

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

**D E C I S I O N**

**in Appeal under Section 42A(7) of  
the Solicitors (Scotland) Act 1980**

**by**

**CARRUTHERS & CO, Solicitors,  
2/4 & 6 Pitt Lane, Lerwick**

**Appellants**

**against**

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

**First Respondents**

**and**

**MR JAMES ROBB, Fearn Cottage,  
East Voe, Scalloway, Shetland**

**Second Respondent**

1. An Appeal was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42A(7) of the Solicitors (Scotland) Act 1980 by Carruthers & Co, Solicitors, 2/4 & 6 Pitt Lane, Lerwick ("the Appellants") against a Finding made by the Council of the Law Society of Scotland ("the Law Society") dated 27 February 2007 and intimated on 18 March 2007, that the Appellants had provided an inadequate professional service in relation to their client Mr James Robb, Fern Cottage, East Voe, Scalloway, Shetland ("the Lay Complainer") and a Direction that the fees to which the Appellants should be entitled to

should be nil, any fees and outlays already paid should be refunded, the sum of £200 paid by the Lay Complainer should be repaid and the Appellants should pay the Lay Complainer £250 by way of compensation.

2. In accordance with the Rules of the Tribunal the Appeal was formally intimated to the Law Society and the Lay Complainer and Answers were lodged on behalf of the Law Society and the Lay Complainer.
3. Having considered the Appeal with the Answers, the Tribunal resolved to set the Appeal down for hearing and appointed that the Appeal should be heard on 14 June 2007.
4. At the hearing on 14 June 2007, the Law Society was represented by their fiscal Paul Reid, Solicitor Glasgow. The Lay Complainer did not attend the hearing and was not represented. The Appellants were not present but were represented by Mr James McCann, Solicitor, Glasgow. No evidence was led.
5. The Appellants made a procedural submission to the effect that the procedure followed by the Law Society in reaching their Decision on the Determination was contrary to the principles of natural justice and fundamentally flawed and accordingly the Determination should be Quashed.
6. Having considered the productions lodged and the submissions behalf of the Appellants, the Law Society and the Lay Complainer, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 14 June 2007. The Tribunal having considered the Appeal by Messrs Carruthers & Co, Solicitors, 2/4 & 6 Pitt Lane, Lerwick (“the

Appellants”) against a Finding of inadequate professional service by the Law Society of Scotland (“the Law Society”) in relation to Mr James Robb of Fern Cottage, East Voe, Scalloway, Shetland (“the Lay Complainer) and a Direction that the Appellants fees should be reduced to nil, that the Appellants refund any fees and outlays already paid, that the Appellants repay the sum of £200 to the Lay Complainer and that the Appellants pay the Lay Complainer £250 by way of compensation; Quash the Determination and Direction of the Law Society; Find the Law Society liable in the expenses of the Appellants as the same may be taxed by the Auditor of the Court of Session on a solicitor and client indemnity basis in terms of Chapter Three of the last published Law Society’s Table of Fees for General Business with a unit rate of £11.85 and Direct that publicity be given to this decision and that this publicity should include the name of the Appellants.

(signed)

Alistair Cockburn

**Chairman**

6. 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 Appellants by recorded delivery service on

IN THE NAME OF THE TRIBUNAL

**Chairman**

**NOTE**

This is an Appeal under the provisions of Section 42A(7) of the Solicitors (Scotland) Act 1980 as amended against a finding of inadequate professional service and a Determination and Direction made by the Council of the Law Society under Section 42A(2)(a)(i), Section 42A(3), Section 42A(2)(c) and Section 42A(2)(d), which was intimated to Carruthers & Co., Solicitors by a letter dated 18 March 2007. The Solicitor for the Appellants indicated that he wished to take a point in respect of the fairness of the procedure carried out by the Law Society in coming to the inadequate professional service Determination against the Appellants. The Tribunal decided to hear submissions on the procedural point prior to going on if necessary to consider the substantive issues.

**SUBMISSIONS FOR THE APPELLANTS**

Mr McCann submitted that a significant part of the evidence and of the comments and arguments presented by the Lay Complainer was deliberately kept from the Appellants and their advisers by the Law Society. Mr McCann explained that when an original complaint comes in from a Lay Complainer the Law Society client relations department convert this in to a set of headings or issues and the solicitor responds to the headings and then the complaint from the Lay Complainer together with the solicitor's response and the file go to a Reporter who provides a report analysing the facts and making a recommendation. This Reporter's report is then copied to the solicitor and the Lay Complainer. Mr McCann explained that the policy of the Law Society was subsequent to the Reporters report not to copy to the other side comments received from either side. Mr McCann explained that in this case the Lay Complainers response to the Reporter's report ran to 9 pages and included a detailed analysis of the Reporter's report. The Lay Complainer advised the Law Society that he did not want the Appellants to see this document and the initial reaction of the Law Society was that this could not therefore be considered. Mr McCann however referred the Tribunal to the file note which shows that in the end the Lay Complainer agreed that the Appellants would be allowed to see his comments but the Appellants did not see his comments until after the Law Society Committee had made their decision. Mr McCann stated that it was fundamentally wrong that a

significant part of what was considered by the Committee, was not seen by the Appellants prior to the Committee making their decision. The Appellants were provided with all the papers when they received the Committee decision. Mr McCann stated that it was accepted that there were resource and time constraints on the Law Society and that there could not be an endless copying of submissions between each side. Mr McCann explained that his submission was however that if one party made substantive comments to the Reporter's report, this should be copied to the other side for them to make comment and the process should then stop at this stage. Mr McCann further explained that in this case the Reporter prepared two supplementary reports, one based on the further comments provided by the Lay Complainer and one based on further comments provided by the Appellants. The Reporter did not change his original view which was supportive of the Appellant's position. The Committee however came to a different view. Mr McCann explained that the case involved a number of fishermen who were taking an action against Quantum Claims. Mr A was the lead case and the Lay Complainer contributed £200 along with other fishermen to the costs. Mr McCann stated that he conceded that the Lay Complainer was a client of the Appellants, as a client account ledger was opened in his name. Mr McCann however stated that the fact that he was a client of the Appellants did not mean that he was entitled to know what another client of the firm was doing. Mr McCann submitted that the Law Society Committee were led into a mistake by considering the Lay Complainer's letter and not allowing the Appellants to make comment on it. Mr McCann referred to paragraph 34 of the Lay Complainer's letter which criticised the Appellants withdrawal without giving the Lay Complainer information as to why. Mr McCann pointed out that the Appellants could not give information with regard to why they were withdrawing as this would have been a breach of confidentiality in respect of another client. Mr McCann explained that Mr A had elected to do a stand alone deal with Quantum Claims but this was not something which the Appellants could tell the Lay Complainer. Mr McCann explained that the Appellants spoke to the Law Society on the phone for advice as to what they should put in the letter and were advised to write the lean letter because of the risk of a breach of confidentiality. Mr McCann asked the Tribunal to Quash the Determination of the Law Society. In a response to a question from the Tribunal Mr McCann confirmed that the first time either the Appellants or their representatives saw the letter from the Lay Complainer was after the Committee had made their decision and was when the decision was

intimated to the Appellants. Mr McCann also confirmed that neither he nor the Appellants saw the second and third Reporter's reports until after the decision had been made.

### **SUBMISSIONS FOR THE COMPLAINERS**

Mr Reid referred the Tribunal to the Committee report which detailed the documentation which the Committee had before it when making its decision. Nine items were listed including the letter from the lay Complainer but also including various emails and letters from the Appellant's solicitors and the three Reporter's reports. Mr Reid submitted that the style letter included in the productions, which was distributed among the fishermen, suggested that there was a common approach. The letter to the Appellant sent prior to the style letter being issued referred to consultation with this particular Lay Complainer. Mr Reid advised that the Law Society Committee spent a lot of time discussing whether or not there was a solicitor, client relationship between the Appellants and the Lay Complainer and it was now conceded by the Appellant's solicitor that there was a solicitor client relationship. Mr Reid referred the Tribunal to paragraph 16.09 of Paterson & Ritchie – Law Practice and Conduct for Solicitors, W Green & Son Ltd 2006. It sets out the basic steps involved in a formal investigation. Mr Reid referred to the passage which indicates that all papers are sent to a Reporter who prepares a report and opinion and both parties are given the opportunity to comment on the report and opinion. Prior to the Reporter preparing his report, both sides have an ample opportunity to put forward their position. Paragraph 16.14 of Paterson & Ritchie refers to post report consultation and indicates that the Reporter's report is checked by the case manager and issued to each side who are asked to comment within 14 days. The passage indicates that the comments from each party are not copied to the other side as they should not raise any new issues and suggests that, very exceptionally, if a new matter arises, which could not reasonably have been raised earlier, the submissions will be copied to the other side. Mr Reid explained that the Appellant's solicitor had already had an opportunity to make representations on the matter and it was necessary for the Law Society to obtain closure or the matter would be never ending. Mr Reid referred the Tribunal to the case of Lloyd and Others-v-McMahon 1987 1AC625 at page 702, where it is stated that the so called rules of natural justice are not engraved on tablets

of stone and that what the requirements of fairness demand, when any body, domestic, administrative or judicial has to make a decision which will affect the rights of individuals, depends on the character of the decision making body, the kind of decision it has to make and the statutory or other framework in which it operates. Mr Reid also referred to the case of Hardie-v-City of Edinburgh Council 2000 SLT 130, where the court held that it was also inherent in the requirements of natural justice that a report containing material of importance, supporting the allegations made against a petitioner, should have been communicated to him prior to any decision being taken and the petitioner should have been given the opportunity to comment on the contents of the report if the authority were to rely on it. Mr Reid submitted that in relation to this case, the case manager decided whether or not there were issues raised which were of importance. Mr Reid further submitted that the Reporter's response to the representations would help the case manager consider whether or not there were issues of importance. In this case the Reporter did not change his original recommendation as a result of the submissions from the Lay Complainer. Mr Reid submitted that the Law Society Committee considered a number of different matters in reaching their decision and were not necessarily influenced by the representations from the Lay Complainer. Mr Reid referred to the case of R-v-The Parliamentary Commissioner for Administration ex parte Dyer 1994 1WLR621 at page 629 where it is indicated that to graft on to the existing practise a need to show a draft report to Complainants would introduce a further stage into the process. Mr Reid stated that the question was whether or not the Lay Complainer's submissions raised anything new or different. In response to a question from the Chairman, Mr Reid indicated that in some cases, further representations were copied, and it was a judgement call on the part of the Law Society. In response to a further question from the Chairman Mr Reid stated that it was accepted that the Lay Complainer's representations formed part of the Committee's deliberations. Mr Reid clarified that the Law Society had to be equal between the parties and it was not a question of the Appellants having the final right of response. Mr Reid also referred the Tribunal to the case of Herring-v-Templeman and Others 1973 3 ALLER page 569 and indicated that it depended on the nature of the powers available whether there was a breach of natural justice. Mr Reid also referred to the case of Moran-v-Lloyds 1 Lloyds Law Reports page 423 at Page 424 where Lord Denning indicated that the rules of natural justice have no application to a

preliminary enquiry made with a view to seeing whether there is a charge to be made. Mr Reid stated that in this case the process was of ingathering materials.

## **DECISION**

The Tribunal accepts that if the Law Society allow parties to continually make comments on each others responses, the procedure could be stalled and go on indefinitely. However in this case the Lay Complainer produced 9 pages of comments including an analysis of the Reporter's report and this was considered by the Law Society Committee without the Appellants having been given a chance to comment on it. The file note of the Law Society case manager makes no suggestion that the case manager used her discretion with regard to whether or not the Lay Complainer's comments raised anything of substance. The Committee's report does not indicate that they did not find the Lay Complainer's comments to be of importance and accordingly the inference has to be that the Committee did take account of these observations in coming to their decision. The Tribunal considered that in this case the comments of the Lay Complainer were extensive and were material of importance as classified in the Hardie case. The Tribunal accordingly considered that these comments should have been disclosed to the Appellants prior to the Committee coming to their decision. The decision taken by the Law Society in inadequate professional service determinations are of considerable importance to solicitors and the Law Society has considerable powers including now the power to award compensation of up to £5000. The Tribunal accordingly concluded in this case that there had been a breach of natural justice in not allowing the Appellants to comment upon matters of materiality affecting the decision making process. Lord Osborne in the Hardie case, makes it clear that where there is a report containing material of importance, this must be communicated prior to any decision being taken. The Tribunal accordingly considered that the appropriate course of action in this case was to Quash the Determination and Direction of the Law Society. It was not necessary to consider the merits of the case.

The Tribunal is not suggesting that in every case it will be necessary for comments made by one side subsequent to the Reporter's report to be copied to the other side. If the case manager takes the view that there is nothing of importance in the

representations received from either side, then either these comments should not go to Committee or the Committee should indicate that they do not consider them of any consequence. It will be for the Law Society to give consideration to how to achieve fairness when extensive comments or material of importance is received after the report has been issued. The Tribunal made the usual orders with regard to publicity and expenses.

**Chairman**