidavit which contained false or misleading information on 5 November 2012; and

- 9.3 Subsequent failure on 29 June 2014 to provide a full and candid explanation to the Law Society in connection with the preparation of the affidavit and its sending to the Secondary Complainer.
10. Having heard the Solicitor for the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

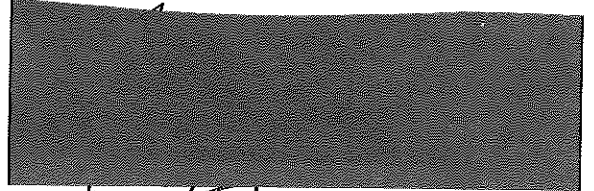
Edinburgh 16 August 2016. The Tribunal having considered the Complaint dated 31 May 2016 at the instance of the Council of the Law Society of Scotland against Jane Elizabeth Steer, Messrs Allan McDougall, 3 Coates Crescent, Edinburgh as amended; Find the Respondent guilty of professional misconduct in respect of her failure to act with trust and personal integrity in connection with the preparation of an affidavit which she purported to notarise on 29 October 2012, submission to the court for lodging an affidavit which contained false or misleading information on 5 November 2012 and subsequent failure on 29 June 2014 to provide a full and candid explanation to the Law Society in connection with the preparation of the affidavit and its sending to the Secondary Complainer; Censure the Respondent; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)

Alan McDonald
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 8 SEPTEMBER 2016 .

IN THE NAME OF THE TRIBUNAL



Alan McDonald

**Alan McDonald
Vice Chairman**

NOTE

Mr Neilson indicated that the Complaint as amended was admitted. It was clarified by Mr Neilson that the Respondent pleaded guilty to the averments of fact, the averments of duty and the averments of professional misconduct contained at paragraphs 5.1(a) and (b) of the Complaint. However the Respondent did not plead guilty to the averment of misconduct contained at paragraph 5.1(c) of the Complaint. It was accepted by the Respondent that whether the facts amounted to professional misconduct was a matter for the Tribunal.

SUBMISSIONS FOR THE COMPLAINERS

Mr Marshall referred to his written submissions:

Introduction

The complaint against the Respondent solicitor, Jane Steer, relates to an affidavit which the Respondent presented to Alloa Sheriff Court as having been sworn in her presence when that was not the case.

The Respondent instructed an affidavit to be prepared and sent to her client, Mrs Mcallister for signature. When the affidavit was returned to the respondent solicitor she arranged to sign it and lodge it with the court. The affidavit was to be relied on by Mrs Mcallister in a child contact action and a related contempt of court procedure.

The actions of the Respondent in signing and lodging the affidavit gave rise to the false impression that:-

- (a) the Respondent had been present when the affidavit was sworn by her client; and
- (b) that the affidavit was sworn in Falkirk

...when neither was the case.

This might not have come to the Law Society's attention but for the Sheriff's decision in the case. The Sheriff referred to the affidavit in her criticisms of the credibility and reliability of Mrs Mcallister as a witness.

The facts of the complaint are admitted in their entirety. An affidavit has been lodged which contains the evidence of Ms McNie, Ms Steer's secretary at the time of preparation of the client affidavit. The

Respondent agrees the affidavit evidence of Ms McNie and I would move the Tribunal to allow that evidence.

The Law Society does not intend to lead any further evidence and considers that the matter can be decided by the Tribunal on the basis of the facts as admitted. The affidavit evidence will also be of assistance.

There are three elements of misconduct presented by the Law Society for the Tribunal to consider. The Respondent admits misconduct in connection with two of the three elements of misconduct. In connection with the third element of misconduct the Law Society considers that the Tribunal will be able to make a judgement on that element on the basis of the admitted facts and Ms McNie's evidence.

Of course the question of misconduct is solely a matter for the Tribunal to decide and that remains the case notwithstanding the fact that the parties are agreed on certain elements.

In this submission I will:-

- Set out the requirements of execution of an affidavit
- Summarise the facts to be found in the complaint
- Summarise the relevant duties owed by the Respondent as set out in the complaint; and
- Submit why a breach of these duties amounts to professional misconduct.

1 Preliminary matter – amendment of paragraph 3.8 of the complaint

There is one paragraph of the Law Society's statement of facts in the complaint which was not admitted in its entirety and that is para 3.8. Having discussed with the Respondent's agent, I am moving to amend para 3.8 to delete the second sentence "The affidavit returned by the Secondary Complainer consisted of two pages of sworn evidence and four pages of appendices." and also the words "consisting of two pages of sworn evidence" where they appear in lines 5 and 6 of para 3.8".

I have discussed this amendment with the Respondent's agent and it is agreed. An amended complaint is produced.

2 Execution of an affidavit

Walker and Walker on The Law of Evidence of Scotland, at paragraphs 15.1-15.3, sets out what an affidavit is and the requirements for execution:-

'An affidavit is a written ex parte statement made on oath or affirmation, before one having authority to administer oaths...Any affidavit may be made before a notary public, justice of the peace, sheriff or magistrate....The deponent must appear in person before the notary public or other person, and must be put on oath or affirm. Each page of the deposition ought to be signed both by the deponent and by the person before whom it is sworn or affirmed.'

Therefore we can see that in order for an affidavit to be properly executed the deponent, in this case Mrs Mcallister, must be present and make the oath or affirm before the person having the authority to administer oaths, in this case the Respondent.

In this matter the Respondent was not present and Mrs Mcallister did not make an oath or affirm before her.

3 Facts of complaint

With the amendment to para 3.8 the position is that all of the facts as set out in the complaint are agreed. In the circumstances I would invite the Tribunal to make findings in fact which re-state paragraphs 3.1-3.16 of the complaint.

For today's purposes, the facts which capture the essence of the conduct are summarised in this section.

Preparation and lodging of the affidavit by the Respondent

Paragraphs 5.1 (a) and (b) of the complaint aver misconduct in connection with the preparation and lodging of the affidavit. The relevant facts can be summarised as follows:-

- The Respondent instructed her assistant Ms McNie, to prepare an affidavit on 24 October 2012 (para 3.4)
- She dictated her client's evidence in the form of a formal affidavit to be typed by Ms McNie (para 3.5)
- Ms McNie sought instructions from the Respondent on what was to be done with the affidavit once typed. The Respondent instructed her to send the affidavit to Mrs Mcallister by e-mail. (para 3.6)
- Ms McNie specifically asked the Respondent if she should arrange a notary public to attend on Mrs Mcallister to allow the affidavit to be sworn. The Respondent said no. (para 3.6)
- Ms McNie sent the affidavit to Mrs Mcallister by e-mail, in accordance with the Respondent's instructions. (para 3.7)

- When the Respondent received the affidavit signed by Mrs Mcallister she added her signature on or around 29 October 2012. As a result it now appeared that the affidavit had been prepared and sworn by Mrs Mcallister before the Respondent on that date when that was not the case. (para 3.8)
- The Respondent instructed the affidavit to be lodged as a production with Alloa Sheriff Court on 5 November 2012 and this was done. (para 3.9)
- Sheriff Tait, having heard the contact action and the related contempt procedure, produced a judgment which referred to the affidavit. The learned sheriff commented on the credibility and reliability of Mrs Mcallister's evidence in connection with her relocation from Scotland to Hertfordshire. She noted that Mrs Mcallister was adamant that she only returned to Scotland between September and December 2012 on one occasion when ordained to appear at Court, before going on to note that the affidavit lodged in process contradicted that evidence, demonstrating that she had been present in Falkirk on another occasion. (para 3.10)

Respondent's explanation to the Law Society on the preparation of the affidavit

Paragraphs 5.1 (c) of the complaint avers misconduct in connection with the explanation provided by the Respondent to the Law Society at the outset of their investigation. In addition to the summary of facts noted above, the Law Society relies on the terms of the explanation provided by the Respondent at para 3.15 repeated here for ease of reference:-

'3.15 The Respondent provided an initial response to the complaint on 29 June 2014 stating inter alia:-

*"...I have to confess to having made a mistake and at an earlier procedural stage in the case Ms McAllister was required to produce certain information to the court. She was not required to produce this by way of an affidavit. A simple statement would have done. **For some reason the statement was drawn in the form of an affidavit and sent to Ms McAllister for signing but without instructions as to how an affidavit should be signed and sworn. I, of course had it in mind that an affidavit was not required.** When it came back signed I foolishly adhibited my signature as Notary Public. Clearly, I should not have done so. It is correct to say that the date and place of the apparent signing of the affidavit was taken into account in assessing Ms McAllister's credibility. But the fact is I made a mistake in relation to that. At the next hearing after the proof and after I had withdrawn from acting I was represented at the hearing and ensured that my error in relation to the affidavit was fully and frankly explained to the court with a view to ensuring that any damage done by the affidavit was mitigated and not taken into account in relation to any penalty to be imposed on the [complainer] in respect of her contempt of court."*

The Law Society was concerned that the explanation provided by the Respondent did not make clear that the affidavit had been prepared, sent to the client, and then lodged with the Court, all on her express instructions. The Law Society was particularly concerned with the following parts of the explanation:-

- *'For some reason the statement was drawn in the form of an affidavit'* - the reason why the statement was drawn as an affidavit was that this was the express instruction of the Respondent. Her explanation does not make that clear.
- *'and sent to Ms McAllister for signing but without instructions as to how an affidavit should be signed and sworn'* – again the affidavit was sent to Ms McAllister on the express instructions of the Respondent. She gave this instruction in spite of the fact that her assistant Ms McNie questioned simply sending the affidavit by e-mail and suggested arranging a Notary Public.
- *'I of course had it in mind that an affidavit was not required'* – again this response fails to make clear that the Respondent specifically instructed that an affidavit be prepared.

The Law Society avers that this response was lacking in candour. The Law Society's concern with this response is that the Respondent did not make clear how the statement came to be prepared and sent to the client. Namely, that she instructed the preparation and sending of the affidavit at the outset, and in spite of the doubts raised by her assistant Ms McNie.

4 Summary of duties owed by the Respondent

At paragraph 4 of the complaint the Law Society sets out the duties owed by the Respondent in this matter and that these duties were breached. The duties relied are noted in this section:-

4.1 The Law Society of Scotland Practice Rules 2011, at B1 Standards of Conduct, Rule 1.2 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."

4.2 Separately, the Law Society of Scotland Practice Rules 2011, at B1 Standards of Conduct, Rule 1.13.1 provide:-

"Relations with the courts

1.13.1 You must never knowingly give false or misleading information to the court. You must maintain due respect and courtesy towards the court while honourably pursuing the interests of your clients."

The failures to comply with these duties are related in the complaint first to the preparation and lodging of the affidavit and second to the explanation given to the Law Society.

In connection with the preparation and lodging of the affidavit

4.3 The Respondent has failed to comply with the duties imposed by Rules B1.2 and B1.13.1. She purported to notarise an affidavit as having been sworn in her presence as a notary public on 29 October 2012 at Falkirk. The truth of the matter was that the affidavit was not sworn in her presence at that time. The Secondary Complainer signed and returned the affidavit to the Respondent. At that time the Respondent purported to notarise the affidavit and subsequently sent it to the court for lodging on 5 November 2012. The sheriff took into account the content of the purported affidavit in assessing the credibility and reliability of the Secondary Complainer.

In connection with the explanation given to the Law Society

4.4 Separately, in her response to the Law Society complaint, dated 29 June 2014, the Respondent stated that a simple statement would have been sufficient for the Court's purposes and that for some reason the statement was drawn in the form of an affidavit. As condescended upon above the affidavit was prepared on the express instructions of the Respondent. The affidavit was sent to the Secondary Complainer for signature on the express instructions of the Respondent. Accordingly, the Respondent's response to the Law Society was lacking in candour and in breach of Rule 1.2 [duty to act with trust and personal integrity at all times].

5 Submission as to why these failures amount to misconduct

I would submit that these failures satisfy the Sharp test:-

'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.'

...and accordingly amount to misconduct.

In connection with the preparation and lodging of the affidavit

The Law Society has published guidance for acting as a Notary Public which is available on the Society's website. In connection with execution of affidavits the guidance provides:-

'It is essential that the document is executed in the presence of the notary and both signatures are applied contemporaneously. It has been held to be professional misconduct for a notary to send a document for signature by a client and subsequently apply the notarial signature.'

I highlight this to demonstrate that clear guidance has been made available by the Law Society to the profession on what is acceptable practice, and the repercussions of departing from that practice.

Each case will turn on its own facts and circumstances but I submit that the following observations from previous decisions of the Discipline Tribunal will assist this Tribunal to find that the Respondent's conduct in this case amounts to professional misconduct.

In *Smith and Barton: Procedures and Decisions of the Scottish Solicitors Discipline Tribunal* the authors dedicate Chapter 17 to "Duties as Notary".

At para 17.01 they note that the Tribunal has said:-

'Solicitors who become Notaries Public are in a privileged position. The formality of swearing before a Notary Public confers a higher standing on documents. Third parties are entitled to rely on them. Historically the employment of Notaries arose because of an increasing incidence of forgeries in private writings. It was, and is crucial to the administration of justice that the public should have faith in deeds authenticated by Notaries.'

A solicitor acting as a Notary Public must therefore take reasonable steps to satisfy [himself] as to the true identity of the person taking the oath and signing the document and of the signatory's understanding of the document. The public and profession are entitled to the protection that documents, signed on oath before a Notary Public, have a status greater than ordinary documents, by virtue of the notarisatioin.' (Case 817/81)

The authors in *Smith and Barton* go to note that in another case the Tribunal stated:-

'The execution of deeds before a notary is a long-standing practice, giving such documents a measure of authenticity....It is an essential feature of a notarial execution that the notary is present and personally attests to the genuineness of the deponent's signature...[I]t is important for the profession of solicitors to be aware that in exercising the functions of a notary, a solicitor must at all times respect the formalities, however inconvenient or time consuming that this may be.' (Case 842/93)

The authors go on to note (in relation to the same decision from 1993):-

'In once case where the solicitor had added his signature as Notary to an Affidavit when the deponent had signed in a different town outwith his presence and he had completed the particulars so as to indicate it had been signed in his presence, there was a finding of Professional Misconduct, notwithstanding that there was no doubt as to the authenticity of the deponent's signature.' (Case 842/93).

Further general guidance is provided on the proper practice of swearing affidavits in Case 410/78:-

'The established and proper practice for the swearing of an Affidavit is that the completed document should be before the Deponent and the Notary, the Deponent should then swear that the contents of the statement are true, and the Deponent and the Notary should immediately sign the document. The Tribunal are unable to accept that any variation of this established procedure is acceptable...It is the duty of a Solicitor to uphold the highest standards of his profession and where a Solicitor acts as a Notary, he has a further duty to the Court to ensure that his conduct is beyond reproach. The actings of the Respondent on this particular occasion fell below the required standard and in these circumstances, a finding of professional misconduct is appropriate....'

Similarly the authors in *Paterson and Ritchie* discuss the significance of acting as a Notary in a paragraph 1.25 'Failure to Comply with Proper Forms of Execution' and note:-

'In several cases, the Discipline Tribunal has held that intentional failure to comply with the proper form of execution of a document amounts to misconduct. In Oliver the solicitor, acting in his capacity as a Notary Public, failed to ensure that a Power of Attorney was properly executed, as it was signed outwith his presence.

"The public and the profession are entitled to the protection that documents, signed on oath before a Notary Public, have a status greater than ordinary documents, by virtue of notarisatio...A solicitor must respect the formalities and not take shortcuts."

In connection with the Respondent's explanation given to the Law Society

The Tribunal has repeatedly found that a failure to be trustworthy and act honestly may amount to professional misconduct. The Tribunal has also repeatedly found that a failure to cooperate fully with the Law Society may amount to professional misconduct.

If you consider that the response to the Law Society does not give a full and accurate account of how an affidavit came to be prepared and lodged then you should consider whether or not the response demonstrates a further instance of a breach of the requirement to be trustworthy and act honestly at all times supporting a finding of professional misconduct.

Conclusion: finding

For the reasons that I have given in this submission above, I would ask you to find that the Respondent is guilty of professional misconduct in accordance with paragraph 5.1 of the complaint which states:-

5.1 *The Council avers that the Respondent has been guilty of acts or omissions which, singularly or in cumulo, constitute professional misconduct on his part within the meaning of the Solicitors (Scotland) Act 1980 (as amended) Section 53. In particular, the Complainer avers that as a consequence of the Respondent's:-*

- a) Failure to act with trust and personal integrity in connection with the preparation of an affidavit which she purported to notarise on 29 October 2012;*
- b) Submission to the court for lodging an affidavit which contained false or misleading information on 5 November 2012; and*
- c) Subsequent failure on 29 June 2014 to provide a full and candid explanation to the Law Society in connection with the preparation of the affidavit and its sending to the Secondary Complainer*

that the Respondent is guilty of professional misconduct.

Mr Marshall invited the Tribunal to make findings in fact corresponding to paragraphs 3.1 to 3.16 as amended and admitted by the Respondent. The Law Society Fiscal indicated to the Tribunal that the disputed part of the Complaint was the final averment of misconduct which alleged that the Respondent had not been candid with the Law Society when providing an explanation of her conduct.

SUBMISSIONS FOR THE RESPONDENT

Mr Neilson indicated that the Respondent admitted that she had prepared and signed an affidavit when one was not required and had submitted the affidavit to the court. However, Mr Neilson contended that the Respondent had written to the Law Society giving a truthful explanation of what had occurred. The Respondent did do what had been alleged in terms of the first two averments of misconduct, but did not know why she had done so. This explanation was given to the Law Society and was candid. Mr Neilson submitted that the Complainers were alleging that the Respondent was at fault by not spelling out each individual act in her conduct for example by giving more detail about the dictation and the fact that her secretary had returned to her querying the instruction than she did. Mr Neilson questioned whether it was reasonable for the Complainers to expect the Respondent to have done this. He also questioned whether, even if her response was lacking in the necessary specifics, this was seriously

reprehensible conduct which could amount to professional misconduct. Mr Neilson said that although the Respondent did not spell out the minutiae of what she did, she did admit the allegation against her. The Respondent would have known that she was heading for the Discipline Tribunal and did admit the allegations from the outset. Mr Neilson said that the Tribunal was bound to take into account the whole circumstances and what was required here was a measured and proportionate decision. In his submission it would not be measured and proportionate to find her guilty of the last averment of misconduct.

In response to a question from a Tribunal member about the reasoning behind the Respondent's decision to pursue an affidavit when this had been queried by her secretary, Mr Neilson said that the Respondent was not functioning at this time. She was under a lot of pressure. He said that her behaviour was "*just daft*". Mr Neilson said that the Respondent accepted that behaviour did constitute professional misconduct. She was aware of the seriousness of the charge and accepted it without demur.

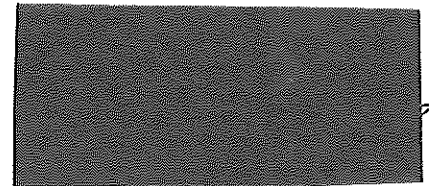
DECISION

The Tribunal considered that the Respondent's conduct clearly amounted to professional misconduct. The established proper practice for the swearing of an affidavit is clear. A completed document should be before the deponent and the notary, the deponent should then swear that the contents of the statement are true, and the deponent and the notary should immediately sign the document. This procedure was not followed on this occasion. The procedure exists to allow greater reliance to be placed upon notarised documents. In this case the Sheriff appears to have relied upon the document in question and this may have been to the detriment of the Secondary Complainer. The Tribunal considered that the Respondent's response to the Law Society at the outset of their investigation did not make clear that the affidavit had been prepared and sent to the Secondary Complainer for signature on the Respondent's express instructions. The Tribunal considered that her response was therefore lacking in candour and was in breach of a solicitor's duty to act with trust and personal integrity at all times.

It is the duty of a solicitor to uphold the higher standards of the profession and where a solicitor acts as a notary that solicitor has a further duty to the court to ensure that his conduct is beyond reproach. The actings of the Respondent on this particular occasion fell far below the required standard and in these circumstances a finding of professional misconduct is appropriate. The Tribunal were of the view that professional misconduct was made out individually and *in cumulo*.

It was noted that the Respondent had withdrawn from acting when she realised the consequences of her misconduct. She had ensured that representations were made in open court to the effect that the inference that the Sheriff had drawn regarding the affidavit was her fault and not the fault of the Secondary Complainer. The Tribunal noted that the Respondent had not previously come to the attention of the Law Society for conduct issues. She had been under pressure due to professional and personal circumstances. The Tribunal took into account the Respondent's employment and personal situation. The Tribunal appreciated that the Respondent was currently in a difficult financial position. The Tribunal was of the view that in the circumstances, the appropriate penalty was Censure.

The Tribunal sought submissions from the parties regarding publicity and expenses. The Complainers were of the view that the usual order should be made with regard to publicity and expenses. The Chairman of the Tribunal queried with the Law Society Fiscal whether any special arrangements should be made with regard to naming the Secondary Complainer given this sensitive nature of the original case. However, the Complainers had no submission to make in this regard. The usual orders were therefore made with regard to publicity and expenses. Publicity will be given to this decision and should include the name of the Respondent.



Alan McDonald
Vice Chairman