

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

**INTERLOCUTOR**

in Appeal under Section 42ZA(9) of the Solicitors  
(Scotland) Act 1980 as amended

by

ANDREW DUTHIE, Grant Smith Law Practice, 252  
Union Street, Aberdeen

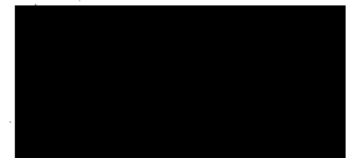
APPELLANT

against

THE COUNCIL OF THE LAW SOCIETY OF  
SCOTLAND, Atria One, 144 Morrison Street,  
Edinburgh

RESPONDENTS

By Video Conference, 28 September 2020. The Tribunal direct that publicity will be given to the decisions of the Tribunal of 17 August 2020 and today's date and that this publicity should include the name of the Appellant but need not name any other person.



**Colin Bell  
Vice Chair**

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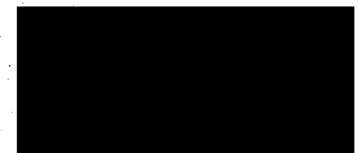
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THE COUNCIL OF THE LAW SOCIETY OF  
SCOTLAND, Atria One, 144 Morrison Street,  
Edinburgh

RESPONDENTS

By Video Conference, 17 August 2020. The Tribunal having considered the Appeal under Section 42ZA(9) of the Solicitors (Scotland) Act 1980 by Andrew Duthie, Grant Smith Law Practice, 252 Union Street, Aberdeen (the Appellant") against the Determination of the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh ("the Respondents") dated 14 May 2020 upholding a complaint of unsatisfactory professional conduct made by the Respondents against the Appellant, censuring the Appellant and directing that he pay a fine of £1,000; Quash the Determination Censure and Direction of the Respondents; Make no award of expenses; and Allow the parties to lodge written submissions relating to the issue of publicity within 28 days of today's date.



**Colin Bell  
Vice Chair**

**THE SOLICITORS (SCOTLAND) ACT 1980  
THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL  
(PROCEDURE RULES 2008)**

**DECISION**

**in Appeal under Section 42ZA(9) of the Solicitors  
(Scotland) Act 1980 as amended**

**by**

**ANDREW DUTHIE, Grant Smith Law Practice, 252  
Union Street, Aberdeen**

**Appellant**

**against**

**THE COUNCIL OF THE LAW SOCIETY of  
SCOTLAND, Atria One, 144 Morrison Street,  
Edinburgh**

**Respondents**

1. An Appeal was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42ZA(9) of the Solicitors (Scotland) Act 1980 by Andrew Duthie, Grant Smith Law Practice, 252 Union Street, Aberdeen (hereinafter referred to as "the Appellant") against the Determination and Direction made by the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the Respondents") dated 14 May 2020 upholding a complaint of unsatisfactory professional conduct made by the Respondents against the Appellant, censuring the solicitor and ordering that he pay a fine of £1,000.
2. In accordance with the Rules of the Tribunal, the Appeal was formally intimated to the Respondents. No Answers were lodged. The Respondents intimated to the Tribunal Office that they were conceding the Appeal and forwarded an unsigned Joint Minute between the parties.
3. Having considered the papers before it, the Tribunal resolved to set the matter down for a hearing on 17 August 2020 which parties agreed could proceed by way of the virtual platform Zoom, given the current coronavirus pandemic. Notice of the hearing was served upon both parties.

4. At the virtual hearing on 17 August 2020, the Appellant was absent but was represented by David Burnside, Solicitor, Aberdeen. The Respondents were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. Both parties confirmed to the Tribunal that the Joint Minute accurately reflected their positions. The Tribunal heard submissions from both parties.
5. Having given careful consideration to the submissions of both parties, the Tribunal upheld the Appeal and Quashed both the Determination and Direction of the Law Society of Scotland. The Tribunal had heard some submissions from the parties in relation to the issue of publicity and concluded that both parties should be provided with the opportunity of making more detailed submissions, if appropriate.

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

By Video Conference, 17 August 2020. The Tribunal having considered the Appeal under Section 42ZA(9) of the Solicitors (Scotland) Act 1980 by Andrew Duthie, Grant Smith Law Practice, 252 Union Street, Aberdeen (the Appellant”) against the Determination of the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh (“the Respondents”) dated 14 May 2020 upholding a complaint of unsatisfactory professional conduct made by the Respondents against the Appellant, censuring the Appellant and directing that he pay a fine of £1,000; Quash the Determination Censure and Direction of the Respondents; Make no award of expenses; and Allow the parties to lodge written submissions relating to the issue of publicity within 28 days of today’s date.

(signed)

**Colin Bell**

**Vice Chair**

7. Written submissions were lodged by both parties. The Tribunal convened to consider these submissions on 28 September 2020 by way of the virtual platform Zoom. Having given careful consideration to the submissions made at the previous hearing and the additional written submissions, the Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 28 September 2020. The Tribunal direct that publicity will be given to the decisions of the Tribunal of 17 August 2020 and today's date and that this publicity should include the name of the Appellant but need not name any other person.

**(signed)**

**Colin Bell**

**Vice Chair**

8. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Appellant and Respondents by recorded delivery service on **5 NOVEMBER 2020**.

**IN THE NAME OF THE TRIBUNAL**



**Colin Bell  
Vice Chair**

**NOTE**

At the hearing of the Appeal on 17 August 2020, the Tribunal had before it the Appeal, a List of Productions for the Appellant and an unsigned Joint Minute. The Respondents confirmed that they were conceding the Appeal and both parties confirmed that the Joint Minute accurately reflected their positions. The Joint Minute was in the following terms:-

**"BURNSIDE** for the Appellant and **STEWART** for the Respondent hereby concur instating to the tribunal that for the purposes of the Appeal the parties are agreed as follows:-

1. The Society's Professional Conduct Sub committee considered a complaint against the appellant on the 14 May 2020.
2. The Sub-committee concluded that the appellant's conduct complained against in issue 1 of that complaint amounted to unsatisfactory professional misconduct in terms of S42ZA(1) of the Solicitors(Scotland) Act 1980..
3. That decision was intimated to the appellant on the 9 June 2020.
4. The obligations of the sub-committee when considering and making a decision are set out in the case of Hood Petitioner 2017 SCLR 799.
5. Hood set out the three grounds for the overturning of a decision of the sub-committee
  - a. Where the ... subcommittee's reasoning disclosed an error of law, which might be an error of general law or an error in the application of the law to the facts
  - b. where the... subcommittee had made a finding for which there was no evidence or which was contradictory of the evidence
  - c. where the... subcommittee had made a fundamental error in the approach to the case asking the wrong question or taking account of manifestly irrelevant considerations or arriving at a decision that no reasonable tribunal or subcommittee could properly reach.

6. The decision made by the sub committee that the Appellant's conduct amount to unsatisfactory professional conduct can be found in the third paragraph of page 3 of the schedule *"it appeared to the Sub Committee that the conduct libelled amounted to more than merely inadequate professional service and did fall well below the standard of conduct to be expected of a competent and reputable solicitor and therefore met the statutory test for unsatisfactory professional conduct"*
7. The decision discloses an error of law, there is no explanation/reasoning why on the facts found, the omission by the Appellant to communicate a material fact to his client amounted to unsatisfactory professional misconduct. The Appellant had accepted he had erred, he offered explanation that he did not recall seeing the e-mails containing the material fact, he accepted his omission, he apologised to his former client for the omission and compensated his client for the loss incurred as a result of his omission. The sub-committee offered no explanation why the conduct amounted to unsatisfactory professional conduct rather *"merely negligence"*, the subcommittee did not address what element of culpability promoted the Appellant's conduct to unsatisfactory professional conduct. Without proper reasoning the decision is flawed.
8. Section 53ZB of the Solicitors (Scotland) Act 1980 provides – "(1) On an appeal ...the tribunal (a) may quash...the determination being appealed against." The parties are agreed that the determination should be quashed.
9. The parties move the tribunal to anonymise the details of the Appellant in the published decision, with reference to Schedule 4, Part II paragraph 14A of the Solicitors (Scotland) Act 1980 the Tribunal has power to refrain from publishing any names which are likely to damage the interests of persons "other than...the solicitor against whom the complaint was made". The Solicitor/Appellant in the present case has not faced a complaint before the Tribunal.
10. The parties are agreed there should be no expenses due to or by either party in respect of the appeal."

The Appellant made oral submissions giving further detail with regard to the background of the original complaint and emphasising paragraph 7 of the Joint Minute.



The Respondents made submissions confirming their concession of the Appeal. Mr Stewart submitted that the Respondents were of the view that the Schedule of the Sub Committee outlining its determination failed to give an appropriate evaluation that the Respondents could rely upon in face of the Appeal.

In the course of their submissions, both parties invited the Tribunal to hold that Paragraph 14A(a) of Schedule 4 to the Solicitors (Scotland) Act 1980 did not apply to the question of publicity in this case.

## **DECISION**

This was a somewhat unusual Appeal before the Tribunal in terms of Section 42ZA(9), with both the Appellant and Respondents inviting the Tribunal to quash the determination of the Professional Conduct Sub Committee dated 14 May 2020.

The powers of the Tribunal in relation to such an appeal are contained within Section 53ZB of the 1980 Act. Section 53ZB(1)(a) states that the Tribunal “may quash or confirm the determination being appealed against.” It is well accepted that in such an Appeal it is not open to the Tribunal to simply consider afresh any complaint made against an Appellant but that the Tribunal must be satisfied that there is a ground in law for it to review the decision of the Sub Committee. The case of Hood v Council of the Law Society of Scotland 2017 SC 386 sets out clearly the legal grounds upon which the Tribunal can review such decisions and one of those grounds is described as the Sub Committee having made an error of law, either of general law or application of that law to the facts.

Mr Stewart invited the Tribunal to hold that the lack of any reasons for holding that the conduct complained of amounted to unsatisfactory professional conduct brought the case within this ground of appeal.

Having given careful consideration to the submissions of both parties and the documents before the Tribunal, it agreed with the parties that there was an apparent absence of reasons justifying the Sub Committee reaching the conclusions it did. In these circumstances, the Tribunal concluded that the appropriate decision was to quash the determination and direction of the Sub Committee.

With regard to the submissions relating to publicity, the Tribunal considered that these raised important issues and that if they were to be insisted upon then it was appropriate to give the parties an

opportunity of doing so in more detail. Accordingly, the Tribunal allowed both parties to lodge written submissions within 28 days if they considered it appropriate.

## **PUBLICITY**

Both parties lodged written submissions which were as follows:-

### “Submission on behalf of the Appellant in relation to publicity

I have had the benefit of reading the submission on behalf of the Council, which sets out the statutory position very well, and the terms of which I respectfully adopt.

I have been advised informally by Mr Stewart that he has been unable to find any authority on this point. I have conferred with my fellow directors of the Legal Defence Union and we too have been unable to find a decision directly in point.

Mr Stewart has referred to the Statute and Regulations and I do not propose to repeat what he has said. It is, however, a well known principle that statutes should be interpreted in a purposive manner.

The Appellant has not been the subject of a ‘complaint’ before this Tribunal. In my submission, therefore, the Tribunal is free to exercise its discretion. Although not directly in point, I refer to the findings in the Complaint against solicitor B, a copy of which is attached. The circumstances were, of course, somewhat different but the case does indicate that a discretion can be exercised.

In my oral submission to the Tribunal, I made reference to the concept of natural justice and I would respectfully request that the Tribunal use that as a basis for exercising its discretion.

Had the Appellant accepted the decision of the sub committee, he would not have been subject to any publicity. He would have paid the fine and accepted the censure. The sub committee, however, acted in error, a fact that has now been conceded by the Law Society. It would in my

submission be contrary to natural justice that his name should be published when his position has been vindicated.

If the Tribunal were not to accept that a solicitor could appeal against an unjust or improper finding of a sub committee, then, those advising him or her, would have to advise him or her that in order to avoid publicity, he or she should simply accept the decision. Such a position would, in my submission, would be wholly unreasonable.

In conclusion, I would add that it might be helpful to the profession if the Tribunal were to issue a decision that successful appellants would not be running the risk of publicity.”

“Submission on behalf of the Council in relation to “publicity”.

1. The Society make the following submission in respect of the Appellant’s motion to anonymise his name from the published decision of the Tribunal in which it quashed a decision of unsatisfactory professional conduct by the Society.
2. The Scottish Solicitors’ Discipline Tribunal is a creature of statute, it is empowered by the Solicitors (Scotland) 1980 Act( the 1980 Act) . Part IV of the act at Section 50 created the modern tribunal.
3. The ordinary principle of statutory interpretation requires the whole words of the section in the context of the statute as a whole.
4. The starting point for considering the meaning of the word complaint in my submission is Section 51(1) starts “a complaint maybe made to the Tribunal by the Council;...” . “Complaint” is not further defined in Part IV of the Act. It is the Society’s submission that where the word “complaint” is used in relation to the statutory powers of the Tribunal, in Part IV of the Act and the Schedule 4, it must be read in line with the first section in which it appears and accordingly relate to the complaint alleging professional misconduct, unless, some other primary legislation alters the definition.

5. Section 52(1) narrates *"Part II of schedule 4 shall have effect in relation to the procedure and powers of the Tribunal in relation to any complaint or appeal concerning a solicitor..."* Section 52 has been amended by Legal Aid (Scotland) Act 2007, the Act which created unsatisfactory professional conduct. The drafter had an opportunity to define "complaint" when used in relation to the Tribunal's business. They did not. It is in the Society's submission important that the tribunal treat the legislation as a deliberate, informed and accurate representation of the legislatures intention and not innovate upon the plain reading of the Act. It is submitted on behalf of the Society that the Tribunal should consider the omission of a definition of "complaint" for the purposes of the Tribunal's business the legislature was content that a complaint was adequately and correctly defined throughout the Act.
6. One should consider the language used in the amended/inserted sections 42ZA – dealing with appeal from a finding of the Society's Professional Conduct Committee. eg 42ZA(1) – the language used is "conduct complaint". The Society submits this was a deliberate use of language.
7. Turning now to the specific power of the Tribunal in relation to publicity. This found in Schedule 4 Part II of the 1980 Act, specifically Para 14 & 14A, the latter paragraph in turn has been amended by Para 23 which was amended (most recently) by the Legal Aid (Scotland) Act 2007. It now reads (para 23 amendment is in bold)
- " 14. Every decision of the Tribunal shall... subject to paragraph 14A be published in full."
- 14A. In carrying out their duty under paragraph 14, the Tribunal may refrain from publishing any names, places or other facts the publication of which would, in their opinion, damage, or be likely to damage, the interests of persons other than-
- (a) the solicitor against whom the complaint **(as respect which the appeal was made)** was made"
8. The Society's position is the amended paragraph 14A does not make easy reading. The Society's position is that the use of "complaint" in 14A(a) is that of a complaint of professional misconduct. For the following reasons:-
- a. The word used is "complaint", we submit in line with section 51 and not "conduct complaint" as found in sections 42ZA etc.

- b. It is presumed the legislature deliberately did not amend the paragraph to refer to conduct complaint.
  - c. It is to be presumed the legislature chose not to add a fresh sub paragraph to specifically exempt details of solicitor in appeal processes from the Tribunals discretion. Eg "(aa )the solicitor who was a party in any appeal."
  - d. That to read the amended paragraph as "conduct complaint" is a to innovate beyond the presumed deliberate informed and accurate intention of the he legislature. The provision has been effective since 1 October 2008, had the intention been different the legislature has had sufficient time to amend the provision.
9. The respondent made the proposition that to identify him would be inherently unfair. I understand this was on the following grounds
- a. That the finding of unsatisfactory professional conduct by the Professional Conduct Committee was and are not published, it was not in the public domain – few people knew about the finding – members of public cannot access the decisions of the PCC. The only option for a solicitor to secure a finding that the decision was in error/wrong is to appeal in terms of the 1980 Act. He must appear in public. He must publicise the decision of the PCC. This is in the first instance unfair. He could accept the finding and keep his public reputation clean or must publicise the finding against him. It was submitted natural justice should prevail and thus if he is successful and the finding overturned he should be placed back (as much as possible) in the position that he would have been had there been no finding. To publicise his name is an affront to this
  - b. That had the PCC not found against him the allegation of misconduct would not have been in the public domain.
  - c. The finding by the Tribunal that the PCC was in error should not expose him to further publicity.
10. The Society see merit in this submission.
11. The society support the appellant's submission that the Tribunal's discretion should not fettered by on one argument, a lack of clear legislature intention and on the other, a

deliberate intent not to include "conduct complaint" within paragraph 14A (a).

12. Ultimately it will be for the appellant to persuade the Tribunal to exercise the discretion to anonymise his name. In the present cause where the Society conceded the appeal and accepted it made an error it would support the exercise of the discretion in the appellant's favour."

### **DECISION WITH REGARD TO PUBLICITY**

Section 42ZA of the Solicitors (Scotland) Act 1980 was inserted by the Legal Profession and Legal Aid (Scotland) Act 2007. The 2007 Act also made amendments to Schedule 4 of the 1980 Act.

Paragraph 23 of Schedule 4 as amended reads as follows:-

*The foregoing provisions of Part II of this Schedule shall apply in relation to an appeal to the Tribunal under section 42ZA(9), ... as they apply in relation to a complaint, but with the following modifications*

*–*

*(cc) in paragraph 14A(a), after the word "complaint" there shall be inserted "(as respects which the appeal was made)";*

It should be noted that Paragraph 23 does provide for certain of the paragraphs of Part 2 not to apply to the appeal procedure.

As amended, Paragraph 14A reads as follows:-

*14A. In carrying out their duty under paragraph 14, the Tribunal may refrain from publishing any names, places or other facts the publication of which would, in their opinion, damage or be likely to damage, the interests of persons other than-*

*(a) the solicitor against whom the complaint (as respects which the appeal was made) was made; or*

*(b) his partners; or*

*(c) his or their families,*

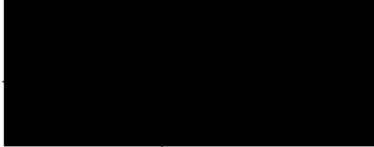
*but where they so refrain they shall publish their reasons for so doing.*

The Tribunal considered that the plain reading of amended paragraph 14A is quite clear and that Parliament clearly intended this provision to apply to Section 42ZA(9) Appeals. The Tribunal accepts

that there is no specific definition of "complaint" given within the 1980 Act. However, it is quite clear that if the Tribunal adopted the interpretation offered by the parties, then Paragraph 14A could have no application to Section 42ZA(9) Appeals. Given that the meaning of the statutory provisions seemed clear to the Tribunal, it considered that it was compelled to comply with these provisions, however harsh that may have appeared to the parties.

It should be made clear that the Tribunal is not saying that in every Section 42ZA(9) Appeal the solicitor complained about must be named. The Tribunal does have a discretion to refrain from publishing his/her name if in the Tribunal's opinion the interests of someone OTHER than the solicitor, his partners or their families would be or would likely be damaged by this publicity. No such submission was made here. In the case of Law Society of Scotland v Solicitor B (Case 1695), the Tribunal was concerned about the effect publicity might have on the Secondary Complainer and a third party.

The Tribunal had a great deal of sympathy for the Appellant but it concluded that it was bound to follow Paragraph 14A and consequently the Appellant required to be named in the Decision.



**Colin Bell**  
**Vice Chair**