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

I N T E R L O C U T O R

in Section 42ZA(12) Appeal of the Solicitors (Scotland) Act 1980 as amended

by

REHAM EL MENSHAWY, [redacted]

The Appellant

against

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

The First Respondents

and

JOSEPH HANN, Solicitor, Hann & Co, 1 Bridgend, High Street, Annan

The Second Respondent

By Video Conference, 14 December 2021. The Tribunal, having heard submissions in relation to the Section 42ZA(12) Appeal by Reham El Menshawy; Repels the preliminary plea of the First Respondents to the specification and relevancy of the Appeal; Refuses the motion for the First Respondents to (a) dismiss the Appeal or (b) ordain the Appellant to find caution or (c) ordain the Appellant to sist a mandatary; Fixes a hearing to take place by video conference on 1 March 2022 at 10am.

[redacted]

Colin Bell
Chair

NOTE

This Appeal under Section 42ZA of the Solicitors (Scotland) Act 1980 ("the 1980 Act") was set down for a virtual preliminary hearing on 14 December 2021 for the Tribunal to hear and rule on submissions on the motion for the First Respondents to dismiss the Appeal or, which failing, to ordain the Appellant to find caution or sist a mandatary. The Appellant was present and represented herself. The First Respondents were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Second Respondent was not present, having previously intimated to the Tribunal that he did not intend to enter the proceedings. Also present was an interpreter invited to attend the hearing by the Tribunal, at the request of the Appellant, English not being her first language.

Both parties present had lodged written Notes of Argument. The First Respondents had lodged a List of Authorities. The Appellant had appended a previous Tribunal decision and a copy of Law Society guidance to her Note of Argument. The Fiscal submitted that, before he began his submissions, the Tribunal required to deal with the issue of the Appellant's late lodging of the Note of Argument, although he emphasised that he had no objection to the Note being received late. The Tribunal noted that there had been no formal order for Notes of Argument, which would normally provide a time limit for lodging. Therefore, the only time limit that might have applied to this issue was that in Rule 27 of the 2008 Rules relating to lists of documents and witnesses. The Tribunal noted that Notes of Arguments and Lists of Authorities are not normally treated as falling within this rule. In answer to a question from the Tribunal regarding the suggested lateness of the Note of Argument, the Fiscal confirmed that he was not suggesting that this was an important issue. Accordingly, the Tribunal considered that the simplest way forward was to formally record that the Appellant's Note of Argument was allowed to be received, without ruling on whether it was in fact late or not.

SUBMISSIONS FOR THE FIRST RESPONDENTS - MOTION FOR DISMISSAL

The Fiscal invited the Tribunal to deal firstly with his motion for dismissal of the appeal. He referred the Tribunal to his written submissions which were as follows:-

"DISMISSAL

The Scottish Solicitors' Discipline Tribunal Rules 2008 make provision for Appeals under Section 42ZA to be dismissed. In terms of Rule 22, where the Tribunal considers that an Appeal has not been made

timeously the Appeal is dismissed. In terms of Rule 23 the Tribunal may determine that an Appeal is manifestly unfounded and take steps to dismiss the Appeal. The Tribunal having accepted the Note of Appeal from this Appellant, it would appear that, unfortunately, having done so, the First Respondents are not entitled to seek dismissal under Rules 22 or 23.

In terms of Rule 25, the following provisions are set out:-

"Rule 25. 1 (2) - The Tribunal shall consider the Appeal and the other documents lodged and, if it is of the opinion that no hearing into the Appeal is necessary because the Appeal is without merit, the Tribunal shall give notice to the Appellant accordingly and provide the Appellant with an opportunity to make representations in writing within twenty one days from the date of sending of such notice.

(3)If after considering any representations submitted in accordance with paragraph (2) the Tribunal remains of the view that no hearing into the Appeal is necessary because the Appeal is without merit, the Tribunal shall make an order dismissing the Appeal and inform the Appellant and the Respondents accordingly. "

In this matter the Tribunal may only consider an Appeal under Section 42ZA if the Note of Appeal sets out in detail any or all of the criteria as set out in Hood, Petitioner 2017 CSIH 21 at para. 17 (Document 1) namely that:-

"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. Secondly where the Sub-Committee has made a finding for which there is no evidence, or which is contradictory of the evidence. Thirdly where the Sub-Committee has made a fundamental error in its approach to the case, as by asking the wrong question, or taking account of manifestly irrelevant considerations, or arriving at a decision that no reasonable Sub-Committee could properly reach."

It is primarily submitted that the current Note of Appeal does not provide any detail or evidence of how this Appellant says the Sub-Committee erred and simply reflects the Appellant's disagreement with the Sub-Committee's decision. It fails to set out any factual or legal basis upon which any of the aforementioned criteria could be considered by the Tribunal in this particular Appeal.

The First Respondent's motion was intimated on 10 May 2021 therefore the Appellant was made aware that the Tribunal would be asked to consider a motion to dismiss the Appeal on the basis of its fundamental irrelevancy or incompetency. The Appellant has had more than twenty one days to consider this position further and has made no further representations, nor sought to adjust the Note of Appeal.

The Appellant has lodged a Note of Argument but the Tribunal cannot consider any material or narrative within that document as supplementing or adjusting the Note of Appeal.

On a prima facie reading of the Note of Appeal, it appears the Appellant has presented this appeal with a view to the Tribunal (a) reconsidering the issues of professional misconduct or unsatisfactory professional conduct; (b) the level of the fine imposed and (c) awarding her an increased level of compensation. What she has failed to set out is any relevant basis as to how the tribunal might review any of those matters, even were it competent to do so. It is clear the Appellant has a fundamental misunderstanding of what matters she can place before the Tribunal in an Appeal of this nature and the manner and format of any such Appeal. She fails to appreciate that she does not obtain a full re-investigation of all matters previously considered by the First Respondents and their Sub-Committee.

More particularly, in terms of Section 42ZA(12) of the Solicitors (Scotland) Act 1980, only the level of compensation can be considered in an Appeal of this type. It follows that any other grounds of appeal purportedly presented are irrelevant.

Having been given notice of the intention of the First Respondents to dismiss the Appeal on the basis that it is without merit, having failed to make any representations in support of her position, having failed to adjust the Note of Appeal, and having been given more than twenty one day's notice of the same, the First Respondents would submit that the Tribunal can competently dismiss this Appeal without a hearing in terms of Rule 25.

In the event that the Tribunal does not find favour with that submission, the Tribunal can still seek to dismiss the Appeal on the basis that it lacks relevancy and specification. The First Respondents have a preliminary plea to that effect which the Tribunal can sustain. Reference is made to the case of Cheah v Law Society of Scotland -28 October 2020 at page 4, penultimate paragraph (Document 2)

Reference is also made to the case of Peter Stewart-v-Law Society of Scotland -28 April 2021 (Document 5). In that case the Tribunal was presented with a similar position in relation to an Appeal which was both irrelevant and lacking in specification. Submissions were tendered on behalf of the Respondents in support of that and those Submissions are adopted in this matter. They are outlined at pages 5, 6 and 7 of that case as are the Tribunal's Determinations at pages 10, 11, 12 and 13.

For the reasons stated above, there is no prima facie basis upon which this Appeal can proceed. It lacks the necessary relevance and specification. It fails to identify any flaws in the detailed decision made by the First Respondent's Sub-Committee. It fails to provide any fair notice of how the Appeal might be advanced on any of the criteria as set out in Hood.

The First Respondents accordingly seek dismissal of the Appeal and for the preliminary plea to be sustained, with an award of expenses in favour of the First Respondents for the entire process to date."

The Fiscal noted that the Appellant's Note of Argument addressed the issues raised in his Note of Argument and the authorities referred to therein. He submitted that this demonstrated that the Appellant understood the Law Society's argument but disagreed with it.

He stated that his primary position was that the Note of Appeal did not set out any relevant grounds of appeal and the Tribunal could not take anything from the Appellant's Note of Argument to supplement the Note of Appeal itself. The Fiscal submitted that it was well-established law that the Tribunal could only consider an appeal on the basis set out in the case of Hood. He argued that none of the content of the Note of Appeal met any of the criteria set out in the Hood case.

The Fiscal emphasised that the Appellant's only right of appeal was in relation to the amount of compensation awarded and that she had no right to appeal the level of fine imposed.

He invited the Tribunal to consider that the Sub Committee had before it the reporter's recommendation with which it had disagreed. The Sub Committee had gone on to carefully set out its decision on why it disagreed with the reporter, why it considered the solicitor's conduct to be unprofessional and then why it considered the level of compensation to be appropriate. It was his position that the Note of Appeal did not contain any relevant criticism of that decision-making process.

SUBMISSIONS FOR THE APPELLANT – MOTION TO DISMISS

The Appellant invited the Tribunal to have regard to her Note of Argument which was as follows:-

"1. The fiscal of the law society of Scotland claims in his opposing response to my request that the law society concern is "that they continue to incur expense opposing an appeal". I need to clarify that the law society of Scotland is handling another complaint for me currently since 2019. The last submissions from both parties in this complaint were in December 2020 when the reporter who investigates the complaint confirmed that she was writing the report. Till this moment - for a whole year - no final report was produced and no decision was taken. The reporter of that complaint is the same reporter who wrote the complaint report whose decision is being appealed here. So there is an intended delay till the LSS knows the decision of the SSDT. That delay also causes me losses. So the LSS should not use double standards. If the LSS opposes delays in the court, it should not cause delays in the reports and decision making for the other complaint nor cause losses to the complainers including me.

2. I am the pursuer of the appeal. I am 100% convinced that I have a right to appeal the decision of the LSS and prove that they erred in applying their own guidance rules as I clarified in the appeal form. I am a challenger and love to learn and search. So even if I do not have a legal representative, I will do my best to challenge my zero knowledge in the Scottish law and legal terminologies, the language barrier,, and also my health difficulties I also never witnessed nor attended any hearings nor know how they are run.

3. The fiscal of the respondent tries to convince the court that appeal is fundamentally irrelevant, and that it should be adjusted, however, he never tried to show nor prove how irrelevant is it. That claim has to be proved with evidences.

4. I proved in the grounds of the appeal in the appeal form that the LSS made three errors in applying their own guidance rules and sanctions categories. I attach their guidance rules here as taken from their website. Please look at the tables in pages 5 and 7 and compare them to the conclusion they made. I extracted these tables in the appeal form and again below.

5. The law society of Scotland categorized the misconduct into 4 categories (minor – clear – significant - serious) each one of them meets a category of awards for the inconvenience and stress (minor – clear – significant -exceptional) as shown in the 2 tables below. The worst category of misconduct (serious) meets the highest category in the compensation level (exceptional).

6. I put the 2 tables adjacent to each other to show each misconduct category and its relevant level of award as decided by the law society of Scotland. They may not be clear in the page layout limitations, so I will put each individual table alone again in the followings points with more explanations.

A suggested indicative scale, addressing both inconvenience and distress, is set out below:

Level of Inconvenience or Distress	Range of Compensation
Inconvenience of having required to complain	£25 - £100
Minor	Additionally £101 - £500
Clear	Additionally £501 - £1,000
Significant	Additionally £1,000 - £2,500
Exceptional	Additionally £2,500 - £5,000

7. When the LSS categorized the misconduct of the solicitor as SERIOUS which imposes a fine from (1201 – 2000) GBP according to their own table and rules, but they violated the table they put for the fine level for the serious action and imposed a fine of only 1000 GBP which lies in the middle of the significant action from (801-1200) GBP which is a lower level and less worse than the serious level. So that is a clear ERROR in applying the law and their own guidance rules. That ground was basically to show an example of the leniency and bias the LSS used in punishing the unprofessional solicitor for his serious action.

A broad categorisation covering the available scale is suggested below:

Seriousness of UPC	Basic penalty
Minor	£50 - £200
Clear	£201 - £800
Significant	£801 - £1200
Serious	£1201 - £2,000

8. The same applies for the compensation level. Despite all the losses I clarified in the appeal form which exceed 58,000 GPB and that resulted from the serious misconduct of the solicitor as described and categorised by the council of the Law Society of Scotland, the council considered that my losses are significant, not exceptional. The exceptional category in the table below reflects the effects of the serious misconduct in the table above which is according to their category should award me from 2500 -5000 GBP. However, the LSS saw that the serious action of the solicitor in my case with all the losses mentioned meets ONLY the significant level of compensation which – according to their rules – should award me from 1000 to 2500 GBP. They awarded me the least amount in the significant category while the clear category awards from 501 to 1000 GBP. This means that my compensation is equal to the clear category of inconveniences- not even the significant level - as in the table extracted from their Guidance on the Unsatisfactory Professional Conduct below.

9. Why did the subcommittee award me the lowest figure in the significant category which is equal to the clear category which constitutes only 20%of the compensation scale which is very low, why not 2500

GBP for example? How come a serious (worst) conduct lead to a 20% only of the compensation scale? That is another example of the council leniency and bias with the solicitor.

A suggested indicative scale, addressing both inconvenience and distress, is set out below:

Level of Inconvenience or Distress	Range of Compensation
Inconvenience of having required to complain	£25 - £100
Minor	Additionally £101 - £500
Clear	Additionally £501 - £1,000
Significant	Additionally £1,000 - £2,500
Exceptional	Additionally £2,500 - £5,000

10. So they erred in categorizing the compensation level twice (significant) instead of exceptional and the lowest figure in the significant level which is equal to clear level). Here are two more errors of applying their own guidance rules.

11. If we use numbers, there are 4 categories in the misconduct, and 4 categories in the compensation level that are

1. Minor
2. Clear
3. Significant
4. Serious.

** The Law Society of Scotland categorized the misconduct as 4 (worst), but put the compensation level as 2 (low middle), the fine level as 3 (middle), while the compensation and fine level must be 4 according to the Law Society of Scotland categorization.**

12. According to the Hood, Petitioner 2017 CSIH 21at para 17, which the fiscal of the first respondent referred to, it is very clear that the LSS made errors of law and the application of law and their own rules. So there is no contradiction between the appeal grounds above and the paragraphs in the case referred to by the fiscal of the LSS.

13. Though I noticed that irrelevance is the allegation that Mr. Knight makes in all his arguments in defending appeals – mine and others, it is the Fiscal's duty to prove to the honourable court how that ground was IRRELEVANT in my appeal? How did I fail to make it relevant? And what does he suggest to adjust it? Otherwise, the fiscal is wasting the tribunal time and effort.

14. The appellant did not request re-investigation of the whole complaint, nor mentioned this in any event or document as the fiscal claims in his note of argument. The appellant did not waste the court time and effort in discussing any details about the complaint or the investigations process. The appellant only discusses the contradictions in the decision of the LSS as per the rules of and regulations put by the LASS itself. The part of the conclusion in which the law society of Scotland categorized the misconduct of the solicitor as serious is satisfying to the appellant as it is the worst category a solicitor conduct can be described with, but the appellant is not satisfied with the amount of compensation awarded to her and compares it to the guidance rules of the LSS and finds contradictions and violations of them. The appellant also finds that the sanctions imposed do not comply with the guidance rules of the LSS as explained above.

15. The appellant did not receive any notice from the court requiring her to make representations within 21 days on the answers of the first respondents. The appellant does not see any need to adjust the appeal as it is relevant and focuses only the compensation level which is the scope of the SSDT in the 427A Appeals.

16. If the honourable court requires any further information or amendments at this stage, the appellant is willing to provide that.

17. The fiscal of the first respondent claims in his answers to the appeal form in May 2021 that "3.The Appellant's Grounds of Appeal disclose no prima facie basis for any appeal and being irrelevant et separatim lacking in specification, the Appeal should be dismissed" The points the appellant clarified above negate his claim, therefore, his motion to dismiss the appeal based on that claim is invalid.

18. The fiscal of the respondent in his answers also uses general sentences that lack specification and evidence to claim that "The decision arrived at discloses no error of law which may be an error of general law or an error in the application of the law to the facts. The decision discloses no finding for which there is no evidence or which is contradictory of the evidence. The decision discloses no fundamental error in approach by asking a wrong question or taking into account a manifestly irrelevant consideration. The decision is not a decision which no reasonable Sub-Committee could properly reach in the whole circumstances. The manner in which the Committee determined the matter was reasonable, and set forth in detail, in its Determination dated 8 March 2021". However, he failed to prove that, nor mention any evidences or examples to support his general words. The points I explained above also negate his claims with evidence and supporting examples from the decision document of the LSS.

19. The appellant also revised the first respondent's submissions in 49 pages in November 2021 for the preliminary hearing in which he repeated his previous claims and submissions again without answering my questions in the procedural hearing submission. Not only this, but he added a very lengthy submission of the case of Peter Stewart against the Law Society of Scotland which is totally different from my case and its content is extremely irrelevant to mine. I kept reading 14 pages of the tribunal decision on Stewart case including the 7 pages he marked, but I found.no relation or similarity at all between that case and mine. The defence should only focus on similar cases, similar arguments or similar requests of appellants, but there is nothing in common between all the submissions of the fiscal and my appeal. The first respondent has copied dismissal decisions of the tribunal and pasted them here without clarifying how they relate to my appeal or showing any relevant grounds of dismissal. It should be a matter of quality (content), not quantity of submissions.

20. May the appellant request from the honourable court that any claim or accusation from the respondent should be supported with evidence and examples instead of using general words that are repeated in all appeals that are opposed by Mr Knight or referring to irrelevant cases to this appeal; otherwise, it is a waste of time and effort and increases the expenses for no benefit to anyone. And it is switching roles, the appellant becomes accused and the defender throws her with accusations instead of replying to her arguments by law.

21. The fiscal of the LLS states that he lodged a motion for the tribunal on the 22 June, however, he did not copy/nor inform the appellant with it on that date or later? He did not also copy the appellant on the reasons to refuse the adjournment/rescheduling request in the previous procedural hearing, and only sent it after the appellant requested that from the tribunal clerk."

She submitted that the Note of Argument did not alter her grounds of appeal, they remained the same. She argued that her grounds of appeal are relevant and fell within the scope of the Hood case. She submitted that the grounds of appeal disclosed an error of law on the part of the Sub Committee in that it had not followed its own rules which were set out in the Law Society guidance.

The Appellant invited the Fiscal to take her Note of Appeal point by point to demonstrate what was irrelevant about it.

She explained she had compared the two tables within the Law Society guidance with each other and with the Sub Committee's conclusions. The point she said she was making was that the Sub Committee "violated" its own tables.

The first error made by the Sub Committee was when it only imposed a fine of £1,000 having categorised the solicitor's conduct as serious. The Sub Committee should have categorised her level of loss, inconvenience and distress as exceptional but it only categorised it as significant and even then only awarded her the lowest level of the "clear" category.

RESPONSE BY THE FIRST RESPONDENTS – MOTION TO DISMISS

The Fiscal submitted that it was not for him to go through the Note of Appeal point by point and show why each one was irrelevant. He argued it was for the Appellant to demonstrate that her appeal was relevant. He emphasised that the Appellant had no right of appeal against the fine imposed. He submitted that the two tables referred to in the guidance from the Law Society were separate and distinct. Assessing the appropriate level of compensation to be awarded was a completely separate process to that of categorising the seriousness of the solicitor's conduct.

In answer to a question from the Tribunal, the Fiscal confirmed that he was proceeding with his motion to dismiss the appeal on the basis of his common law plea to the relevancy and specification and not on an application of Rule 25 of the 2008 Rules.

RESPONSE BY THE APPELLANT – MOTION TO DISMISS

The Appellant clarified that she had pointed to the level of fine imposed to demonstrate an error on the part of the Sub Committee.

DECISION – MOTION TO DISMISS

Section 42ZA(4)(c) provides that where the Council of the Law Society has made a determination of unsatisfactory professional conduct it may direct the solicitor to pay compensation of such amount, not exceeding £5,000, for loss, inconvenience or distress resulting from the conduct. Section 42ZA(12) provides that a complainer, who has been awarded compensation, may appeal to the Tribunal against the amount of the compensation directed to be paid.

In this case, the Appellant made a complaint to the Scottish Legal Complaints Commission regarding the conduct of the Second Respondent. This in turn was referred to the Law Society of Scotland. The Professional Conduct Sub Committee of the Council of the Law Society dealing with this complaint upheld the complaint and made a determination of unsatisfactory professional conduct. The Sub Committee had gone on to direct the solicitor to pay the Appellant £1,000 in compensation, in addition to imposing a fine. Following that decision, the Appellant had lodged her Note of Appeal.

The First Respondents lodged Answers to the appeal which included a plea to the relevancy and specification of the Note of Appeal. Thereafter, the First Respondents lodged a motion with the Tribunal inviting the Tribunal to (a) dismiss the appeal in terms of Rule 25 of the 2008 Tribunal Rules or (b) dismiss the Appeal in terms of the plea to relevancy or (c) ordain the Appellant to find caution or (d) ordain the Appellant to sist a mandatary. That motion had been continued to this preliminary hearing for the Tribunal to hear submissions.

The Fiscal clarified that he was proceeding with his motion to dismiss on the common law plea to the relevancy and specification and not on any application of Rule 25. Given the decision of the Tribunal in the case of Cheah, referred to by the First Respondents, this appeared to the Tribunal to be a sensible course of action.

The First Respondents were inviting the Tribunal to dismiss the appeal on the basis that it did not sufficiently specify any relevant grounds of appeal. The Tribunal had very careful regard to the written submissions of both parties, the parties' oral submissions and the contents of the Note of Appeal. The Tribunal agreed with the First Respondents that it was perfectly competent to take a plea to the relevancy and specification of a Note of Appeal before the Tribunal. The Tribunal accepted that it had on previous occasions dismissed Notes of Appeal as being irrelevant or lacking in specification. However, the Tribunal had regard to what was said at paragraph 9.33 of *MacPhail, Sheriff Court Practice* where it is said:-

"An action will not be dismissed as irrelevant unless it must necessarily fail even if all of the pursuer's averments are proved."

The Tribunal accepted that the general criteria set out within the case of Hood apply to this case. It also agreed with the Fiscal's submission that what was being examined were the grounds of appeal set out within

the Note of Appeal itself. The Appellant's Note of Argument was simply that and could not substitute the content of the Note of Appeal.

Having regard to all of the above, the Tribunal required to consider in detail the contents of the Note of Appeal itself. Much of the Note of Appeal could be described as discussion or argument. However, the Tribunal noted that at paragraph 3 of the Note of Appeal, the Appellant lists a number of matters that she states the Sub Committee failed to take into consideration in awarding her compensation. At paragraph 6 of the Note of Appeal, she states that the level of inconvenience and distress caused to her should have been assessed as exceptional. At paragraph 4, the Appellant questions the appropriateness of awarding her the lowest amount described within the category of the schedule described as "significant". The Tribunal noted that the decision of the Sub Committee made no reference to what, if anything, the Sub Committee had taken into account in assessing the level of compensation and, in particular, the decision made no reference at all to "loss".

Whilst the case of Hood set out criteria to be met for an appeal to proceed, the Tribunal concluded that this did not mean that an Appellant requires to follow a particular formula of words. The Tribunal considered that what was described by the Appellant in paragraphs 3, 4 and 6, as discussed above, fell within what could be described as an error of law and/or fact. Accordingly, the Tribunal refused the Fiscal's motion to dismiss.

It should be emphasised that this decision was made on a *prima facie* assessment of the grounds of appeal and it should not be taken as an assessment of the strength of the appeal itself.

The Tribunal noted the Appellant's explanation for referring to the level of fine imposed on the solicitor and accepted that she was not attempting to appeal the fine itself. The Tribunal agreed with the Fiscal that, in this case, the only right of appeal was in regard to the level of compensation awarded. The Tribunal agreed with the Fiscal's submission that the two tables set out within the Law Society guidance are separate and distinct. The amount of compensation to be awarded must be assessed on the levels of loss, inconvenience and distress caused by the conduct. Unsatisfactory professional conduct that may be considered of the most serious kind may result in little or no loss or inconvenience. Likewise, unsatisfactory professional conduct at the lowest end of the scale may result in high levels of loss and inconvenience.

SUBMISSIONS FOR THE FIRST RESPONDENTS – MOTION FOR CAUTION OR SISTING A MANDATARY

The Fiscal directed the Tribunal's attention to his written submissions which were as follows:-

"CAUTION

It is a well-established legal principle that whether a party to an action should or should not find Caution or security for expenses that may be awarded against them is a matter entirely within the discretion of the Court or Tribunal before which the proceedings are extant. Further, the Court or Tribunal will not make such an order unless the interests of justice appear to require it.

The Tribunal requires to exercise a balance between the interests of the parties. It would be wrong that a party litigant with a stateable case should in effect be excluded from advancing that case by an order for Caution. On the other hand, if that litigant does not have a stateable case and is unable to meet an award of expenses it would be unfair to oblige any opponent to continue with the process without any prospect of recovering expenses in the event of success. See Macphail on Sheriff Court Practice at paras. 11.52-11.53. (Document 3).

The Appellant in this matter resides and is domiciled in Egypt, furth of the jurisdiction.

For the reasons given above, it is contended that the Appellant has no stateable case.

Even if that were not deemed to be the position here, it is submitted that it is unfair to oblige the First Respondents to continue with their opposition to this Appeal without any reasonable prospect of recovering expenses in the event of that opposition being successful. Enforcement of any award of expenses would be impractical if not unsustainable.

The Tribunal has previously considered an application for Caution in a Section 42ZA Appeal. Reference is made to the case of Brown -v-The Council of the Law Society of Scotland-13 May 2014 (Document 4), in which Caution was awarded in the sum of £3,000 to be lodged within two months.

In the event of the Tribunal not granting the First Respondent's primary motion for dismissal of the Appeal, the First Respondents would seek an order in terms of paragraph 2 of the motion before the Tribunal with the further provision that in the event that that Caution is not lodged within four weeks of its order, the Appeal shall be dismissed.

In respect of the amount of caution, the First Respondents have been involved in number of similar cases where awards of expenses have been made in their favour ranging from £4,500 to £7,000. The sum of £5,000 is accordingly deemed to be a reasonable estimate.

MANDATARY

The third and alternative part of the motion for the First Respondents is that if the motion for dismissal is refused, and the Tribunal does not find favour with the motion for Caution, the First Respondent's seek an order for the Appellant to sist a Mandatary who is within the jurisdiction of this Tribunal. The grounds for doing so are similar to those advanced in relation to the matter of Caution. Whether a Mandatary is sisted is a question entirely for the discretion of the Tribunal but given the obvious fact that this Appellant is furth of the jurisdiction of the Tribunal, the First Respondents seek the protection of such a Mandatary in the event of their successful opposition to his Appeal and an award of expenses in their favour."

The Fiscal emphasised that two matters were of particular importance in considering the matters of caution and sisting a mandatary. The first was that, in considering the interests of justice, the Tribunal required to balance the interests of both parties. The second matter was that the Tribunal required to assess the Appellant's prospects of success. He argued that even though the Tribunal had held that the appeal was relevant, the Tribunal should consider that its prospects of success were poor. The Fiscal pointed to the case of Brown as support for the Tribunal looking at the prospects of success when considering whether caution was appropriate. He submitted that it was also relevant to the interests of justice that the Appellant was furth of the jurisdiction of the Tribunal i.e. in Egypt.

With regard to the motion for sisting a mandatary, the Fiscal submitted that the fact that the Appellant resided outwith the jurisdiction of the Tribunal was sufficient in itself to support the requirement of sisting a mandatary.

In response to a question from the Tribunal, the Fiscal conceded that there was likely to be a convention or international treaty allowing for the enforcement of any decree of expenses that the Tribunal might make. However, he submitted the likely cost of doing so was wholly prohibitive. The Tribunal sought clarification from the Fiscal with regard to the practicalities of appointing a mandatary. The Fiscal confirmed that it was for the Appellant to identify an individual who would then require to agree to be a mandatary and that person would require to be domiciled in Scotland.

SUBMISSONS FOR THE APPELLANT - MOTION FOR CAUTION OR SISTING A MANDATARY

The Appellant referred the Tribunal to her written submissions which were as follows:-

"22. The fiscal of the first respondent seeks orders to find caution and refers to MacPhail on sheriff court practice. Macphail Sheriff court practice states that " it would clearly be wrong that a litigant with a statable case should in effect be excluded from the court by an order for caution". It also clarifies that poverty and bankruptcy are not always reasons to find caution although it is impossible for the litigant to meet the expenses. The fiscal fails to prove that I cannot meet the expenses.

23. The fiscal also failed to prove that the appellant does not have a statable case given the points mentioned above to negate and defend his allegations.

24. The appellant is the pursuer of the case, not a criminal to be suspected or accused of escaping from expenses. She has clear financial and security records both in UK and Egypt. She was chosen among the top students in 5 continents to receive an academic scholarship in UK for postgraduate degrees after passing many examinations by the British government. She chose to pursue the appeal after thorough consideration of all aspects and risks of litigation. She reached her decision after she studied the position very well to avoid risks of wasting the court time and effort.

25. The fiscal of the first respondent considers that the appellant's being domiciled in Egypt is an obstacle and states that "enforcement of any award of expenses would be impractical if not unsustainable", however he failed to prove that.

26. The fiscal ignores the fact that judgements can be enforced internationally. There are treaties between UK and Egypt for enforcing judgements as the relations between UK and Egypt started centuries ago. UK was ruling Egypt in the 19th and 20th century. So the Fiscal's argument here is invalid.

27. Mr. Knight refers to the case of Brown vs- the law society of Scotland 12 may 2014. There are many differences between my case and the case of Brown that he had previously referred to.

28. The appellant refers to the case of Alan Strain vs. the council of the law society of Scotland in 2013 which was opposed by Mr. Knight who raised the same motions and used the same arguments here. In that case, Mr.Knight referred to the case of Brown above when there were no similarities between the two cases. That was also the view of the honourable tribunal which stated in the decision in page 13 that "the Tribunal took the view that there was no similarity to this case at all. The Fiscal had not suggested that the Appellant was impecunious". This decision is attached to the documents lodged in the procedural hearing.

29. The Tribunal also stated in the decision in page 13 that "Having regard to all of the circumstances, the Tribunal concluded that it would be premature to consider the question of expenses at this stage and ordered that the question of expenses be reserved to the conclusion of the case".

30. It is too early to decide which party is liable for expenses given that the arguments of the fiscal were proved wrong here, and also given that the fiscal is intentionally adding irrelevant details and arguments that waste a lot of time and effort and discussing and defending which increase the expenses.. The appellant suggests that the question of expenses should be reserved to the conclusion of the case as supported by the tribunal previous decision.

31. The fiscal of the first respondent seeks an order for the appellant to sist a mandatory. The grounds for doing so are similar to those advanced in relation to the matter of caution. The appellant proved to the honourable court that these grounds were wrong. Therefore the base on which the fiscal builds his motion is invalid.

32. In addition, as extracted from the website of the law society of Scotland in the section of (Civil law update of recent decisions), it states that " In Rossmeier v Mounthooly Transport 1999 GWD 35-1661 the First Division decided that there was no requirement for a European national or resident to sist a mandatory in an action before the Scottish Courts". Rossmeier was a decision dealing with indirect discrimination under European Union law.

33. Applying fairness, non-discriminatory human rights rules, the same applies for all non-Scottish nationals/residents outside Europe as per Rossmeier that the appellant's mere residence abroad would not justify an order to sist a mandatory, (Rossmeier, per the Lord President (Rodger) at 212). According

to Rossmeier, it will be discriminatory to impose such an order to sist a mandatory against those outside Scotland.

34. To grant the respondent's motion of sisting a mandatory that would, in effect, be depriving the appellant of the right to pursue her action, a right -which is conferred upon her by Act of Parliament. This shuts the court door in the face of non-Scottish people who suffered and were exposed to misconduct of Scottish solicitors on the Scottish lands as there is nowhere else they can pursue their rights.

35. The appellant was a postgraduate student in Scotland in 2009. She had a visitor visa for the duration of her academic program. All her colleagues were expatriates who went to Scotland for the same purpose. None of them is a UK or a Scottish citizen or permanent resident. They all left Scotland after finishing the program. She has no friends or relatives who live in Scotland. She was exposed to illegal eviction, defamation, death threats and other dangers that is why she had to seek the protection of the Scottish law against the criminals who exposed her to danger. She resorted to the LAW, instead of other illegal ways. That is the best and safest way for her to be protected and take her right. She started the litigation in the sheriff court and was never asked to find caution or sist a mandatory.

36. The events happened in Scotland. The solicitors who ruined her case live and work in Scotland according to the Scottish law. The only place she can raise a court action against them is Scotland courts.

37. Asking the appellant to sist a mandatory is putting a huge obstacle in her approach to take her right by law because it is impossible for her to find a person or an entity as a mandatory and at the same time she cannot sue them outside Scotland. It is simply to tell her "leave your right", while the law was made to protect people's rights, not to force them to leave their rights.

38. The law is fair and just and does not differentiate between people from different nationalities, races, ethnicities or religions. All people are the same and have the same rights in from of the law.

39. According to what I mentioned earlier about the treaty between UK and Egypt, there is no need to sist a mandatory as long as the court judgements can be enforced in Egypt. That protects the court and the respondent's right to enforce the judgements and get the expenses in case if I they are imposed against me."

She drew the Tribunal's attention to MacPhail and argued that a litigant with a stateable case should not be prevented from proceeding with that case by the imposition of an order for caution. She emphasised that

she was not impecunious or bankrupt. She emphasised that the case of Brown had no similarity at all with her case. Her complaint required to be made in Scotland.

She confirmed she was aware of the risks of an award of expenses being made against her and that she was in a position to pay such an award. She submitted that to ordain her to find caution was a premature decision of awarding expenses against her. She described herself and the First Respondents as "two balanced parties" within the process and stated that it would be unfair to expect her to find caution and not the Law Society.

RESPONSE BY THE FIRST RESPONDENTS - MOTION FOR CAUTION OR SISTING A MANDATARY

The Fiscal invited the Tribunal to distinguish the case of Strain referred to by the Appellant in her submissions. He argued in that case the Appellant had amended his appeal to make it relevant, the Appellant had assets in Scotland and was Scottish although living in Australia.

DECISION - MOTION FOR CAUTION OR SISTING A MANDATARY

The Tribunal accepted that it was competent for the First Respondents to raise the issue of caution before it. An order for caution is a matter for the Tribunal's discretion. It must be in the interests of justice for such an order to be made. That requires balancing the interests of both parties. In carrying out that balancing act, the First Respondents had invited the Tribunal to hold that the appeal had poor prospects of success. On the information before it, the Tribunal was unable to reach that conclusion. The case of Brown was not helpful in the particular circumstances of this case. In that case, the grounds of appeal were so unfocussed the Tribunal had concluded that it could not succeed. At paragraph 11.53, MacPhail states that it is not appropriate to prevent a party from proceeding with a stateable case by ordering caution unless in "exceptional circumstances". The Fiscal had conceded that any award of expenses was in fact likely to be enforceable although perhaps with cost consequences. MacPhail notes that impecuniosity is not in itself considered an "exceptional circumstance". With that in mind, the Tribunal concluded that the little information before it did not either.

Whether or not to order the Appellant to sist a mandatary is also a matter that falls within the discretion of the Tribunal and requires to be in the interests of justice. No authorities were referred to by the First

Respondents. The Tribunal did not consider it appropriate to order the Appellant to sist a mandatary in an appeal which it had concluded was relevant and stateable.

Accordingly, the Tribunal refused the First Respondents' motion to either ordain caution or order the Appellant to sist a mandatary. The Tribunal set down the Appeal for a full hearing on 1 March 2022 at 10am to proceed by way of video conference. It noted that an interpreter should be organised for that date.

Colin Bell
Chair