

THE SOLICITORS (SCOTLAND) ACT 1980
THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL

D E C I S I O N

in Application

by

JAMES IAN MCALLISTER STEWART SLOAN,
62 Martin Brae, Ladywell, Livingston .

for an Order restoring his name to the Roll of
Solicitors.

1. An Application dated 2nd September 2002 was lodged with the Scottish Solicitors' Discipline Tribunal by James Ian McAllister Stewart Sloan, 62 Martin Brae, Ladywell, Livingston (hereinafter referred to as "the Applicant") for restoration to the Roll of Solicitors.
2. In terms of their usual procedure the Tribunal intimated the Application to the Law Society. A form of Notice of Objection was received from the Law Society (hereinafter referred to as "the Objector") on 20th November 2002.
3. The Solicitor acting on behalf of the Applicant raised preliminary issues and the Tribunal appointed a hearing to be held to hear submissions on the preliminary issues on 17th December 2002 and notice thereof was duly intimated to the Applicant and the Objector.
4. The hearing on the preliminary issues took place on 17th December 2002. The Applicant was represented by Mr Joseph d'Inverno, Solicitor, Edinburgh and the Objector was represented by Mr Paul Reid, Solicitor, Glasgow.
5. Having heard submissions on behalf of the Applicant and on behalf of the Objector the Tribunal found that the Notice of Objection did not disclose a *prima*

facie case for enquiry and that accordingly the Tribunal would not afford to the Objector an opportunity of being heard by the Tribunal and of adducing evidence. With regard to the Applicant's second preliminary plea the Tribunal found that the Rules give fair notice to the Applicant of what kind of evidence the Tribunal requires but the Tribunal has given further guidance in the Note attached to this Decision. With regard to the Applicant's third preliminary plea the Tribunal found that the Discipline Tribunal is a fair and impartial Tribunal in terms of Article 6 of the European Convention on Human Rights and accordingly repelled the Applicant's plea.

6. The Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 17th December 2002. The Tribunal having considered the preliminary pleas made by the Applicant in respect of his application for restoration to the Roll of Solicitors, Find that the Notice of Objection does not disclose a *prima facie* case for enquiry and that accordingly the Tribunal shall not afford the Objector an opportunity of being heard by the Tribunal and adducing evidence, Find that the Scottish Solicitors' Discipline Tribunal (Procedure) Rules 2002 do give fair notice to the Applicant of the evidence which he requires to adduce, repel the Applicant's plea under Article 6 of the European Convention on Human Rights and reserve the issue of publicity and expenses until the substantive hearing of the Application.

G FRASER RITCHIE

Chairman

7. A copy of the foregoing together with a copy of the Decision certified by the Clerk to the Tribunal as correct were duly sent to the Applicant by recorded delivery service on

IN THE NAME OF THE TRIBUNAL

Chairman

NOTE

The Solicitor for the Applicant raised certain preliminary issues in his letter dated 5th December 2002. The Tribunal accordingly fixed a hearing on the preliminary issues for 17th December 2002 so that these matters could be clarified before the substantive hearing proceeded.

APPLICANT'S FIRST PRELIMINARY PLEA

Mr d'Inverno addressed the Tribunal on behalf of the Applicant. He stated that the Law Society was an objector in terms of Rule 30 and had no special privileges under the Rules. It was therefore up to the Law Society to seek to persuade the Tribunal that their Notice of Objection disclosed a *prima facie* case for enquiry. Mr d'Inverno stated that he was not challenging the competence of the Tribunal having intimated the Application to the Law Society as a potential objector but he pointed out to the Tribunal that an Application for Restoration to the Roll was different from a Complaint lodged with the Tribunal because the Tribunal was exercising a judicial function rather than a disciplinary function in connection with an Application for Restoration to the Roll. Mr d'Inverno said that the Notice of Objection lodged by the Objector did not put in dispute any issues of fact in the Applicant's Application. The Notice of Objection appeared to be stating that once a solicitor had been struck from the Roll for an act of serious dishonesty he could never be restored to the Roll. The Objector had not given any indication in the Notice of Objection of an intention to prove anything. The Objector had merely referred back to the previous Tribunal decision. Mr d'Inverno alleged that the Objector had not focused on any issues in the Notice of Objection and the Notice of Objection did not provide fair notice to the Applicant of what the Objector's objection was.

Mr Reid for the Law Society referred the Tribunal to the Solicitors (Scotland) Act 1980 which set out the objectives of the Law Society, which include promoting the interests of the profession and the public. The Law Society accordingly had a locus to object to an Application for Restoration to the Roll by a solicitor who had been convicted in the past of serious dishonesty. Mr Reid stated that the Notice of Objection lodged by the Law Society as Objector did disclose a *prima facie* case and accordingly the Law Society

should be allowed to be heard and to adduce evidence. Mr Reid confirmed that the Objector took no issue with the factual circumstances as set out in the Application. The Law Society was questioning the suitability of the Applicant for Restoration to the Roll and would wish to be able to ask questions of the Applicant's witnesses to elicit evidence and to make submissions on the suitability of the Applicant for Restoration to the Roll. Both Mr Reid and Mr d'Inverno confirmed that they understood "adduced evidence" as set out in the Rules to mean presentation of evidence being witnesses or documents.

The Tribunal carefully considered the submissions on behalf of the Applicant and the Objector. The Notice of Objection lodged by the Law Society refers to the Findings made by the Tribunal when the Applicant was struck off the Roll and quotes various passages from the Tribunal's Findings. The last sentence of the Notice of Objection states that there is nothing in the application lodged by the Applicant that would allow a departure from the usual position that there is no place in the legal profession for solicitors who are dishonest. This is all that is said by the Objector and no comment has been made on the merits of the Application as lodged by the Applicant. The Tribunal are accordingly of the view that the Notice of Objection lodged by the Law Society does not disclose a *prima facie* case for enquiry. Given the terms of the Notice of Objection the Tribunal cannot see what evidence the Law Society would wish to lead in support of their objection. Mr Reid indicated that the Law Society wished the opportunity to cross-examine the Applicant's witnesses but the Tribunal are of the view that this is not what is envisaged by the terms of Rule 30. The Tribunal accordingly find that the Objector will not be given the opportunity of being heard by the Tribunal or of adducing evidence but the Tribunal will take account of the written Notice of Objection lodged by the Objector.

SECOND SUBMISSION FOR THE APPLICANT

Mr d'Inverno stated that in order for the Applicant to be able to prepare his case properly he would require some indication from the Tribunal of the test which it would apply in considering whether the Applicant was suitable for Restoration to the Roll. Mr d'Inverno referred the Tribunal to the case of *H v Belgium* 1987 ECHR page 350-351 where the Court stated that it was difficult for the Applicant to adduce appropriate evidence of

“exceptional circumstances” which might in law have brought about his restoration to the Roll and to argue the case with the requisite of effectiveness because neither the applicable provisions nor the previous decisions of Councils of the *Ordre* gave any indication of what could amount to exceptional circumstances. Mr d’Inverno stated that what was contained in Rule 29 was not sufficient for the Applicant to know what test he had to meet. The Applicant had received a copy of a previous decision of the Tribunal in respect of an Application for Restoration to the Roll where the Tribunal had indicated that there were circumstances which could apply where Restoration to the Roll would be appropriate. Mr d’Inverno stated that it does not appear either from precedent or the Rules that he has sufficient notice of the test he must satisfy to discharge the onus that is upon him and accordingly he could not prepare for his case properly. Mr d’Inverno explained that for example it would be useful for the Applicant to know whether or not the Tribunal started its consideration with a presumption that the Applicant was unsuitable.

In view of their decision on the first submission, the Tribunal did not consider that the Objector had any locus to reply to this submission made by the Applicant. The Tribunal considered Mr d’Inverno’s plea very carefully. Rule 29 makes it quite clear that the Tribunal will require evidence with regard to the identity and the character of the Applicant, his conduct since his name was struck off the Roll and his suitability for Restoration to the Roll. This gives the Applicant notice of what kind of evidence the Tribunal are looking for. The Tribunal is however prepared, in this case, to give the Applicant further guidance. The Tribunal consider that the onus is on the Applicant to show that he is now a fit and proper person to be on the Roll of Solicitors and that there is no risk whatever of repetition of offences which caused him to be struck off. As is clearly stated in the Applicant’s production E (Mr d’Inverno’s letter) at para 2.1 the starting point is the paragraph quoted at the end of the previous page and the onus is on the Applicant to displace the original conclusion reached at the time of striking off that he was not a fit and proper person to be a solicitor and to show a change in character, conduct and suitability between the time when he was struck off and the time of his making his Application for Restoration. The Tribunal must also take account of the

attitude of the profession and public perception. In this particular case, as the Applicant was struck off for dishonesty, trust will be at the heart of the matter and the Applicant will have to demonstrate to the Tribunal that he can be trusted by the public and the profession.

THE APPLICANT'S THIRD SUBMISSION

Mr d'Inverno submitted that the Tribunal had a duty to consider its own position with regard to Article 6 compliance. As the majority of Tribunal Members were appointed by the Lord President on the recommendation of the Council of the Law Society, Mr d'Inverno asked the Tribunal to consider whether or not the public perception of the Tribunal was that it was independent from the Law Society. Mr d'Inverno stated that in considering an Application for Restoration to the Roll the Tribunal might like to consider having more non-solicitor members sitting to overcome any possible public perception of lack of independence. In view of their decision on the first submission, the Tribunal did not consider that the Objector had any locus to respond to this submission.

In terms of the Rules there is an appeal in respect of the Tribunal's decision on an application for Restoration to the Roll under Section 54 of the Solicitors (Scotland) Act 1980 ("the Act"). If this is the case then there is a right of appeal in terms of Section 54 which is unfettered and would cure any Article 6 defect of the Tribunal. Mr d'Inverno has however submitted that when the Tribunal is sitting to hear an application for Restoration to the Roll it is not making a decision relating to discipline and accordingly it may be that the right of appeal under Section 54 does not give an unfettered right of appeal in respect of Application for Restoration to the Roll. The Tribunal accept that in terms of the Solicitors (Scotland) Act 1980 Solicitor Members of the Tribunal are appointed on the recommendation of the Council of the Law Society of Scotland. However Members are appointed by the Lord President for a period of five years and may be re-appointed. Solicitor Tribunal Members receive no remuneration and no financial inducement to seek re-appointment to the Tribunal on expiry of their term of office. The Law Society has no involvement in the appointment of lay members to the Tribunal. The Discipline Tribunal was specifically referred to in the case of Tehrani v

United Kingdom Central Council for Nursing, Midwifery and Health Visiting, SLT issue 24 July 2001 page 879 at page 896 as avoiding any overlap between those involved in the prosecutorial and judicatory function. The Tribunal accordingly considers that it is an impartial and independent Tribunal. Its quorum is set out in paragraph 5 of Schedule 4 of the Act. The Tribunal normally sits with four solicitor members and two lay members. The Tribunal see no justification for departing from this in respect of an application for Restoration to the Roll.

The Tribunal took its decision to avizandum and parties were not given the opportunity to address the Tribunal on the issue of publicity and expenses. These matters were accordingly reserved until the substantive hearing.