

**BROOKE'S NOTARY**

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BIBLIOGRAPHICAL NOTE

Brooke's treatise on the Office and Practice of a Notary in England was first published in 1839. Richard Brooke, a scholar and writer, published the first edition of *Notary in England* for the District of Liverpool and Commission for the High Court of Admiralty in England. The second edition (1857) was also the work of Brooke. The third edition (1887) and fourth edition (1913) were by James Cranstoun, a barrister-at-law and Professor of the Practice and Procedure in Law at King's College, London. George H. Cranstoun, barrister-at-law, undertook the revision of the work for the fifth edition published in 1929. Subsequent editions appeared in 1901, 1913 and 1929 under the supervision of James Cranstoun, a.c. The ninth edition (1939) was by J. Cranstoun, J. G. L. Cranstoun, a.c. and the tenth (1988), eleventh (1995), twelfth (2009) and thirteenth (2013) editions by the present editor.

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Board are to advise the Master and the Registrar of the Court of Faculties on any matter pertaining to the notarial profession in England and Wales and its regulation referred to it in accordance with the Rules, or any such matter which the Board may of its own motion wish to consider.

**3-10 Disciplinary powers of the Court of Faculties.** A notary guilty of fraudulent or dishonourable conduct is amenable to the Court of Faculties. The court has always had inherent power to withdraw the faculty for some good and sufficient reason<sup>48</sup> and, as we have seen, s.57(4) of the Courts and Legal Services Act 1990 enabled the Master of the Faculties to make rules regulating among other things the conduct and discipline of public notaries. As an approved regulator under the Legal Services Act 2007, the Master's disciplinary role continues.

The rules mentioned are known as the Notaries (Conduct and Discipline) Rules 2015<sup>49</sup> and came into operation on 1 November 2015.<sup>50</sup> The Rules regulate the handling of complaints against public notaries and disciplinary proceedings in the Court of Faculties. The disciplinary functions of the Master of the Faculties have now been assigned to a Commissary appointed by the Archbishop of Canterbury under s.3 of the Ecclesiastical Licences Act 1533. Accordingly, complaints and petitions under the Conduct and Discipline Rules are now heard by the Commissary who sits with two assessors.<sup>51</sup> The Archbishop may also appoint a Deputy Commissary who may perform all the functions of the Commissary in relation to matters where the Commissary is unable, or unwilling, to perform his functions.<sup>52</sup>

The Conduct and Discipline Rules contain detailed provisions regulating disciplinary procedures in the Court of Faculties in cases involving notarial misconduct. Those provisions are discussed at para.3-12 below.

**3-11 Office for Legal Complaints.** Part 6 of the Legal Services Act 2007 establishes an independent Office for Legal Complaints (OLC) which administers an ombudsman scheme for the purpose of resolving service complaints against persons who carry on reserved legal activities.<sup>53</sup> The OLC is funded partly by a

<sup>48</sup> In, *Re Champion* [1906] P. 86 at [90]:

"The Statutes dealing with notaries public in England . . . I think take for granted the power of the Master of Faculties to strike a notary public off the roll for sufficient reason. . . . I have come to the conclusion that I have as Master of the Faculties an inherent power to deal with the roll of notaries public of which I am the custodian, and that for a proper cause—a cause likely to interfere with the proper discharge of the functions of a notary public—it is competent for me as Master of the Faculties to remove the name of a notary public from the roll." This principle has been re-affirmed in several recent disciplinary cases in the Court of Faculties: *Re Marrache* (4 August 2016), *Re Box* (17 December 2016), *Re Hill* (17 December 2018) and *Re Walsh* (3 December 2019). It is immaterial whether or not the criminal offence or misconduct giving rise to the proceedings was committed by the respondent acting qua notary.

<sup>49</sup> The text of the Rules is set out in Appendix 2 below, para.A2-13.

<sup>50</sup> The Notaries (Conduct and Discipline) Rules 2011 and the Notarial Appeals and Hearings Rules 2000 are revoked save for proceedings already commenced under those rules prior to 1 November, 2015.

<sup>51</sup> Notaries (Conduct and Discipline) Rules 2015 r.5. See below, para.3-12.

<sup>52</sup> Notaries (Conduct and Discipline) Rules 2015 r.3.2.

<sup>53</sup> The scheme rules made by the OLC may be consulted at <http://www.legalombudsman.org.uk> [Accessed 8 January 2021].

levy on approved regulators and partly through charges payable by respondents in respect of individual complaints. Under the scheme, redress may be provided to the complainant, but no disciplinary action may be taken against the respondent notary: this power is reserved to the Master of the Faculties as an approved regulator.<sup>54</sup> The OLC is empowered to award redress to complainants of up to £50,000<sup>55</sup>; at the same time, the Act removes from the Master of the Faculties and other front-line regulators the ability to order redress.<sup>56</sup> Where an ombudsman forms the opinion that a complaint with which he is dealing discloses evidence of misconduct on the part of a notary, he must make a report to the Master of the Faculties.<sup>57</sup>

The Act requires<sup>58</sup> the Master of the Faculties to make rules requiring notaries to establish and maintain complaints handling procedures which, except in limited circumstances, must be exhausted before a matter may be dealt with by the OLC<sup>59</sup>; such "first tier" procedures may be operated either "in house" by the notary concerned or by his participating in a procedure operated by a third party. In furtherance of this requirement, the Master of the Faculties has approved, in accordance with r.7.1 of the Notaries (Conduct and Discipline) Rules 2015, complaints procedures operated by the Notaries Society and by the Worshipful Company of Scriveners. The complaints procedures so operated, known as "approved procedures", are discussed in more detail at para.3-17 below. In accordance with the "signposting" requirement of the Legal Services Board, the Notaries Practice Rules 2019<sup>60</sup> stipulate that when a notary accepts instructions for professional work or changes the terms on which he acts, he must notify the instructing party with a form of words prescribed by the Master of his right to complain and the manner of so doing.

When determining a complaint, an ombudsman may direct the notary to do one or more of the following<sup>61</sup>:

- 1) Apologise to the complainant;
- 2) Forego all or part of his fee;
- 3) Pay the complainant compensation in a specified amount for any loss, inconvenience or distress;
- 4) Rectify, at the notary's expense, any error, omission or deficiency in the work giving rise to the complaint;
- 5) Take at the notary's expense such other action in the complainant's interest as the ombudsman may specify.

<sup>54</sup> Legal Services Act 2007 s.113.

<sup>55</sup> Sections 137 and 138. The limit was originally £30,000 but increased by Legal Services Act 2007 (Alteration of Limit) Order 2012 (SI 2013/3091).

<sup>56</sup> Section 157. The section does not seemingly affect a regulator's "compensation arrangements" (as defined in s.21).

<sup>57</sup> Section 143.

<sup>58</sup> Legal Services Act 2007 s.112.

<sup>59</sup> Section 126 and see Legal Ombudsman Scheme Rules, Ch.4.

<sup>60</sup> Notaries Practice Rules 2019 r.8.1.4. See below, para A2-15.

<sup>61</sup> Legal Services Act 2007 s.137.

The total value of the directions made by an ombudsman in determining a complaint may not exceed £50,000.<sup>62</sup> By s.140 of the Act, where an ombudsman has determined a complaint, he must prepare a written statement setting out the reasons for his determination and this must be given to the notary who is the subject of the complaint, the complainant and the Master of the Faculties. The statement must specify a time by which the complainant must notify his acceptance or rejection of the determination; failure to notify by the specified time is treated as rejection. Once the complainant has notified the ombudsman of his acceptance, the determination becomes binding on the notary and the complainant and thereafter neither party may institute or commence legal proceedings in respect of the subject matter of the complaint.

**3-12 Disciplinary proceedings in the Court of Faculties.** As mentioned above, disciplinary cases, i.e. those involving notarial misconduct, are dealt with by the Court of Faculties. Notarial misconduct is defined<sup>63</sup> as:

- 1) Fraudulent conduct;
- 2) Practising as a notary public without a valid practising certificate or in breach of a condition or limitation imposed on a practising certificate;
- 3) Other serious misconduct which may include failure to observe the requirements of the Conduct and Discipline Rules themselves, those of the Notaries Practice Rules or falling seriously below the standard of service reasonably to be expected of a public notary or persistent failure to provide the standard of service reasonably to be expected by a notary, or
- 4) Conduct unbecoming of the office of notary which may include being convicted of a criminal offence (other than a minor road traffic offence).

Complaints of notarial misconduct may be made to the court by a "competent complainant".<sup>64</sup> The following are competent complainants<sup>65</sup>:

- 1) A nominated notary, being a notary appointed by the Registrar pursuant to r.6<sup>66</sup>; the function of a nominated notary is to diligently and expeditiously investigate evidence of or an allegation of notarial misconduct against notaries referred to him by the Registrar of the Court of Faculties. If, following such investigation, the nominated notary believes that there is a prima facie case to be answered he must prepare and prosecute disciplinary proceedings in the Court of Faculties<sup>67</sup>;

<sup>62</sup> Legal Services Act 2007 (Alteration of Limit) Order 2012 (SI 2013/3091) and see fn.55 above.

<sup>63</sup> Notaries (Conduct and Discipline) Rules 2015 r.2.1. See also Notaries (Prevention of Money Laundering) Rules 2008 r.3.3 (below para.A2-08) and the discussion at para.2-24 above.

<sup>64</sup> Notaries (Conduct and Discipline) Rules 2015 r.11.1.

<sup>65</sup> Notaries (Conduct and Discipline) Rules 2015 r.2.1.

<sup>66</sup> A nominated notary must be a notary who holds a current notarial practising certificate and has held such a certificate for not less than five years. He must be independent of and not personally acquainted with the notary who is the subject of the allegation of misconduct.

<sup>67</sup> Notaries (Conduct and Discipline) Rules 2015 r.8.3.

- 2) A client where the complaint relates to notarial misconduct arising from notarial acts or other professional services performed by the notary in question. "Client" is defined by the Rules as any person who has instructed the notary to carry out a reserved legal activity or other legal activity within the meaning of the Legal Services Act 2007 s.12 and any person who has placed legitimate reliance on a notarial act.<sup>68</sup>

In the circumstances set out in r.11.2, namely failure by the Registrar to appoint a nominated notary or determination by the nominated notary not to make a formal complaint of misconduct to the Court of Faculties, the complaint may be made to the court by any public notary who holds a notarial practising certificate. In those circumstances the notary is deemed to be a competent complainant for the purposes of the Rules.

Part IV of the Conduct and Discipline Rules sets out the procedures for making complaints of notarial misconduct and the handling of those complaints in the Court of Faculties. A complaint of notarial misconduct is made in writing in the form appended to the Rules<sup>69</sup> supported by a statement of truth in the form also appended setting out the allegations and the facts and matters giving rise thereto.<sup>70</sup> On receipt of the written complaint and statement of truth, the Registrar of the Court of Faculties issues the complaint and serves a copy of each document together with a notice of proceedings<sup>71</sup> on the respondent. The respondent then has 21 days following service of the notice of proceedings on him to deliver to the Registrar an answer to the complaint,<sup>72</sup> indicating whether or not he intends to contest the proceedings in whole or in part. On receipt of the answer, the Registrar serves a copy on the complainant. If the respondent intends to contest the proceedings he must deliver to the Registrar, within 42 days of service of the notice of proceedings, a statement in reply to the complaint and on receipt of such statement the Registrar sends a copy to the complainant. If the

<sup>68</sup> Notaries (Conduct and Discipline) Rules 2015 r.2.1.

The reserved legal activities are:

- (a) the exercise of a right of audience;
- (b) the conduct of litigation;
- (c) reserved instrument activities;
- (d) probate activities;
- (e) notarial activities;
- (f) the administration of oaths.

"Legal activity" other than a reserved legal activity means any activity which consists of one or both of the following—

- (i) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes;
- (ii) the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes.

<sup>69</sup> Notaries (Conduct and Discipline) Rules 2015 Appendix, Form 1.

<sup>70</sup> Notaries (Conduct and Discipline) Rules 2015 Appendix, Form 2.

<sup>71</sup> Notaries (Conduct and Discipline) Rules 2015 Appendix, Form 3.

<sup>72</sup> Notaries (Conduct and Discipline) Rules 2015 Appendix, Form 4.

answer to the complaint and statement in reply have not been received by the Registrar within the prescribed time limits, the Registrar appoints a date for the hearing of the complaint and gives notice to both parties.<sup>73</sup> If the answer and statement in reply are received within the time limits, the Registrar refers the papers to the Commissary who thereupon makes directions for the future conduct of the complaint as he thinks fit. In the directions, he may make provision:

- 1) For the filing and service of further evidence, including statement evidence of witnesses;
- 2) For the preparation and disclosure of lists of documents and for the inspection of such documents;
- 3) For the filing of skeleton arguments;
- 4) For a preliminary hearing to consider any point of law or procedure which may be raised by the proceedings or to consider the making of further directions;
- 5) For the hearing of the complaint and the attendance of witnesses at the hearing.

A copy of the directions and notice of any hearing are served on each party.<sup>74</sup>

The Rules make provision for the complainant to apply to the Court for an interim order pending determination of the complaint<sup>75</sup> and also for the presentation to the Court of agreed statements as to facts and issues following "without prejudice" communications between respondent and claimant.<sup>76</sup>

The hearing of the complaint takes place at such venue as the Commissary directs; each party is entitled to be present and to be represented by counsel, a solicitor or a notary or with the Court's permission by any other person.<sup>77</sup> Subject to certain exceptions, hearings take place in public.<sup>78</sup> Except in the case of interlocutory issues (including an application for an interim order as just described), complaints and petitions are heard by the Commissary sitting with two assessors appointed from the Panel of Assessors established under r.4 of the Notaries (Conduct and Discipline) Rules 2015.<sup>79</sup> The panel comprises at least six persons appointed by the Master of whom half are notaries public of at least 10 years standing (notary assessors) and half persons of good standing who are not notaries public (lay assessors). Of the two assessors assisting the Commissary at a hearing one is a notary assessor and the other a lay assessor, both chosen by him. Questions of law are determined by the Commissary alone, but all other issues are determined by a majority decision.<sup>80</sup> In cases where the Commissary

<sup>73</sup> Notaries (Conduct and Discipline) Rules 2015 Appendix, Form 5.

<sup>74</sup> Notaries (Conduct and Discipline) Rules 2015 r.16.2

<sup>75</sup> Notaries (Conduct and Discipline) Rules 2015 r.21.1 and see Appendix, Form 7. See below para.3.19.

<sup>76</sup> Notaries (Conduct and Discipline) Rules 2015 r.14.

<sup>77</sup> Notaries (Conduct and Discipline) Rules 2015 r.18.9.

<sup>78</sup> Notaries (Conduct and Discipline) Rules 2015 r.18.10.

<sup>79</sup> The text is set out in Appendix 2, below, para.A2-13.

<sup>80</sup> Notaries (Conduct and Discipline) Rules 2015 r.5.2.

is unable or unwilling to perform his functions in relation to any matter, that matter is assigned by the Registrar to a deputy commissary.

The procedure at the hearing may take such form as the Court thinks fit in all the circumstances of the case, but must ensure that both parties are given an opportunity to state their case to the Court and to cross-examine any witnesses giving evidence in person at the hearing.<sup>81</sup> It is provided<sup>82</sup> that the complaint shall be decided on the basis of the statements filed and the evidence of any witnesses. If a party to the complaint requires the witness to any statement to attend at the hearing, he must give notice to the Registrar and to the other party not less than 14 days before the date appointed for the hearing.<sup>83</sup> At any time prior to conclusion of the hearing, the Commissary may, if he thinks it expedient to do so, adjourn the hearing and give such further directions as he thinks fit.<sup>84</sup> As to standard of proof, findings of fact are made by the Court on the balance of probabilities.<sup>85</sup> After hearing the complaint, the Commissary may give his decision at the hearing or reserve judgment. The Registrar gives notice to the parties of the Commissary's order in the form appended to the Rules.<sup>86</sup> In either case the contents of the Court's decision are made public; this may include posting the decision on the Court's website.<sup>87</sup> The Registrar must publish on the Court's website the order imposing any sanction against a notary for such period stipulated by the Court.<sup>88</sup>

**Investigation of complaints by a nominated notary (r.8.2).** As indicated above,<sup>89</sup> the function of a nominated notary is to investigate allegations of notarial misconduct referred to him by the Registrar and prepare and prosecute disciplinary proceedings in the Court of Faculties.<sup>90</sup> If the Registrar is unable to identify a nominated notary independent of and not personally acquainted with the notary who is the subject of the allegation the Master may appoint an independent person, who need not be a notary, to act in place of a nominated notary.<sup>91</sup> 3-13

**Disciplinary sanctions; costs.** Where, after hearing a complaint of notarial misconduct against a public notary, the Commissary finds that it has been proved, he may<sup>92</sup>: 3-14

- 1) Order that the notary be struck off the Roll of Notaries;
- 2) Order that the notary be suspended from practice as a notary for a specified period or until certain conditions have been met or indefinitely;

<sup>81</sup> Notaries (Conduct and Discipline) Rules 2015 r.18.1

<sup>82</sup> Notaries (Conduct and Discipline) Rules 2015 r.18.4

<sup>83</sup> Notaries (Conduct and Discipline) Rules 2015 r.17.1.

<sup>84</sup> Notaries (Conduct and Discipline) Rules 2015 r.18.5.

<sup>85</sup> Notaries (Conduct and Discipline) Rules 2015 r.19.

<sup>86</sup> Notaries (Conduct and Discipline) Rules 2015 Appendix, Form 6.

<sup>87</sup> Notaries (Conduct and Discipline) Rules 2015 r.18.6.

<sup>88</sup> Notaries (Conduct and Discipline) Rules 2015 r.22.5.

<sup>89</sup> See para.3-12.

<sup>90</sup> Notaries (Conduct and Discipline) Rules 2015 r.8.3

<sup>91</sup> Notaries (Conduct and Discipline) Rules 2015 r.6.4

<sup>92</sup> Notaries (Conduct and Discipline) Rules 2015 r.22.

- 3) Impose conditions as to the future scope or conduct of the notarial practice of the notary or conditions relating to the monitoring or supervision of his practice and direct that his practising certificate be endorsed;
- 4) Impose conditions as to the training that the notary must complete or further examination or examinations that he must pass before resuming his notarial practice; or
- 5) Order that the notary be admonished.

The Rules further provide<sup>93</sup> that, in addition to imposing any of the above penalties, the court may order that the notary:

- 1) Indemnifies any client of the notary whom the court finds to have suffered actual loss as a result of the notarial misconduct in question, and
- 2) Pays a monetary sum not exceeding £10,000 (or such higher sum as the Master may from time to time specify for the purpose of the Rules), such sum to be paid to whomsoever the court may direct.

On the question of costs, r.23 provides that the Court may at its discretion order that the costs of either party to the complaint be paid by the other party and that the costs of the Court be paid by either party or by both parties, whether in equal or unequal shares, or from the contingency fund<sup>94</sup>; it is also open to the Court to order that costs be paid into the contingency fund instead of to the other party or the court. Costs may not be awarded against a nominated notary, who in all cases is entitled to an order for costs payable out of the contingency fund.<sup>95</sup> The Master is required, after consultation with the Commissary, to approve by Order a table of costs to be applied by the Court, save in exceptional cases, in relation to orders for costs under the Rules.<sup>96</sup>

**3-15 Application for Review.** Where, as a result of an order made under the Rules,<sup>97</sup> certain sanctions, which include striking-off, suspension from practice or conditions on future practice, have been imposed against a notary, the notary may apply to the Court of Faculties to review the order. The procedures set out in r.25 apply to an application for review.

**3-16 Appeals.** Except in the case provided for in s.5 of the Public Notaries Act 1843 whereby complaint may be made to the Chancellor of the High Court in the event of refusal to grant a faculty to practise as a notary without just and reasonable

<sup>93</sup> Notaries (Conduct and Discipline) Rules 2015 r.22.2.

<sup>94</sup> See the Notarial Contingency Fund Rules 1981 as amended by the Notarial Contingency Fund (Amendment) Rules 1993 (see para.A2-01, below).

<sup>95</sup> Notaries (Conduct and Discipline) Rules 2015 r.23.3

<sup>96</sup> Notaries (Conduct and Discipline) Rules 2015 r.23.4 and the Notaries (Conduct and Discipline) Fees and Costs Order 2015.

<sup>97</sup> Including under the 1993, 2009 or 2011 Conduct and Discipline Rules.

cause,<sup>98</sup> no appeal lies from a decision of the Court of the Faculties. Its decisions are, however, subject to judicial review.

**Non-disciplinary complaints; approved procedures.** The Conduct and Discipline Rules provide for disputes between members of the public and notaries where there is no allegation of notarial misconduct to be dealt with by a designated society<sup>99</sup> in accordance with a complaints resolution procedure approved by the Master (an "Approved Procedure").<sup>100</sup> In the case of a scrivener notary, the allegation is referred to the Scriveners' Company and in the case of a non-scrivener notary to the Notaries Society. The allegation must thereafter be dealt with by the designated society in accordance with the relevant approved procedure. Such a procedure may include provision:

- 1) For the informal resolution of disputes between members of the public and notaries concerning notarial acts done by a notary, or the conduct of a notary's practice;
- 2) For the informal resolution of disputes between members of the public and notaries concerning the charges made by notaries for notarial services;
- 3) For dealing with complaints referred to a designated society by the Registrar about the conduct or practice of a notary who is a member of that society.<sup>101</sup>

The Rules require a notary to cooperate with a designated society in the operation of an approved procedure and comply with any reasonable action proposed by the designated society at the conclusion thereof.<sup>102</sup>

Cases will arise where there is no approved procedure available to deal with a complaint, because for example the notary concerned is not a member of a designated society, or a designated society does not have such a procedure in place. In these circumstances, the Registrar is required<sup>103</sup> to refer the matter to a member of a panel of senior notaries appointed to carry out the functions set out in r.7.2 concerning approved procedures.

Allegations of notarial misconduct may not be dealt with in accordance with an approved procedure. Where an allegation against a notary comes to the attention of a designated society (whether or not in the course of the operation of an approved procedure) and where it appears to the designated society concerned that such allegation amounts to an allegation of notarial misconduct, the allegation must be referred to the Registrar for consideration under r.8.2.<sup>104</sup>

<sup>98</sup> See para.3-05 above.

<sup>99</sup> These are currently the Scriveners' Company and the Notaries Society (r.2.1).

<sup>100</sup> Notaries (Conduct and Discipline) Rules 2015 r.7.

<sup>101</sup> Notaries (Conduct and Discipline) Rules 2015 r.7.2.

<sup>102</sup> Notaries (Conduct and Discipline) Rules 2015 r.7.3.

<sup>103</sup> Notaries (Conduct and Discipline) Rules 2015 r.7.5

<sup>104</sup> Notaries (Conduct and Discipline) Rules 2015 r.10. For the procedures under r.8.2, see above para.3-13.

**3-18 Special provision for members of specified professions.** Rule 24 makes provision for cases where a body (a “Relevant Body”) exercising disciplinary jurisdiction over certain specified professions,<sup>105</sup> including barristers, legal executives, licensed conveyancers and legal practitioners outside England and Wales has found a complaint against a notary, who is also a member of the specified profession concerned, to be substantiated. In such circumstances, the notary must report that finding to the Registrar, whether or not a penalty was imposed. Where such a finding comes to the attention of the Registrar, he must appoint a nominated notary<sup>106</sup> to investigate the matter and if thought fit prepare and prosecute disciplinary proceedings in the Court of Faculties.

**3-19 Interim orders.** In cases where the Registrar receives prima facie evidence of notarial misconduct on the part of a notary or a notary is charged with committing an offence (whether in England and Wales or elsewhere) he may, for the protection of the public and pending the conclusion of disciplinary proceedings under the Rules, make an interim order suspending the notary from practice or restricting, limiting or imposing conditions on his practice.<sup>107</sup> The notary may appeal to the Master against such an order.

Provision is also made for a complainant to apply to the court for an interim order in like terms as above pending determination of the complaint. The procedure for the hearing of such an application is set out in r.21 although the commissary or deputy commissary has a discretion to modify that procedure where necessary for the protection of the public.<sup>108</sup>

Rule 21.9 makes special provision for the case where a notary has been struck off or suspended from legal practice as a result of a finding of misconduct by a Relevant Body.<sup>109</sup> In such circumstances, where a complaint has been made under r.11.1, the court may, pending determination of the complaint and after considering any representations made by the notary, of its own initiative or on the application of the complainant suspend the notary from practice or restrict, limit or impose conditions on his practice.

#### PRACTICE REGULATION

**3-20** Although many notaries are sole practitioners, the majority practise within general or limited liability partnerships. A few notaries practise as or within limited companies. It is an offence under the Legal Services Act 2007<sup>110</sup> to provide reserved legal services to the public or a section of the public through a body, corporate or unincorporate, which has not been authorised for that purpose by an approved regulator if the provision of those services is part of the business

<sup>105</sup> See Schedule to the Rules for a full list of specified professions and corresponding disciplinary bodies.

<sup>106</sup> See above, para.3-13.

<sup>107</sup> Notaries (Conduct and Discipline) Rules 2015 r.9.1.

<sup>108</sup> Notaries (Conduct and Discipline) Rules 2015 r.21.8

<sup>109</sup> See para.3-18 above.

<sup>110</sup> Legal Services Act 2007 s.14 in conjunction with the interpretation provision of s.15.

of that body. However, such bodies are currently protected from prosecution by transitional provisions in the Act.<sup>111</sup>

We have seen earlier in this Chapter<sup>112</sup> that the Courts and Legal Services Act 1990, s.57 gave specific rule-making powers to the Master of the Faculties. However, those powers do not include that of regulating bodies (sometimes called “entity regulation”) rather than individual notaries. At the time of writing the Faculty Office was seeking an order from the Lord Chancellor under s.69 of the 2007 Act granting that power together with additional enforcement and sanctioning powers, including that of intervening in a notarial practice. In anticipation of the Lord Chancellor’s order, which is unlikely to be granted in the immediate future, the Faculty Office has published draft Notaries (Authorisation of Notarial Practices) Rules which may be consulted on its website.<sup>113</sup>

<sup>111</sup> Legal Services Act 2007 Sch.5, para.13.

<sup>112</sup> Paragraph 3-06.

<sup>113</sup> The Faculty Office, Notaries (Authorisation of Notarial Practices) Rules (Draft) (2018), available at <https://www.facultyoffice.org.uk/wp-content/uploads/2020/10/Consultation-Practice-Authorisation-March-2018-For-Publication.pdf> [Accessed 8 January 2021].

## CLASSES, APPOINTMENT AND TRAINING OF NOTARIES

## THE POSITION PRIOR TO 1991

In order to understand the present structure of the notarial profession in England and Wales, it is necessary briefly to examine the position prior to the important changes introduced by the Courts and Legal Services Act 1990, the principal provisions of which affecting notaries came into force on 1 July 1991. Prior to that date three classes of notary were appointed in England and Wales, namely general, district and ecclesiastical notaries.<sup>1</sup> 4-01

**General notaries.** No person could be admitted as a general notary unless he had been bound by a contract in writing or by an indenture of apprenticeship to serve as a clerk and apprentice to a duly qualified notary for a period of not less than five years<sup>2</sup> and had in fact served the notary to whom he so bound himself "in the proper business, practice or employment of a Public Notary" continuously for the full period of five years. 4-02

The class of general notaries comprised:

- 1) Notaries who held a faculty to practise in all parts of England and Wales, except within the City of London and areas adjacent thereto then subject to the exclusive jurisdiction of the Scriveners' Company;
- 2) Notaries who, being members of the Scriveners' Company, held a faculty to practise in all parts of England and Wales, including the areas then subject to the exclusive jurisdiction of the Company. These notaries are referred to as "scrivener notaries" and, because of their particular status, will be considered separately in this chapter.

**District notaries.** This class comprised:

4-03

- 1) Notaries who were practising solicitors residing more than 10 miles from the Royal Exchange, London and held a faculty entitling them to act as notaries public within a limited and specified area in England outside that limit.

<sup>1</sup> In 1987, according to the practising certificate returns of the Faculty Office, there were 764 practising general notaries in England and Wales (of which 25 within the jurisdiction of the Scriveners' Company), and in England, 378 practising district notaries. Butterworth's Law Directory 1988 listed 27 district notaries practising in Wales. At the time of writing 717 general notaries are listed by the Faculty Office of whom 32 are scrivener notaries; there are approximately 35 ecclesiastical notaries.

<sup>2</sup> Public Notaries Act 1801 s.2, as amended by the Public Notaries Act 1843 s.3.

- 2) Notaries who were practising solicitors admitted to act as notaries within a limited and specified area wholly within Wales.<sup>3</sup> Since the disestablishment of the Church in Wales, they had been appointed by the Clerk of the Crown in Chancery acting under powers conferred on him by the Lord Chancellor.<sup>4</sup>

4-04 **Ecclesiastical notaries.** This class was largely unaffected by the 1990 legislation and continued, as it does now, to consist mainly of registrars of the diocesan courts and their deputies.

#### COURTS AND LEGAL SERVICES ACT 1990

4-05 The Courts and Legal Services Act 1990 saw the emergence of the notarial profession in England and Wales from a long period of legislative neglect. Until this legislation there had been no major statutory intervention affecting notaries since the passage of the last of the three nineteenth-century Public Notaries Acts in 1843. A number of reasons can be identified for this renewed legislative interest: the UK's entry into the European Communities and the growing international contacts of the legal professions had led to an appreciation of the importance of the role played by notaries in the civil-law jurisdictions of continental Europe; increased demand for notarial services from businesses and private individuals had revealed an unequal geographical distribution of notaries in England and Wales and, in particular, a relative shortage of notaries in the London suburban areas, where district notaries were not allowed to practise; recognition of the need to bring the profession within a tighter regulatory framework analogous to that existing in the other branches of the legal professions.

The Courts and Legal Services Act 1990, whilst introducing far-reaching changes in the structure and regulation of the profession, maintained the status quo in two important respects:

- 1) The jurisdiction exercised, since the Reformation, by the Court of Faculties of the Archbishop of Canterbury over notaries was preserved;
- 2) The privileges of the Worshipful Company of Scriveners concerning entitlement to practise as a notary within the City of London and the circuit of three miles of the City<sup>5</sup> were left intact.<sup>6</sup>

The principal changes introduced by the Courts and Legal Services Act 1990 affecting notaries were the following:

- 1) The category of district notaries (introduced by the Public Notaries Act 1833) in both England and Wales was abolished; all notaries appointed

<sup>3</sup> Including the former administrative county of Monmouthshire and county borough of Newport. (See the Local Government Act 1972 s.20(7)).

<sup>4</sup> Welsh Church Act 1914 s.37.

<sup>5</sup> But see para.4-06, below.

<sup>6</sup> Courts and Legal Services Act 1990 s.57(11); subsequently repealed by Access to Justice Act 1999 s.106 and Sch.15 Pt II.

after 1 July 1991 (except ecclesiastical notaries) have been granted general faculties.<sup>7</sup> With effect from that date any restrictions placed on existing district notaries in terms of the districts within which they might practise as notaries ceased to apply;<sup>8</sup>

- 2) As a consequence of the abolition of the category of district notaries, the jurisdiction exercised by the Lord Chancellor over district notaries in Wales under s.37 of the Welsh Church Act 1914 ceased;<sup>9</sup> the Master of the Faculties was empowered to make rules providing for the grant by the Master of new faculties for former Welsh district notaries affirming and recognising their status as public notaries;<sup>10</sup>
- 3) The requirement for the service of a period of apprenticeship prior to appointment as a notary which had applied to general notaries, including scrivener notaries, was abolished.<sup>11</sup>

The Master of the Faculties was given statutory authority to issue rules making provision as to the educational and training qualifications which must be satisfied before a person may be granted a faculty to practise as a public notary.<sup>12</sup> However, the power of the Scriveners' Company to require a person seeking to become a public notary within its jurisdiction to serve a period of apprenticeship was expressly preserved<sup>13</sup> and until 1 November 1999 (the date on which the company's exclusive jurisdiction in central London was abolished),<sup>14</sup> all persons seeking appointment as notaries within the Company's jurisdiction were required to serve five years' apprenticeship with a scrivener notary in full-time practice.

#### ACCESS TO JUSTICE ACT 1999

**Abolition of the exclusive jurisdiction of the Scriveners' Company.** In 1999, 4-06 the government resolved to abolish the exclusive right of scrivener notaries to practise in, or within three miles of, the City of London and provision to that effect was made in the Access to Justice Act 1999.<sup>15</sup> However, despite the fact that scrivener notaries no longer enjoy the exclusive right to practise in the City of London and its surrounds, they remain a discrete branch of the profession and the Company continues to prescribe particular standards of education and training for those seeking to qualify as scrivener notaries. These are contained in the Scriveners (Qualifications) Rules 2019<sup>16</sup> and no notary may describe himself as a scrivener notary unless he has qualified in accordance with these rules.<sup>17</sup>

<sup>7</sup> Courts and Legal Services Act 1990 s.57(1).

<sup>8</sup> Courts and Legal Services Act 1990 s.57(8).

<sup>9</sup> Courts and Legal Services Act 1990 s.57(3)(e).

<sup>10</sup> Courts and Legal Services Act 1990 s.57(5)(6); Public Notaries (Wales) Transitional Rules 1991.

<sup>11</sup> Courts and Legal Services Act 1990 s.57(2).

<sup>12</sup> Courts and Legal Services Act 1990 s.57(4)(a).

<sup>13</sup> Courts and Legal Services Act 1990 s.57(11).

<sup>14</sup> Access to Justice Act 1999 s.53; see para.4-06, below.

<sup>15</sup> Access to Justice Act 1999 s.53.

<sup>16</sup> The text of the rules is set out in Appendix 2, para.A2-18, below.

<sup>17</sup> Notaries Practice Rules 2019 r.15.

## LEGAL SERVICES ACT 2007

4-07 As we have seen above,<sup>18</sup> with effect from the entry into force of s.13 of the Legal Services Act 2007,<sup>19</sup> entitlement to carry on reserved legal activities, which include notarial activities,<sup>20</sup> is determined solely in accordance with the Act. The Master of the Faculties is designated by the Act<sup>21</sup> as an approved regulator in respect of notarial activities, reserved instrument activities, probate activities and the administration of oaths; accordingly, he is empowered by the Act<sup>22</sup> to authorise persons to carry on those activities.

NOTARIES (QUALIFICATION) RULES 2017<sup>23</sup>

4-08 The Rules set out the requirements for qualification as a notary in England and Wales. Rule 3 provides that no person shall be admitted as a notary to practise within England and Wales unless: (1) he is over 21 years of age and satisfies the qualification requirements of the Rules; (2) takes the oath of allegiance and the oath required by s.7 of the Public Notaries Act 1843<sup>24</sup>; and (3) except in the case of ecclesiastical notaries<sup>25</sup> and notaries qualified in jurisdictions outside England and Wales,<sup>26</sup> is either a solicitor of the Senior Courts of England and Wales, a barrister at law, a chartered legal executive or holds a degree.<sup>27</sup>

## GENERAL NOTARIES

4-09 In addition to satisfying the requirements of r.3 of the Qualification Rules, an applicant for admission as a general notary must first obtain the practical qualifications specified in Pt III of the Rules. These require (r.7 and Sch.2) that the prospective notary must have followed and obtained a satisfactory standard in a course or courses of study covering all the following subjects:

- 1) Public and constitutional law;
- 2) Law of property;

<sup>18</sup> See paras 3-07 et seq.

<sup>19</sup> Entered into force 1 January 2010.

<sup>20</sup> Defined in Sch.2 para.7 as activities which immediately prior to the entry into force of s.13 were customarily carried on by virtue of enrolment as a notary in accordance with s.1 of the Public Notaries Act 1801. By s.14 it is an offence for a person to carry on a reserved legal activity unless that person is entitled to do so.

<sup>21</sup> Legal Services Act 2007 s.20 and Sch.4 Pt 1 para.1.

<sup>22</sup> Legal Services Act 2007 s.20(6).

<sup>23</sup> The text of the Rules is set out in para.A2-14, below.

<sup>24</sup> See para.A1-05, below. It is the view of the Faculty Office that the requirement that the applicant take the oath of allegiance does not presuppose that he is a British citizen.

<sup>25</sup> See para.4-11, below.

<sup>26</sup> Notaries (Qualification) Rules 2017 r.8. See para.4-09, below.

<sup>27</sup> For the purposes of the rules, a degree means a qualification awarded following a post-secondary course of at least three years' duration (or of an equivalent duration part-time) at a university or an establishment of higher education or an establishment of similar level (r.2).

- 3) Law of contract;
- 4) Law of the European Union;
- 5) Equity and the law of trusts;
- 6) Conveyancing;
- 7) The law and practice of companies and partnerships;
- 8) Wills, probate and administration;
- 9) Roman law as an introduction to civil-law systems;
- 10) Private international law;
- 11) Notarial practice.

Whether a particular course of studies satisfies the requirements of the Rules and whether the applicant has attained a satisfactory standard is determined by the Master of the Faculties after seeking the advice of the Qualifications Board established by r.6.<sup>28</sup>

As mentioned above, r.8 makes special provision for notaries from jurisdictions outside England and Wales. The rule applies not only to persons holding the office of notary in those jurisdictions, but also to those holding all the qualifications and having completed all the practical training necessary for appointment or admission to that office in such a jurisdiction but have not yet been so appointed or admitted. Any such person may apply to the Master for recognition that he is qualified for admission as a general notary to practise in England and Wales. The applicant must satisfy the Master, in consultation with the Qualifications Board, that he can demonstrate a knowledge sufficient for a notary to practise in England and Wales in those subjects listed in Schs 3 and 4<sup>29</sup> to the Rules, either as a result of examinations set by an institution or body recognised by the Qualifications Board taken within the previous five years in those subjects or from the applicant's direct practical experience. The applicant must also demonstrate competence with respect to the practice of a notary in England and Wales. Where an applicant is unable to demonstrate the requisite knowledge or experience, the Master may require the applicant to pass an aptitude test by way of examination or examinations or undertake a period of supervision not exceeding three years.

Where an application is made under r.8, the Master must make his determination as soon as possible and advise the outcome to the applicant in a reasoned decision within four months of submission of all the certificates and documents relating to the applicant as the Qualifications Board may reasonably require. If the Master refuses an application or fails to determine it within the time-limit specified, he is deemed to have refused an application for a faculty and the applicant may pursue the remedy provided for in s.11 of the Ecclesiastical Licences Act 1533, and s.5 of the Public Notaries Act 1843.<sup>30</sup>

<sup>28</sup> For the constitution of the Board, see Sch.1 to the Rules, para.A2-14 below.

<sup>29</sup> See below, para.A2-20.

<sup>30</sup> Notaries (Qualification) Rules 2017 r.8.5. For discussion of the remedy referred to, see paras 3-04 and 3-05, above.

All persons seeking admission as notaries are now required to undertake an Office Practice Course approved by the Master covering the subjects listed in Sch.5 to the Rules.<sup>31</sup>

#### PROCEDURE FOR ADMISSION

4-10 A person qualified for admission as a notary must make application in writing to the Faculty Office on a prescribed form<sup>32</sup> accompanied by:

- 1) A certificate of fitness in the prescribed form given by a notary public to the effect that the applicant is known to him or her and, to the best of the notary's knowledge and belief after making due inquiry, a fit and proper person to be created a notary public<sup>33</sup>; and
- 2) A certificate of good character in the prescribed form, given by a person who is of good standing and character and has known the applicant for not less than five years, is not related to the applicant by blood, marriage or adoption and is not a professional partner, employer or employee of the applicant, testifying to the good character, honesty, reliability, diligence and trustworthiness of the applicant and stating that the person giving the certificate knows of no reason why the applicant should not be created a notary public.<sup>34</sup> In the case of a person seeking appointment as an ecclesiastical notary, the certificate of fitness must also state that the applicant is conformable to the doctrine and discipline of the Church of England or, in the case of a person qualified only by reason of holding an ecclesiastical appointment in Wales, the doctrine, discipline and constitution of the Church in Wales<sup>35</sup>;
- 3) Evidence that the applicant has successfully completed the notarial practice course referred to in para.4-09 above within a period not exceeding two years prior to the date of the application<sup>36</sup>;
- 4) The prescribed fee.<sup>37</sup>

In the case of notaries other than ecclesiastical notaries, the application contains an undertaking by the applicant that, whilst in practice as a notary, he will keep himself insured by suitable professional indemnity and fidelity insurance acceptable to the Master.

<sup>31</sup> Notaries (Qualification) Rules 2017 r.10(5). See below, para.A2-14.

<sup>32</sup> Notaries (Qualification) Rules 2017 r.9.1.

<sup>33</sup> Notaries (Qualification) Rules 2017 r.9.2(a).

<sup>34</sup> See rr.9.2(b) and 9.3. The prescribed forms of the certificates of fitness and good character are scheduled to the Orders of the Master of the Faculties dated 27 August 1992 and 13 September 1993 respectively, the text of which is set out in paras A2-06 and A2-07 below.

<sup>35</sup> Notaries (Qualification) Rules 2017 r.9.4.

<sup>36</sup> In the case of applicants qualified as notaries outside England and Wales, the application is accompanied by evidence of demonstration to the Master of knowledge and competence as required by r.8.3.

<sup>37</sup> Notaries (Qualification) Rules 2017 r.9.6. Currently £625. For overseas notaries, the fee is £700 and for ecclesiastical notaries £312.50.

The Master may give or require an applicant to give such publicity to an application as appears to him necessary in the circumstances.<sup>38</sup> Any representations following upon such publicity are notified to the applicant and his response thereto considered by the Master prior to his decision whether or not to grant a faculty.<sup>39</sup>

The Registrar is required<sup>40</sup> to notify refusal of an application for admission as a notary to the applicant in writing to enable the applicant to pursue (if so advised) the appeal proceedings to the Chancellor of the High Court under s.11 of the Ecclesiastical Licences Act 1533 and s.5 of the Public Notaries Act 1843.<sup>41</sup>

In order to be admitted as a notary, the applicant appears personally before the Registrar to make the oaths required by r.3.2.<sup>42</sup> The Registrar thereupon admits the applicant by delivering to him the notarial faculty and entering his name on the roll of notaries<sup>43</sup>; before such admission, the Registrar must be satisfied that the applicant has successfully completed the Office Practice Course referred to above.<sup>44</sup>

#### ECCLESIASTICAL NOTARIES

The Qualification Rules provide<sup>45</sup> that any person appointed as registrar of either of the Provinces of Canterbury or York, as registrar to the Archbishop of Wales, as legal adviser to the General Synod of the Church of England, as legal secretary to the Governing Body of the Church in Wales, as registrar of any diocese in England and Wales, as an officer of the ecclesiastical court in Jersey or Guernsey, or as the deputy of any such officer, may apply for admission as a notary public for ecclesiastical purposes only, upon satisfying the Master of the Faculties of the fact of such appointment. The principal duty of an ecclesiastical notary is to attest records of ecclesiastical proceedings such as the election and installation of bishops, the consecration of churchyards, etc.; their presence at such ceremonies is often considered to be an essential requirement.<sup>46</sup> Although appointed by the Master of the Faculties, they form a category entirely separate from other notaries and are not in general subject to the provisions of the Public Notaries Acts 1801 and 1843<sup>47</sup>; they are also exempt from the provisions of the Legal Services Act 2007.<sup>48</sup> A notary appointed for ecclesiastical purposes only is not required to have in force a practising certificate as a notary public issued by the

4-11

<sup>38</sup> Notaries (Qualification) Rules 2017 r.10.1.

<sup>39</sup> Notaries (Qualification) Rules 2017 r.10.2.

<sup>40</sup> Notaries (Qualification) Rules 2017 r.10.3.

<sup>41</sup> See paras 3-04 and 3-05, above.

<sup>42</sup> See para.4-08, above. The Master may appoint a commissioner to act in place of the Registrar for this purpose. See also para.3-06 above, fn.34.

<sup>43</sup> See Notaries (Qualification) Rules 2017 r.10.4.

<sup>44</sup> Notaries (Qualification) Rules 2017 r.10.5 and see para.4-09 in fine.

<sup>45</sup> Notaries (Qualification) Rules 2017 r.4.

<sup>46</sup> See *Halsbury's Laws of England*, 5th edn (2011), Vol.34, paras 183 and 190.

<sup>47</sup> Public Notaries Act 1801 s.14. Many of the rules of the Master of the Faculties do not apply to ecclesiastical notaries.

<sup>48</sup> Legal Services Act 2007 Sch.3 para.5(3).