

**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

MESSRS A C WHITE SOLICITORS  
23 Wellington Square, Ayr

Appellants

against

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

First Respondent

and

MR D H TELFORD  
11 Highfield Terrace, Fairlie, Ayrshire

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 Messrs A C White Solicitors, 23 Wellington Square, Ayr ("the Appellants") against a finding by the Council of the Law Society of Scotland ("the Law Society") dated 6 September 2007 that the Appellants had provided an Inadequate Professional Service in relation to their client, Mr Telford, 11 Highfield Terrace, Fairlie, Ayrshire ("the Lay Complainer") and a Direction that the fee and VAT charged by the Appellants be abated by 20% and that the Appellants pay £750 by way of compensation to the Lay Complainer.
  
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 Lay Complainer.

3. The case was sisted on the motion of all parties.
4. The case then called on 29 October 2008 when there was a motion on behalf of the Law Society to recall the sist. The Appellants had no objection to this motion. The Law Society indicated that they were not to oppose the Appeal. The Lay Complainer indicated that he still wished to oppose the Appeal. The Appellants submitted that as the matter had been remitted back to the Law Society for reconsideration following a complaint by the Lay Complainer to the Ombudsman, the only way the Appeal could be disposed of was by the Tribunal quashing the Law Society's Determination. The Tribunal did not agree to this and fixed a further procedural hearing for 17 December 2008 at 10:30am to allow the Lay Complainer to consider his position in light of his possible liability for expenses.
5. When the case called on 17 December 2008, the Law Society were not presented nor represented. The Appellants were represented by their Solicitor, Mr Macreath, Solicitor, Glasgow. The Lay Complainer was present and represented himself.
6. Mr Macreath on behalf of the Appellants requested that a debate be heard in connection with the status of the Appeal as the matter was of great importance to the profession, the Legal Services Commission and Lay Complainers. The Lay Complainer indicated that he wished to continue to defend the Appeal and asked that the Appeal be sisted pending the outcome of another issue presently being considered by a Law Society Reporter.
7. On the basis of the all the information provided to the Tribunal, the Tribunal agreed to the Appellants' motion that there be a debate given that there was a significant issue of interpretation of the current law to be decided. A diet of debate was fixed for 17 February 2009.

8. When the case called on 17 February 2009, the Appellants were represented by Mr Brown, Counsel. The Lay Complainer was present and represented himself. Mr Reid was present on behalf of the Law Society in order to answer any questions which might arise.
9. The Tribunal heard submissions from Mr Brown on behalf of the Appellants and submissions from the Lay Complainer. Mr Reid lodged the two opinions prepared by the Ombudsman with the Tribunal to help with its deliberation.
10. Having carefully considered the points made, the Tribunal pronounced an Interlocutor in the following terms:

Edinburgh 17 February 2009. The Tribunal having considered the Appeal by Messrs A C White Solicitors, 23 Wellington Square, Ayr (“the Appellants”) against a finding of Inadequate Professional Service by the Council of the Law Society of Scotland (“the Law Society”) in relation to Mr D H Telford, 11 Highfield Terrace, Fairlie, Ayrshire (“the Lay Complainer”) and a Direction that the fees and VAT charged by the Appellants be abated by 20% and that the Appellants pay £750 by way of compensation to the Lay Complainer; Find that the Decision of the Law Society dated 6 September 2007 has been wholly supplanted by the second Decision made by the Law Society in respect of the same matter following the reconsideration which was directed by the Ombudsman following the Lay Complainer’s complaint to the Ombudsman and further Find that accordingly all rights flowing from the first Decision fall and there is no longer any valid Appeal before the Tribunal and accordingly nothing for the Tribunal to rule on; Make a finding of no expenses due to or by any party and Direct that publicity be given to this Decision and that this publicity shall include the name of the Appellants.

**(Signed)**  
**David Coull**  
**Vice Chairman**

11. 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**

**Vice Chairman**

## NOTE

On 6 September 2007 the Law Society made a Determination and Direction that the Appellants had provided an inadequate professional service to the Lay Complainer. The Law Society had upheld heads of Complaint 8 and 9 in respect of the Appellant's failure to adequately advise the Lay Complainer of the extent of their fees at the date when his Employment Tribunal case was settled in that they advised the Lay Complainer of a maximum fee value then subsequently attempted to charge a much higher fee and that the Appellants delayed in providing the Lay Complainer with a breakdown of their fees. The Appellants appealed this Determination and Direction to the Tribunal. Answers were lodged to the Appeal by the Lay Complainer. No Answers were lodged by the Law Society. As the matter had been taken by the Lay Complainer to the Ombudsman, it was agreed by all parties that the matter be sisted until the outcome of the reference to the Ombudsman was known. The Ombudsman's opinion was issued on 14 December 2007. A motion by the Law Society to recall the sist was heard by the Tribunal on 29 October 2008. The Law Society requested that a further procedural hearing be held with regard to further procedure in the case and this was consented to by the Appellants. The Appellants then made a motion that the Tribunal find that the only way of disposing of the Appeal was to quash the Law Society's Determination given that the Law Society had reconsidered their original Decision and made a fresh Decision. The Tribunal was not prepared to do so at this stage and adjourned the matter to a further procedural hearing and advised the Lay Complainer to seek advice with regard to his possible liability in expenses if he was to continue with his opposition to the Appeal.

The case then called on 17 December 2008 when the Appellants made a motion for a debate in respect of the legal status of the Appeal. The Lay Complainer asked that the matter be sisted as there was another matter which was connected which was presently being considered by the Law Society. Given that the issue of the status of the Appeal is a significant issue of interpretation of current law, the Tribunal considered that a full debate on the matter should be heard before a final decision was made.

On 17 February 2009 the Tribunal heard formal submissions in connection with the status of the Appeal.

## **SUBMISSIONS FOR THE APPELLANTS**

Mr Brown referred to his written submission. He lodged with the Tribunal extracts from the Solicitors (Scotland) Act 1980 and the Law Reform Miscellaneous Provisions (Scotland) Act 1990. He also lodged an extract from a dictionary in respect of the meaning of the word “reconsider”. The Lay Complainer objected to the late lodging of these documents but given that the documents were merely extracts from relevant legislation which had been referred to in written submissions and given that there was nothing new in the dictionary definition of the word “reconsider”, the Tribunal did not consider that there was any difficulty in having these documents lodged on the day of the Tribunal. The Lay Complainer was provided with copies of the documentation prior to the hearing commencing.

Mr Brown explained that the basic structure of the scheme is set out in the 1980 Act. The issue arose from the Ombudsman’s jurisdiction. There had been a decision of first instance which would become final if there was no appeal or at the end of the appeal process. In this case it was a decision of the Law Society in the first instance which was appealed to the Tribunal. Superimposed on this was the power of the Ombudsman who is not a court of appeal but who can request the Law Society to reconsider and the Law Society must give reasons if they do not reconsider. Mr Brown pointed out that the Ombudsman could only become involved if there was a reference from a Lay Complainer. In this case, the Law Society accepted the Ombudsman’s recommendation and reconsidered their first decision. This resulted in a different decision being made. Mr Brown submitted that this second decision was the operative decision and that once the first decision had been reconsidered it was superseded by the second decision and this was a matter of common sense and logic. Mr Brown referred to the dictionary definition of “reconsider”. Mr Brown stated that although there was a strict limit in respect of the jurisdiction of the Ombudsman - limited to looking at the way the Law Society had handled complaints, the way this had been done in practice was wider and there was a shading between handling and the merits. It was essential to the whole concept of looking at something again that the

result may not be same otherwise it would be a pointless exercise. Mr Brown stated that it was common sense that as the legislation permitted reconsideration, the reconsidered decision must have primacy over the original decision. In this case, the original decision satisfied neither the Appellants or the Lay Complainer. The Ombudsman reconsidered the matter before the Appeal had been disposed of. The reconsideration decision was issued and there was no appeal against it and it became a final decision. The original decision had been kept alive by the Appeal to the Tribunal. The Law Society and the Appellants agreed that the Appeal was academic but the Lay Complainer insisted that the Appeal be determined presumably because he wanted the decision confirmed which would lead to two final decisions in respect of the same complaint which were inconsistent with each other. Mr Brown stated that the original decision was superseded as soon as the reconsidered decision was issued. The Appeal accordingly raised no live practical issue to be disposed of. Mr Brown stated that he accepted that the Lay Complainer was a party to the Appeal and had a right of appeal from the Tribunal's decision to the Court of Session. Lay Complainers however could not initiate appeals to the Tribunal. This seemed to be an odd situation.

### **SUBMISSIONS FOR THE LAY COMPLAINER**

The Lay Complainer stated that at the Tribunal meeting on 29 October 2008 the Chairman did not allow the Appellants motion to bring the Appeal to an end. He indicated that the Chairman stated that the Law Society did not have the power to overrule a decision which they had made in favour of the Lay Complainer and the fact that another Law Society Committee had made a different decision did not affect the decision of the original Law Society Committee. The Lay Complainer stated that he went to the Ombudsman because he was complaining about the fact that the Law Society had decided not to defend the Appeal. He stated that the Ombudsman is only able to look at the Law Society's handling of the complaint and that the Ombudsman had recommended that he be given access to the advice given by the Law Society Fiscal. This had not been done. The Lay Complainer submitted that when the Law Society reconsidered their decision they did not have the files or the Reporter's opinion, they only had statements of the fiscal which contained errors. The fiscal did not have the files when he made his decision not to defend the Appeal. The Lay Complainer indicated that he wished the Appeal to proceed so that he could question

the Appellants under oath and he could give evidence himself. He submitted that if he was denied the opportunity to continue, it was a breach of his right to natural justice.

Mr Brown pointed out that the Lay Complainer only had a right to be heard before the Tribunal due to the solicitor's Appeal. Mr Brown further pointed out that the Lay Complainer took the matter to the Ombudsman who said that the Law Society should look at the matter again afresh. The Ombudsman did this as a pragmatic and practical response at the Lay Complainer's instigation. It was not now open to the Lay Complainer to say that he did not like the end result. The Lay Complainer stated that the Ombudsman could not overturn the original decision. At this stage the Tribunal asked the Law Society's Fiscal if he had a full copy of the Ombudsman opinion issued on 14<sup>th</sup> December 2007. Mr Reid produced the opinion of 14 December 2007 and also another opinion dated 22 July 2008 in respect of the second decision of the Law Society. It was confirmed that the Lay Complainer and the Appellants had both seen these opinions.

## **DECISION**

The Tribunal noted that the Chairman at the meeting on 29 October 2008 had not been prepared to allow the Appellant's motion that the matter be disposed of on that day by the Tribunal quashing the Law Society's Determination. At that time, however, the Tribunal did not have full information before it. It became clear at the hearing on 17 December 2008 that it was as a result of the Lay Complainer taking matters to the Ombudsman that the Law Society reconsidered their original decision and made a second decision. This led to the extraordinary position of an Appeal being outstanding in respect of two heads of complaint which had been reconsidered by the Law Society and dismissed. In the circumstances, the Tribunal felt that a full debate was required on the issue which was of importance to the profession, Lay Complainers and the Legal Services Commission. It was now clear from the evidence available to the Tribunal that the Lay Complainer had taken matters to the Ombudsman in respect of the Law Society's first determination. It was also clear from the opinion issued by the Ombudsman that it was not only the Law Society's failure to defend the Appeal to the Tribunal that was complained about by the Lay Complainer. The Lay Complainer's reference to the Ombudsman resulted in the Ombudsman recommending

reconsideration by the Law Society of the whole matter. This was done and the Law Society made a different Determination. The Lay Complainer then took this Determination to the Ombudsman who issued another opinion in July 2008 concluding that she was satisfied with the handling of the complaint. It is clear to the Tribunal that the second decision of the Law Society was neither appealed nor was any reconsideration of the decision recommended by the Ombudsman. This second decision accordingly became a final decision. It is further clear to the Tribunal that the second decision on the same issues wholly supplants the first decision. As the first decision is supplanted all rights flowing from the first decision are no longer in existence. The Tribunal accordingly consider that there is no live appeal before it because the appeal was in respect of a decision which has been supplanted. It is accordingly not possible for the Tribunal to make a decision in respect of an Appeal that no longer exists.

Mr Brown indicated that he was not looking for expenses given that the debate was in relation to a point of general importance. The Tribunal also considered that it would be unfair to award expenses against the Lay Complainer in this particular matter. The Tribunal accordingly made an order of no expenses due to or by any party. The Tribunal determined that publicity will be given to this decision as it is a decision of the Tribunal. The Lay Complainer indicated that he had no objection to being named in any publicity.

**Vice Chairman**