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

INTERLOCUTOR

in Appeal under Section 42ZA(10) of the Solicitors (Scotland) Act 1980 as amended

by

WESLEY MITCHELL, Glenwarren, Shanmullagh, Ballinamallard (hereinafter referred to as "the Appellant")

against

THE COUNCIL OF THE LAW SOCIETY OF SCOTLAND, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the First Respondents")

and

HUGH COLIN SOMERVILLE, 39 Bridge Street, Musselburgh (hereinafter referred to as "the Second Respondent")

By Video Conference, 9 November 2021. The Tribunal, having considered parties' submissions firstly on the Appellant's motion to receive an amended Appeal, and secondly on the First Respondents' motion to dismiss the Appeal in accordance with the preliminary plea regarding relevance and specification, and to order the Appellant to find caution or alternatively, sist a mandatary; Refuses the Appellant's motion to receive an amended Appeal; Repels the First Respondents' preliminary plea regarding issues 3 and 5 of the Appeal; Upholds the First Respondents' preliminary plea regarding issues 6 and 9 of the Appeal; Refuses the First Respondents' motion to order the Appellant to find caution or alternatively to sist a mandatary; Fixes a procedural hearing to take place remotely by video conference on 26 January 2022 and a hearing in-person to take place on a date to be afterwards fixed; and Reserves all questions of publicity and expenses meantime.

[redacted]

Colin Bell
Chair

NOTE

On 26 October 2020 an appeal was lodged with the Tribunal under Section 42ZA(10) of the Solicitors (Scotland) Act 1980 ("the 1980 Act") by the Appellant. An amended appeal was subsequently lodged. Answers were lodged for the First Respondents. These Answers contained a preliminary plea regarding relevancy and specification. The First Respondents submitted a motion in three parts. In terms of that motion, the First Respondents moved the Tribunal:-

(1) To dismiss the appeal in respect that it was manifestly unfounded and/or without merit in terms of Rules 23 and/or 25 of the Scottish Solicitors' Discipline Tribunal Procedure Rules 2008 ("the Tribunal Rules");
(2) To order the Appellant to find caution in the sum of £5,000; or alternatively,
(3) To order the Appellant to sist a mandatary.

In the Note of Argument produced by the First Respondents in support of their motion, they argued that in the event the Tribunal did not find favour with its primary submission, the Tribunal should dismiss the appeal on the basis that it lacked relevancy and specification. This was the basis of the First Respondents' preliminary plea contained within the Answers. The preliminary plea was as follows:-

"The Appellant's grounds of appeal disclosing no prima facie basis for any appeal, and being irrelevant et separatum lacking in specification, the appeal should be dismissed."

At the virtual procedural hearing on 22 June 2021, the Tribunal refused the First Respondents' motion to dismiss the appeal under Rules 23 and 25 of the Tribunal Rules. The Tribunal had already accepted that the appeal was not manifestly unfounded under Rules 21 to 23 of the Tribunal Rules. It was not therefore appropriate to dismiss the appeal under Rules 25 at that stage in proceedings.

The Tribunal considered that the argument for dismissal based on relevancy and specification was a matter for a preliminary hearing. The Tribunal granted the Appellant's motion for a period of adjustment. It allowed the Appellant 14 days from the date of the virtual procedural hearing to lodge adjustments to his appeal (6 July 2021). The First Respondents were allowed 14 days thereafter to make adjustments to their Answers (20 July 2021). A virtual preliminary

hearing was set down for 29 September 2021 and the motion for caution and to sist a mandatary was continued to that date. On the morning of 29 September 2021, the Tribunal adjourned the preliminary hearing due to the Appellant's ill-health. Another preliminary hearing was fixed for 9 November 2021.

On 9 November 2021, the matter called for a virtual preliminary hearing. The Appellant was present and represented himself. The First Respondents were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Second Respondent was not present or represented. He had previously indicated to the Tribunal that he did not intend to take part in these proceedings.

APPELLANT'S MOTION – SUBMISSIONS FOR THE APPELLANT

The Appellant moved the Tribunal to receive an amended appeal which he had sent by email to the Tribunal Office on the morning of 9 November 2021. He noted he had been given a period to adjust in June 2021. He said that in the intervening period he had sought production of a report from the First Respondents. He did not see the Tribunal's Interlocutor and Note of 23 September 2021 giving reasons for its refusal to order production until about a week ago. He said that proceedings were back to the stage they were at in June. The production issue had been complicated and difficult. He could not deal with this next stage until he had sight of the Tribunal's reasons.

APPELLANT'S MOTION – SUBMISSIONS FOR THE FIRST RESPONDENTS

The Fiscal noted that this was the third occasion on which the Appellant had sought to lodge papers on the morning of a hearing. The Appellant knew in April 2021 that his appeal lacked detail and required adjustment. There was no good reason why the Tribunal should accept adjustments at this late stage. The Tribunal's Interlocutor and Note of 23 September 2021 was of no significance. There was no change of circumstances justifying a further need for adjustment. Party litigants must follow procedural rules (Application for Permission to Appeal by AW [2018] CSIH 25). The information available to the Appellant had not changed. Nothing had affected his ability to amend the appeal on time. The Tribunal should take a strict view of this motion and bring it to an end.

APPELLANT'S MOTION – DECISION

Following careful consideration of parties' submissions, the Tribunal refused the Appellant's motion to receive an amended appeal. The Respondents' Answers had contained a preliminary plea regarding relevancy and specification. At the virtual procedural hearing on 22 April 2021, the Fiscal raised these issues again. The First Respondents submitted their motion on 10 May 2021. At the virtual procedural hearing on 22 June 2021, the Tribunal allowed the Appellant a further period of adjustment to 6 July 2021. The Appellant did not adjust his appeal during that period or at any time up to the morning of 9 November 2021. The motion for production of documents under Rule 28 had no effect on the Appellant's ability to adjust his appeal. If additional documents had been produced, there might have been an argument for further time to adjust. However, that was not the case. The Appellant has had everything he required since at least June 2021. Fairness cuts both ways, even with party litigants (Aslam-v-The Royal Bank of Scotland [2018] CSIH 47 and Barton-v-Wright Hassall LLP [2018] 1 WLR 119). It would be unfair to the First Respondents to allow the appeal to be amended at this late stage.

FIRST RESPONDENTS' MOTION TO DISMISS APPEAL – SUBMISSIONS BY FIRST RESPONDENTS

The Fiscal referred the Tribunal to his written submissions. He sought dismissal of the appeal on the grounds of relevancy and specification which failing, an order to find caution, or alternatively to sist a mandatary. He asked the Tribunal to consider the Court of Session case Hood, Petitioner [2017] CSIH 21 and the Tribunal's decisions in the Section 42ZA Appeals by Wan Hock Cheah [28 October 2020] and Peter Stewart [28 April 2021]. He indicated he would address the Tribunal on caution and sisting a mandatary after it had made its decision on dismissal of the appeal.

FIRST RESPONDENTS' MOTION TO DISMISS APPEAL – SUBMISSIONS BY THE APPELLANT

The Appellant asked the Tribunal to refuse the First Respondents' motion for dismissal. The appeal was properly made and had developed as he gained a greater understanding of the Tribunal's procedure and the Hood principles. He referred to the Sub Committee's use of medical evidence which did not relate to the date in question.

FIRST RESPONDENTS' MOTION TO DISMISS APPEAL – DECISION

The appeal is based on various issues which were the subject of the original complaint. The issues before the Tribunal in this appeal are as follows:-

"Issue 3: Mr Somerville acted inappropriately on the 16 May 2012, the day of [Ms A's] death, when, he arrived hours after her passing at the home of the surviving [Ms B] with Mr X and Mr X's family members and told her Will was "all wrong and needed to be changed", thereafter notarising, on her behalf, a Will prepared by Mr X, with Mr X's sister as witness;

Issue 5: Mr Somerville inappropriately witnessed a further Will prepared by Mr X for [Ms B] on 2 July 2012, despite the fact [Ms B] indicated she did not want to sign the document. Mr Somerville arrived at the home of the surviving [Ms B] with Mr X and persuaded her to sign it, advising that he would not leave until she did;

Issue 6: Mr Somerville acted inappropriately and failed to follow his client's instructions, when, on around 11/12 March 2013, he tore a deed of revocation of Mr X from her affairs signed by [Ms B] on 10 March 2013 and refused to enact it; and

Issue 9: Mr Somerville inappropriately submitted an affidavit to the Sheriff Court in October 2015 stating [Ms B] failed to sign page six of Will dated 2 July 2012 as she inadvertently turned the fifth and sixth page together thus leaving page six unsigned. Having considered the document in question and [Ms B's] physical and manual dexterity on 2 July 2012, it is believed highly unlikely she would have had sufficient grip to turn the fifth and sixth page of the Will simultaneously, as [Ms B] would have had difficulty in turning any one page of the Will."

The Tribunal's usual approach to appeals has been to follow the guidance in Hood, Petitioner 2017 SCLR 799. In that case it was said that the Court should be slow to interfere with the Sub Committee's decision on an evaluative question and should only do so in three main situations. The first is where the Sub Committee's reasoning discloses an error of law, which may be an error of general law or an error in the application of the law to the facts. The second is where the Sub Committee has made a finding for which there is no evidence, or which is contradictory of the evidence. The third is where the Sub Committee has made a fundamental error in its approach to the case by asking the wrong question, or taking account of manifestly irrelevant considerations or arriving at a decision that no reasonable Tribunal or Sub Committee

could properly reach. The ultimate question is what a competent and reputable solicitor ought to have done in the circumstances. The finding or refusal to find unsatisfactory professional conduct follows on from that evaluative question. Therefore, a section 42ZA(10) appeal must address how the solicitor concerned is said to be guilty of unsatisfactory professional conduct.

The Tribunal gave careful consideration to the written submissions and documents produced by both parties. It took into account everything said by the parties at the preliminary hearing. It bore in mind some general principles when considering the preliminary plea. The Tribunal noted that it should read the pleadings as if they are completely true and interpret them broadly in favour of the pleader. The Appeal could only be dismissed if, reading the averments as if they were true, the claim was bound to fail even if the Appellant proved all the facts stated by him.

The Tribunal considered that issues 3 and 5 of the appeal were sufficiently relevant and specific and on a fair construction ought to be permitted to proceed to a substantive hearing. The Appellant claims that the Sub Committee misdirected itself regarding the available medical evidence. He says that the Sub Committee applied medical information from 2013 to a situation which occurred in 2012. The Tribunal considered that this issue could potentially fall within the Hood grounds. On the basis of the Appellant's pleadings, it was arguable that the Sub Committee might have made a finding for which there was no evidence. Alternatively, it might be argued that it had made a fundamental error in its approach by taking into account manifestly irrelevant considerations or arriving at a decision no reasonable Sub Committee could properly reach. The Tribunal was therefore satisfied that these issues could proceed to a substantive hearing.

The Tribunal considered that issues 6 and 9 were not sufficiently relevant and specific and should not be allowed to proceed to a substantive hearing. The appeal in relation to these issues amounts to no more than a disagreement with the Sub Committee's decision.

In relation to issue 6, the Tribunal noted the discrepancy between the original agreed complaint remitted to the Law Society and the appeal ground at paragraph 4. The original complaint refers to the Second Respondent acting inappropriately and failing to carry out instructions, but the thrust of paragraph 4 of the appeal relates to Ms B's distress. The appeal criticises the Sub Committee's reliance on the reporter's reasoning but provides no basis for this. According to paragraph 4 of the appeal,

"For the Sub Committee to note that the Reporter had found, as a matter of fact that Mr Somerville had torn the deed in the presence of [Ms B]..., causing her grievous trauma and distress but then to suggest the Reporter's reasoning to be unimpeachable is manifestly unreasonable and contradictory to the evidence."

However, the Appellant, reporter and the Sub Committee all appear to have proceeded on the basis that the deed was indeed torn up by the Second Respondent. There was no basis for this ground of appeal, other than a disagreement with the Sub Committee's decision. There is nothing within this ground of appeal which is capable of satisfying a test under Hood, Petitioner 2017 SCLR 799 which would allow the Tribunal to interfere with the Sub Committee's decision.

Issue 9 of the appeal proceeds on the basis that the Sub Committee erred in finding the allegation speculative. Disagreement with the Sub Committee decision is not sufficient to overturn its decision on appeal. Even the Appellant accepts that the complainers' evidence was considered, although ultimately dismissed. The fact that the Sub Committee preferred one account over another is not sufficient in itself to overturn its decision on appeal. There is nothing within this ground of appeal which is capable of satisfying a test under Hood, Petitioner 2017 SCLR 799 which would allow the Tribunal to interfere with the Sub Committee's decision.

FIRST RESPONDENTS' MOTION FOR CAUTION OR A MANDATARY – SUBMISSIONS FOR THE FIRST RESPONDENT

The Fiscal referred to his written submissions. His main point was that the Appellant had failed to pay expenses awarded against him in other proceedings. The Appellant lives in Northern Ireland and it would be very difficult if not impossible to pursue him for an award of expenses. Huge expense has already been incurred. Alternatively, the Fiscal asked the Tribunal to order the Appellant to sist a mandatary. Although Northern Ireland is part of the United Kingdom, it is furth of the jurisdiction of the Tribunal.

FIRST RESPONDENTS' MOTION FOR CAUTION OR A MANDATARY – SUBMISSIONS FOR THE APPELLANT

The Appellant said it was his understanding that Scottish decrees can be implemented in any part of the United Kingdom. He lived in Scotland until the end of 2019 but has returned to Northern Ireland to live with extended family during the pandemic. He said he was not aware of any unsatisfied awards of expenses. Anything he owed was abated from his own share of the estate in question. If the Tribunal ordered caution, this might prevent the case from proceeding. These are serious allegations which ought to be decided by the Tribunal. The case raises important questions relating to professional conduct and boundaries.

FIRST RESPONDENTS' MOTION FOR CAUTION OR A MANDATARY – DECISION

The Tribunal understands that awards of expenses under Paragraphs 19 to 22 of Schedule 4 of the 1980 Act can be enforced throughout the United Kingdom. An order for caution is a matter for the Tribunal's discretion. It must be in the interests of justice. Even an impecunious litigant should be entitled to present a stateable case without finding caution (Thompson-v-Ross 2001 SLT 807).

The Tribunal was concerned about the allegation that the Appellant had failed to pay expenses awarded against him in other proceedings. However, the Fiscal was unable to elaborate on this or counter the Appellant's assertion that these had been satisfied from his share of an inheritance. In the only case where this Tribunal has made an order for caution (Section 42ZA Appeal by James Brown (13 May 2014)) it considered that the application was so unfocussed it could not succeed. Having considered that the present appeal contained a stateable case in relation to issues 3 and 5, the Tribunal was not satisfied that an order for caution was appropriate.

Similarly, the Tribunal considered that it was not appropriate to order the Appellant to sist a mandatary in an appeal which contained stateable issues. In addition, it considered that sisting a mandatary was not appropriate for a party currently residing within the United Kingdom *(MacPhail's Sheriff Court Practice*, paragraphs 11.67 and 11.68).

The Appellant indicated he may call witnesses at the substantive hearing. The Fiscal raised questions about the competency of this. Parties confirmed they would prefer a substantive hearing in-person rather than a remote hearing, even if no witness evidence was to be led. Parties were referred to the Tribunal's decision in Section 42ZA Appeal by Campbell Thomas [27 May 2021] which is available on the Tribunal's website.

The Tribunal fixed a virtual procedural hearing for 26 January 2022 at 10am. The Tribunal also fixed a substantive hearing in-person on a date to be afterwards fixed. The Tribunal Office will liaise with parties regarding potential dates. All questions of publicity and expenses were reserved meantime.

[redacted]

Colin Bell
Chair