

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

MARIA FORREST-MUIR, 39 Muirsketh Road,
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
Respondents")

and

JOHN KEVIN DUFFY, Ruthven Keenan Pollock &
Co. Solicitors, 832 Crow Road, Anniesland,
Glasgow (hereinafter referred to as "the Second
Respondent")

By Video Conference, 31 January 2023. The Tribunal, having considered the First Respondents' preliminary plea that the appeal should be dismissed on the basis that the grounds of appeal disclosed no *prima facie* basis for an Appeal and were irrelevant *et separatim* lacking in specification; Uphold the First Respondents' preliminary plea; Dismiss the Appeal; Find the Appellant liable in the expenses of the First Respondents and of the Tribunal including the 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 Three of the last published Law Society's 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 Respondents and the Second Respondent.


Catherine Hart
Vice Chair

NOTE

This case is about disclosure of personal data by a solicitor. The Second Respondent received a subject access request (SAR). He indicated in his response to the SAR that he understood that the Appellant, whom he identified by name, held a copy of a document which had been requested. In a letter to a different recipient, the Second Respondent indicated that the Appellant had made several complaints to the Scottish Legal Complaints Commission (SLCC) about his firm. He also identified the Appellant by name in that letter. The Appellant complained to the Information Commissioner's Office (ICO) about the Second Respondent's actions. The ICO upheld the complaint but took no action which regard to the breach.

The Appellant complained to the SLCC. The complaint which was accepted by the SLCC and passed to the Law Society of Scotland for investigation as a conduct complaint was as follows:

"1. Mr Duffy of the firm of Ruthven, Keenan, Pollock & Co. failed to act appropriately or diligently in that Mr Duffy inappropriately shared my personal data with my sister and my brother on 29 September 2020 in response to their complaints against his firm, pertaining to our late mother's Power of Attorney and Will."

The Professional Conduct Sub Committee (PCSC) made no finding of unsatisfactory professional conduct against the Second Respondent. Unsatisfactory professional conduct is defined in Section 46 of the Legal Profession and Legal Aid (Scotland) Act 2007 as "professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor." It lies on a spectrum between inadequate professional services and professional misconduct.

The Appellant appealed timeously against the PCSC's decision under section 42ZA(10) of the Solicitors (Scotland) Act 1980 in accordance with the Tribunal's Procedure Rules 2008. The Appeal was intimated to the First and Second Respondents. Only the First Respondents lodged Answers to the Appeal. The Second Respondent did not enter proceedings. The First Respondents' Answers contained a preliminary plea which was in the following terms:

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

The Complainers lodged and intimated a Note of Argument on 31 October 2023 in support of their preliminary plea. The case called for a virtual preliminary hearing on 28 November 2022. The matter

was continued to a virtual procedural hearing on 31 January 2023 for the Tribunal to be addressed on whether the Reporter's unredacted report should be provided to the Appellant. In early January the First Respondents sent a copy of the unredacted report to the Appellant. Both parties confirmed that in the circumstances they were content that the case called as a preliminary hearing on 31 January 2023 and parties would address the Tribunal on the relevancy and specification of the Appeal.

At the virtual preliminary hearing on 31 January 2023, the Appellant was present and represented herself. The First Respondents were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Second Respondent was not present and had intimated that he did not intend to enter proceedings. The Tribunal had before it the Appeal dated 8 September 2022 and the documents which had been submitted with the Appeal, Answers for the First Respondents, an Inventory of Productions for the First Respondents, a List of Authorities for the First Respondents, a Note of Argument for the First Respondents, an Inventory of Productions for the Appellant and written submissions for the Appellant.

SUBMISSIONS FOR THE FIRST RESPONDENTS

The Fiscal indicated that he would highlight and discuss the issues raised in his Note of Argument. He reminded the Tribunal of the terms of the original complaint to the SLCC. He said that the Tribunal should only consider the documents which were before the PCSC. It should not look at any extrinsic evidence. He said it was key that the only data shared by the Second Respondent was the Appellant's name and that the Second Respondent responded in the context of a SAR which he was obliged to answer.

The Fiscal noted that the PCSC acknowledged that the ICO had found the Second Respondent to be in breach. However, they did not consider that the Respondent's actions constituted unsatisfactory professional conduct. In his submission, the PCSC gave consideration to the Appellant's follow-up emails. However, the PCSC's task was not to consider whether the Second Respondent was correct in his legal and factual analysis but rather was to determine whether he was guilty of unsatisfactory professional conduct. A mistake or error does not in itself constitute unsatisfactory professional conduct.

The Fiscal noted that the Appellant was a party litigant, and the Tribunal had a balancing act to carry out. However, case law confirms that an Appellant cannot be treated more favourably because of a lack of familiarity with law and procedure. In this context, the Appellant must plead a relevant and specific case. She must set out her case in a clear and concise way, giving fair notice to the Law Society.

According to the Fiscal, the Tribunal should be slow to interfere with a PCSC decision and can only do so in three situations. The test for a successful appeal is contained in Hood, Petitioner 2017 SCLR 799. To proceed to a substantive hearing, the Appellant must provide specific and relevant pleadings to allow the Tribunal to consider the PCSC's decision in the light of Hood. The Appellant had not done this. She had not set out what elements of the PCSC decision would allow the Tribunal to interfere under Hood. The Appellant clearly disagrees with the decision but there is no identification of an error under Hood.

With reference to the Appeal document, the Fiscal highlighted what he said were its shortcomings. He noted that the Appellant said the PCSC had failed to take into account that the Second Respondent had not acted in response to the ICO's letter of 19 February 2021. However, this was not part of the original complaint. This was not therefore something the PCSC could consider. The Appellant does not say what personal obligations fell on the Respondent. She does not say why the ICO decision should be binding on the PCSC or the Tribunal. The ICO has no obligations under the 2007 Act. The First Respondents are left to guess what the Appellant's point might be. The Appellant refers to data protection duties on entities but present proceedings are concerned with personal regulation. She attacks the reasoning of the Reporter but the decision under review is that of the PCSC. The Fiscal said that even if the Appellant established everything in her Appeal, it was bound to fail.

The Fiscal said that the disclosure of the existence of the SLCC complaint was not personal data and did not come within the scope of the Appellant's original complaint. However, even if they were different, the same sentence within the letter released both the Appellant's name and the fact of the SLCC complaint. The Fiscal said that the difficult relationship between the siblings did not make the breach of data any worse than if the relationship had been good.

SUBMISSIONS FOR THE APPELLANT

The Appellant said her complaint was about a data breach but the extent of that breach was not just about her name being disclosed. There was no ambiguity that a data breach had occurred and that the Appellant's complaint to the ICO was upheld. The Second Respondent shared the Respondent's name and also the fact that the Appellant had made a complaint about his firm.

The Appellant described her family situation at the time of the data breach and how the disclosures made by the Second Respondent to her siblings had a significant effect on the family dynamic. The Appellant's name had changed and her family were not aware of her new surname. The disclosure of her name was therefore serious.

The Appellant spoke about receiving the unredacted version of the Reporter's report and how it had led her to believe that the Second Respondent's conduct was linked to his knowledge of potential litigation against his firm.

The Appellant repeatedly said that she did not pretend to know the law. She was a member of the public. She made a complaint about a solicitor and the Law Society failed to take on board the relevance of the details in front of them. She understood the decision was taken by the PCSC, not the Reporter but it seemed to her that the PCSC could pick and choose whether or not to take on the Reporter's recommendations. The Appellant highlighted the Rules which the Reporter had suggested were most likely to apply in the circumstances. The Appellant believed there had been a breach of Rule B1.2 and that the Second Respondent's honesty and integrity had been called into question. She said that if the PCSC had considered Rule B1.2, her complaint would have been upheld. However, it was not for her as a member of the public to assess which rule applied.

The Chair invited the Appellant to address the Tribunal on the Hood case. She asked the Appellant to take the Tribunal through her Appeal and highlight the relevant grounds which should be the basis for revisiting the decision. The Appellant asked whether she could read out her written submissions. The Chair noted that the members had read the submissions before the hearing. The essence of the Fiscal's submission was that the Appeal did not disclose any basis for interference under Hood and it would be helpful to hear from the Appellant on this point.

The Appellant said that no reasonable sub committee could have decided to take no action in the circumstances. It did not make any sense to her. She could not say in law where they had gone wrong. However, she did not believe that they had taken account of all the material put in front of them. The PCSC had noted that only her name had been shared. The PCSC did not consider the fact that information regarding her complaint had been shared with two individuals. The PCSC therefore did not take into account all the information before it.

The Appellant said that the real reason for the Second Respondent's disclosures was down to his worry that he might be sued by the Appellant's family. She said the Second Respondent acted deliberately in disclosing her data for his own gain and to her detriment. There was an emotional and mental impact on her. She also alleged that the Reporter had passed more data to the Second Respondent.

The Appellant described the Second Respondent's responses to the SLCC and how these had made her feel, particularly the references to frivolous and vexatious complaints.

DECISION

The Tribunal gave very careful consideration to the documents lodged by both parties, the Note of Argument and the Appellant's written submissions. It took into account everything said by the parties at the preliminary hearing.

In appeals cases, the Tribunal follows the guidance contained 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 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 bore in mind some general principles when considering the preliminary plea. The pleadings should be read as if they are completely true and interpreted broadly in favour of the pleader. The Appeal could only be dismissed if, reading the averments as if they were true, the Appeal was bound to fail, even if the Appellant proved everything in the Appeal. Party litigants must comply with procedural rules (Aslam-v-Royal Bank of Scotland [2018] CSIH 47 and Barton-v-Wright Hassall LLP [2018] 1 WLR 1119). This can be difficult for those who are not legally qualified. The Tribunal analysed the Appeal carefully to see whether anything in it on a fair construction ought to be permitted to proceed to a hearing.

Careful regard was paid to the terms of the complaint made to the SLCC. The focus must be on the nature of the grievance expressed by the complainer, rather than on the nature of potential grievances which have never been expressed (Law Society of Scotland-v-Scottish Legal Complaints Commission 2010 SCLR 781). The Appellant complained that the Second Respondent had inappropriately shared her personal data with her siblings.

There were several general problems with the Appeal. Firstly, much of the Appeal was taken up with the Second Respondent's responses to the findings and investigations by the ICO and the SLCC. This material was not part of the original complaint and was therefore irrelevant to this Appeal. Secondly, the

Appeal failed to set out how the PCSC had failed in its decision-making in terms of the criteria set out in Hood, Petitioner. Thirdly, there were no pleadings linking any alleged failures on the part of the Second Respondent to unsatisfactory professional conduct.

The Tribunal analysed the Appeal in detail. Paragraph 1 of the Appeal alleged that the PCSC failed to take into account that the Second Respondent ignored the ICO's letter of 19 February 2021. This was not part of the original complaint which was before the PCSC. That complaint referred only to an inappropriate sharing of personal data, not any actions thereafter. The Second Respondent's actions in response to the ICO's finding were irrelevant to this Appeal.

Paragraphs 2 and 3 of the Appeal referred to ICO correspondence and the ICO determination. There was no explanation of how the Appellant said this supported her argument that the PCSC fell into error. As with paragraph 1 of the Appeal, her complaint referred only to an inappropriate sharing of personal data, not any actions thereafter. The Second Respondent's actions in response to the ICO's finding were irrelevant to this Appeal.

Paragraphs 4 and 5 of the Appeal refer to Article 5 of the GDPR, the obligations on data controllers and the action required by the ICO in this particular case. There is no explanation of how the Appellant says this supports her argument that the PCSC fell into error. In any case, her complaint referred only to an inappropriate sharing of personal data, not any actions thereafter.

Paragraph 6 avers that the Second Respondent had repeatedly demonstrated either his complete lack of understanding of the issues raised or his contempt for the ICO and the concerns of the Appellant. This is not part of the original complaint and is irrelevant to this Appeal.

Paragraph 7 refers to the Reporter's assessment of the Second Respondent's conduct and the exemptions which might have been applicable in the circumstances. The Tribunal is only concerned with the decision of the PCSC. It noted that the PCSC, although it raised doubts about whether the ICO's decision was correct, proceeded on the basis that the solicitor might have made an error of law in relation to his decision to disclose the Appellant's personal data and assessed his conduct against the test for unsatisfactory professional conduct. The PCSC decision says,

"Leaving aside the question as to whether the decision of the ICO was correct..., although the solicitor may have made an error of law, that error fell far short of meeting the test for unsatisfactory professional conduct let alone professional misconduct."

Paragraph 8 of the Appeal notes that the ICO determined that a breach had occurred and that it did not refer to any exemptions being applicable. The Tribunal noted that the PCSC proceeded on the basis that the solicitor might have made an error of law in relation to his decision to disclose the Appellant's personal data.

Paragraph 9 claims that the PCSC failed to take into consideration the Appellant's relationship (or lack of it) with her siblings. It is said that the disclosure was reckless and a breach of confidentiality. The Tribunal recognised the substantial effect the Second Respondent's conduct had on the Appellant, her private life and her relationships with her family. This information was before the PCSC. The report (quoting the ICO determination) refers to the detrimental effect on the Appellant's private life and later refers to the detrimental impact on her personal relationships. The Appellant's email of 30 April 2023 was made available to the PCSC. It also contained details of the effect the breach on the Appellant. The Appeal fails to show how the PCSC failed to take this into account. It does not identify the extent of the Second Respondent's knowledge of the family relationships. The Appeal does not address how the Respondent's behaviour constituted unsatisfactory professional conduct in the circumstances.

Paragraphs 10, 11 and 12 refer to the Second Respondent's responses to the SLCC investigation. This was not part of the original complaint and was therefore irrelevant to this Appeal.

The Tribunal considered the Appellant's written submissions. The Tribunal noted that in the final paragraph the Appellant submitted that,

"The Reporter agreed with Mr Duffy's representative as to the matter of exemption and this is at total variance with the ICO's comments regarding exemptions. I fail to understand why the sub committee accepted the argument for exemption as surely it would be bound by the comments made regarding the exemption made by the ICO. Therefore, the sub committee's decision seems to be irrational in its acceptance of the Reporter's recommendations."

The Reporter's view of the exemptions was irrelevant to this appeal. The PCSC, while raising some doubts about the ICO decision, did not expressly accept the Reporter's position on the exemption claimed by the Second Respondent. It proceeded as if the Second Respondent had made an error of law with regard to the disclosure.

In the written papers and in her oral submissions, the Appellant seemed to suggest that a breach established by the ICO should automatically result in a conduct finding against a solicitor. The Tribunal had careful regard to Lord Drummond-Young's opinion in Hood, Petitioner at paragraph 19. The

PCSC's task was not to decide whether the Second Respondent was correct in his legal and factual analysis of the situation. It was rather to decide whether he was guilty of unsatisfactory professional conduct. This involved an assessment of whether his conduct was of the standard which could reasonably be expected of a competent and reputable solicitor. A solicitor can make an error of law or be mistaken as to factual matters. However, errors of that nature do not necessarily amount to unsatisfactory professional conduct.

No link was made at any stage by the Appellant between the data breach and unsatisfactory professional conduct. The Tribunal's task was not to determine whether there had been a data breach. It took the ICO's finding at face value. However, not every breach, whether that is contravention of a rule or statute, or a even a crime, will constitute a conduct matter. Unsatisfactory professional conduct is professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor.

There was some discussion during the hearing about the extent of the personal data breach. The Fiscal claimed that only the Appellant's name was shared. The Appellant said that the information that she had made a complaint to the SLCC was also personal data. While the Tribunal tended to the view that the complaints were also capable of constituting personal data when linked to the Appellant's name, the PCSC knew that the existence of the complaints had also been disclosed. The Reporter's report quoted the letter to the Appellant's brother as follows:

"You may be aware that the circumstances surrounding the preparation of these documents, has already been made subject to a number of complaints to the SLCC by one of your siblings, Maria Forrest-Muir."

The disclosure of the complaint was therefore part of the data breach relating to the Appellant's name.

Taking all this into account, the Tribunal considered that the Appeal was not sufficiently relevant or specific to allow it to review the PCSC's decision. Even after hearing the Appellant at the preliminary hearing and considering all the material lodged by her, she was unable to give sufficient notice of her case to the Respondents and the Tribunal. Even if the Appellant proved all the grounds, the Appeal was bound to fail. The Appellant had been aware since 31 October 2022 of the First Respondent's well-founded criticisms of the appeal contained in the Fiscal's Note of Argument. The First Respondents set out what the Appellant was required to do in paragraph 11 of the Note of Argument. No attempt was made to amend the grounds of Appeal. Therefore, on the basis that the Appeal disclosed no *prima facie* basis, and was irrelevant *et separatim* lacking in specification, the Tribunal upheld the First Respondent's preliminary plea and dismissed the Appeal.

The Tribunal invited submissions on publicity and expenses. The Fiscal moved for expenses on the basis that the First Respondents had been successful. In his submissions, the profession ought not to bear the expenses of an Appeal which was dismissed for lack of relevance and specification. The Fiscal had no comment to make on publicity. The Appellant noted that she did not have the means to pay expenses but understood that she would be liable for them. She had nothing to say regarding publicity. The Tribunal found the Appellant liable in the expenses of the First Respondents and of the Tribunal. Publicity will be given to this decision. All parties will be named but no other person need be identified.



Catherine Hart
Vice Chair