

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

INTERLOCUTOR

in Section 42ZA Appeal

by

Dr. WAN HOCK CHEAH, 19 Glenpark Avenue,
Glasgow (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
Respondent")

and

KHALDA WALI, LKW Solicitors, 414 Cathcart
Road, Glasgow (hereinafter referred to as "the Second
Respondent")

By Video Conference, 28 October 2020. The Tribunal having considered the First Respondent's motion to dismiss the Appeal and the First Respondent's preliminary plea contained within the Answers; Refuse said motion; Uphold said preliminary plea; Dismiss the Appeal; Find the Appellant liable in the expenses of the First Respondent and of the Tribunal including expenses of the Clerk chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter 3 of the last published Table of Fees for General Business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Appellant, the First Respondent and the Second Respondent.



**Nicholas Whyte
Chair**

NOTE

The Appellant complained about the conduct of his solicitor, the Second Respondent. The Professional Conduct Sub Committee (PCSC) of the First Respondent did not uphold that complaint. The Appellant appealed to the Tribunal under Section 42ZA(10) of the Solicitors (Scotland) Act 1980. The original appeal document was dated 3 May 2020. In accordance with its Rules, the Tribunal invited the Appellant to supply further information in support of his appeal. An updated appeal dated 20 May 2020 was lodged. The appeal was intimated on both Respondents. The First Respondent lodged Answers containing a preliminary plea. The Second Respondent confirmed she did not intend to enter the process.

The matter called for a procedural hearing on 29 July 2020. In advance of that procedural hearing, the First Respondent lodged a motion to dismiss the appeal. The Tribunal allowed the Appellant two weeks to amend his grounds of appeal. The Appellant submitted another updated appeal dated 8 August 2020. The matter called for a procedural hearing on 25 August 2020. On the First Respondent's motion, the Tribunal fixed a preliminary hearing for 28 October 2020. Both parties were content this could take place by video conference. Both parties provided written submissions and bundles of authorities in advance of the preliminary hearing.

At the preliminary hearing on 28 October 2020, the Appellant was present and represented himself. The First Respondent was represented by its Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Tribunal had before it the Appeal and documents dated 3 May 2020, the amended Appeal and documents dated 20 May 2020, the amended Appeal and documents dated 8 August 2020, Answers for the First Respondent dated 18 June 2020, Amended Answers for the First Respondent dated 17 August 2020, the Appellant's Response to the Answers, an Inventory of Productions for the Appellant lodged in July 2020, an Inventory of Productions for the Appellant lodged in September 2020, the Motion for the First Respondent, written submissions from both the Appellant and First Respondent, supplementary notes of submissions for the Appellant and Lists of Authorities from both parties.

The Fiscal indicated that it was the First Respondent's position that the appeal did not meet the standard required to move to a full hearing. Referring to his motion, he said that the appeal was manifestly unfounded and the Tribunal should dismiss it under Rules 23 to 25 of the Tribunal's Rules. Alternatively, referring to the preliminary plea contained in the Answers, the Fiscal said the Tribunal should dismiss the appeal on grounds that it lacked relevancy and specification.

Referring to Rules 21 to 22, the Fiscal made various criticisms of the form of the appeal. The Appellant had submitted many pages of material in various fonts and unnumbered paragraphs. He said there had been a failure to follow basic rules. Therefore, the foundation of the Appellant's case was "in sand". He drew the Tribunal's attention to the need for party litigants to comply with procedural rules, referring to Aslam-v-The Royal Bank of Scotland [2018] CSIH 47 and Barton-v-Wright Hassall LLP [2018] 1 WLR 119. The Fiscal submitted that the Appellant had not properly complied with these rules which provided the "building blocks" of an appeal. He noted that some of the documents which ought to accompany an appeal were in fact provided by the Law Society.

The Fiscal referred to his preliminary plea which was that the Appellant's grounds of appeal disclosing no *prima facie* basis for any appeal, and being irrelevant *et separatim* lacking in specification, the appeal should be dismissed. Referring to MacPhail's Sheriff Court Practice at paragraphs 9.27 to 9.33, the Fiscal noted that the Appellant could only be successful if he pled a clear and specific case.

With reference to the grounds of appeal, the Fiscal submitted that the Appellant had given insufficient notice of his argument. The Appellant ought to have given specification of matters such as the fundamental error he said the Sub Committee fell into, which findings were inconsistent with the evidence, and which evidence should lead to an alternative finding. The background to the case was that the Appellant said his solicitor did not follow his instructions. However, the Appellant failed to give the date of those instructions, where and how they were given, or provide confirmation that the instructions were accepted. The Appellant said the Sub Committee decision was contradictory of the evidence but did not identify the issue this criticism was directed against. He did not specify what evidence should have been considered or preferred. He said the Sub Committee failed to take account of the whole circumstances but did not say what those circumstances were. The First Respondent was left guessing the grounds of appeal.

The Fiscal also criticised the appeal on grounds of relevancy. The appeal refers to two issues – failure to follow instructions and taking action beyond those instructions. In the Fiscal's submission, it was not possible for the Second Respondent to follow the Appellant's instruction regarding the extent of the Sasine title. As a matter of law, the Appellant's instruction would not have brought the matter to an end due to the "curtain effect" described by Professors Rennie and Gretton. The Appellant's understanding of the law was misconceived.

The Fiscal also noted that this was not the complaint the Sub Committee received from the SLCC. It was a wholly separate complaint and the Sub Committee could only address the complaint submitted by the SLCC (Council of the Law Society of Scotland-v-Scottish Legal Complaints Commission 2010 SCLR 781 and Cowan, Petitioner [2014] CSIH 11).

The Appellant noted he was a retired consultant engineer and not a lawyer. He submitted that his appeal was well-founded and the Tribunal ought to set a full hearing. The Appellant read from the written submission he had provided to the Tribunal in advance of the preliminary hearing.

The Appellant noted he had completed the Tribunal's "Form 4" when making his appeal. He has three grounds of appeal. He has also provided sheets of information to clarify the issues raised. In his submission, the pages of information and documents give fair notice to the First Respondent. He explained that his case concerned a simple boundary issue which should have involved the Second Respondent measuring up and locating the boundary. However, she entered into uninstructed negotiations of the location without applying the law. The Appellant has made this clear in his grounds of appeal. A party litigant ought not to be prejudiced by a lack of skill in pleading.

With regard to specification, the Appellant said his grounds were specific. There was an abundance of evidence that the primary and consistent instruction to the Second Respondent was to recover a strip of land in accordance with the Sasine boundary and the Second Respondent failed to follow that instruction. He said this was the crux of the matter. The Sub Committee only dealt with the negotiated boundary which the Second Respondent was not instructed to negotiate. The Sub Committee ought to have considered the Appellant's complaint about the solicitor not ensuring the boundary was reinstated to the location of the Sasine boundary. The Appellant challenged the Sub Committee's decision and the reports provided to it. He said there was a lack of reasons. He said there had been a fundamental error by the Sub Committee, it had made a finding which did not fit with the evidence and was a decision no reasonable Sub Committee could reach. It had not taken account of the whole circumstances surrounding the case.

With regard to relevancy, the Appellant disagreed with the Fiscal's understanding of the case and his interpretation of the law relating to the use of old Sasine titles in Land Register cases. In the Appellant's submission, Professor Rennie's opinion supported reference to the Sasine boundary. He said that if the Second Respondent had the ground marked the dispute would have been resolved. According to him, any competent and reputable solicitor would see the Sasine boundary as the true boundary. The Sub

Committee failed to see this was essential. He said that he had raised the issue with the reporter in his letters of 20 February 2020 and 5 March 2020. He said he referred to this issue in his original complaint to the Scottish Legal Complaints Commissions (SLCC) but that only some of the heads of complaint were referred to the Sub Committee. He accepted the issues before the Sub Committee did not refer to the Sasine boundary but said if this issue had been properly dealt with these later problems would not have arisen.

In answer to questions from the Chair, the Appellant confirmed his main complaint was the failure to consider the Sasine boundary. He complained about this to the SLCC. He expected the Sub Committee to have regard to this issue. The reporter knew this was his main issue. The First Respondent should have investigated it and have regard to the whole circumstances. Whether the issue was referred or not to the First Respondent by the SLCC was not within the Appellant's control. In answer to another question, the Appellant indicated that Professor Rennie was of the view it was possible to consult the Register of Sasines regarding boundaries for titles which had been subject to land registration. He said this statement was contained at paragraph 2.1 of Professor Rennie's opinion (Production 4a for the Appellant).

The Tribunal considered the Fiscal's criticism of the Form of Appeal and his motion to dismiss based on Rules 21 to 25. It decided that it was not appropriate at this stage to consider the matter under these Rules. The Chair, exercising the powers of the Tribunal under Rule 56, applies these Rules when carrying out a sifting function to new appeals. The Tribunal has already accepted the appeal applying Rules 21 and 22 to it. It invited the Appellant to provide further information under Rule 23(2). It then proceeded to serve the appeal in accordance with Rule 24. The Appeal and Answers were considered under Rule 25 and the Tribunal set the matter down for various hearings. Notices of those hearings were intimated under Rule 26. The Fiscal argued that the Tribunal should be able to use these Rules at a preliminary hearing because otherwise, the First Respondent would have no power to challenge the decision other than by judicial review or appeal at the conclusion of proceedings. However, this is the situation created by the legislation and the Rules. The First Respondent is not prejudiced because it can raise a preliminary plea in the Answers as the Fiscal did in this case. It was therefore not appropriate for the Tribunal to consider the matter under Rules 21 to 25 and the Tribunal refused the First Respondent's motion. The Tribunal accepted the Appeal in the form it is in and had already decided that it was not manifestly unfounded.

The Tribunal considered the First Respondent's plea-in-law contained in the Answers which consisted of a challenge based on the relevancy and specification of the appeal. There was some overlap between these issues and those raised in the First Respondent's motion which referred to the appeal being manifestly unfounded and/or without merit. The Tribunal noted the Appellant's repeated assertions that his complaint is based on the Second Respondent's failure to follow his instructions regarding the Sasine boundary. However, the Tribunal considered this issue to be irrelevant to the heads of complaint which were referred to the Sub Committee. Issues 1 to 5 were not referred to the Sub Committee. Issue 6 related to the Second Respondent entering into discussions with the defender's solicitor regarding a settlement. Issues 7 and 8 were not referred to the Sub Committee. Issue 9 was a complaint that the Second Respondent pressured the Appellant and his wife to make a decision without giving them adequate time to consider their position. Issue 10 was a complaint about the Second Respondent failing to contact the defender's solicitors regarding their objections to the settlement proposals. Issue 11 related to a failure to inform the Appellant and his wife that this settlement proposal would be binding. Issue 12 related to the Second Respondent acting outwith the clients' instruction or knowledge by accepting the terms of the proposed settlement. These heads of complaint all relate to a period of days at the end of September 2017 and are not concerned with the Appellant's complaint about the Sasine boundary.

The Tribunal went on to consider whether there was sufficient relevant material in the appeal and documents to support an appeal which was not based on the Sasine boundary issue and concluded that there was not. The Appeal contains statements which correspond with the grounds for appellate interference described in Hood, Petitioner [2017] CSIH 21 but does not provide any detail or evidence of how the Appellant says the Sub Committee went wrong. The appeal merely reflects the Appellant's disagreement with the Sub Committee's decision and his assertion that the Second Respondent ought to have followed his instruction regarding the reinstatement of the boundary as described in the Sasine title. The Tribunal cannot have regard to this complaint as it was not one which was referred to the Sub Committee. The Tribunal rejected the Appellant's argument that heads of complaint 6 and 9-12 would not have become live if the Second Respondent had followed the Appellant's instruction regarding the Sasine boundary. The PCSC can only have regard to the complaint which was referred to it (Council of the Law Society of Scotland-v-Scottish Legal Complaints Commission 2010 SCLR 781).

However, even if the Tribunal could have regard to the argument regarding Sasine titles, it considered that the appeal could not succeed. The curtain effect is well known and reference to the Sasine boundary

alone was unlikely to have led to the result the Appellant sought. Contrary to the Appellant's interpretation, Professor Rennie's opinion was not an unambiguous statement that Sasine boundaries would be considered by a court. Paragraph 2.1 of the opinion states that:-

"It is a moot point as to how far one can look at the previous Sasine titles where title has been registered. This in registration terms is known as "the curtain principle"."

Professor Rennie refers to some cases where this point was raised but none of these cases appeared to have been decided on the basis of Sasine titles. At paragraph 2.5, he says:-

"The most one can perhaps say about the decided cases is that they are all decided on the basis of their own facts and possibly on the basis of the quality of the evidence given by the parties and their respective surveyors. It is not possible to derive any clear principle."

Professor Rennie notes that possession can be critical and where there is doubt over the interpretation of boundaries, even registered boundaries, courts tend to favour the *status quo* (Authority 5 for the First Respondent).

There was therefore no *prima facie* basis upon which the appeal could proceed. The Appeal lacks relevancy and specification. Even if the grounds of appeal were established, the Tribunal could not come to a different conclusion to the Sub Committee. Fair notice had not been given to the First Respondent or the Tribunal despite the Appellant being given various opportunities to amend the Appeal. Therefore, the Tribunal upheld the First Respondent's plea-in-law and dismissed the Appeal.

The Fiscal moved for expenses on the usual award regarding publicity. The Appellant noted he was retired. He had no objection to the matter being given publicity. The Tribunal awarded expenses to the First Respondent on the usual basis and ordered that the matter be given publicity and that this publicity should include the names of the Appellant, First Respondent and Second Respondent.



Nicholas Whyte

Chair