

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

INTERLOCUTOR

in Section 42ZA(10) Appeal

by

DR DAVID LANC, 5 Netherbank View, Alnwickhill,
Edinburgh (hereinafter referred to as "the Appellant")

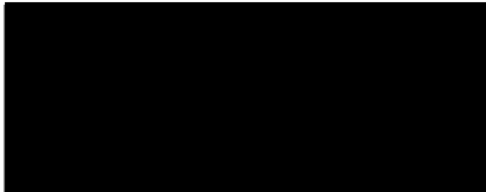
against

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

and

MARTIN NOLAN, c/o his agent Laura Irvine,
Davidson Chalmers Stewart, 12 Hope Street,
Edinburgh (hereinafter referred to as "the Second
Respondent")

By Video Conference, 7 November 2022. The Tribunal, having considered the First Respondents' motion that the appeal should be dismissed; Grants said motion; Dismisses the Appeal; To the extent that expenses had not already been awarded, Finds the Appellant liable in the expenses of the Respondents 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 Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Directs that publicity will be given to this decision and that this publicity should include the names of the Appellant, the First Respondent and the Second Respondent.



**Colin Bell
Chair**

NOTE

The Appellant was formerly a director of a company which employed the Second Respondent. The Appellant made various complaints about the actions of the Second Respondent. Only part of one complaint was relevant to this appeal. It was alleged that on his last day of employment, the Second Respondent had sent an email from his office email address to his personal email address which contained confidential company documents.

The First Respondents investigated the Appellant's complaints. A report and supplementary report were produced. The First Respondents' Professional Conduct Sub Committee (PCSC) considered the complaints on 28 January 2021 and decided to take no action. The Appellant appealed that decision to this Tribunal under section 42ZA(10) of the Solicitors (Scotland) Act 1980. The case called for procedural hearings on 10 June 2021, 21 July 2021, 4 October 2021 and 1 November 2021. On 20 January 2022 the case was sisted on the joint motion of all parties. The First Respondents had agreed (in response to a handling complaint decision) to re-investigate two of the Appellant's complaints. Parties were agreed that it was appropriate that the present appeal was halted pending the outcome of that re-investigation. The matter was considered by a differently constituted PCSC on 14 July 2022. It determined to take no action in respect of the two issues before it. The sist in the present case was recalled on 30 September 2022 and the matter was set down for a virtual procedural hearing on 7 November 2022. On 31 October 2022, the First Respondents lodged a motion with the Tribunal inviting the Tribunal to dismiss the present appeal on the basis that the decision of the PCSC under appeal had been superseded by the latest decision of the PCSC. It was noted that the determination of 14 July 2022 had not been appealed, and there had been no attempt to adjust the present appeal to incorporate that determination within the statutory time limits. The First Respondents moved for expenses, insofar as they had not already been determined.

On 7 November 2022, the Appellant was not present but was represented by Scott Milne, Solicitor, Dundee. The First Respondents were represented by their Fiscal, Elaine Motion, Solicitor Advocate, Edinburgh. The Second Respondent was not present but was represented by Laura Irvine, Solicitor, Edinburgh. The Tribunal had before it the Appeal and accompanying documents, the amended appeal of 15 July 2021, adjusted Answers for the First Respondents, adjusted Answers for the Second Respondent, three inventories of productions for the First Respondents, one inventory of productions for the Appellant, authorities for the First Respondent, the Tribunal's Interlocutor and Note of 1 November 2021 and the First Respondent's motion of 31 October 2022.

SUBMISSIONS FOR THE FIRST RESPONDENTS

The Fiscal referred to her written motion to dismiss the Appeal and find the Appellant liable in expenses. She noted that she had received no communication from the Appellant's agent about this case. She had been advised that Mr Milne would respond to her on Friday 4 November 2022 but that had not happened. She assumed that the Appellant opposed the motion.

The Fiscal referred to the procedural history of the case. She noted that the Appellant had not mentioned the handling complaint he had made on 21 May 2021 at the hearings in June, July and October of last year. She was first aware of it on 1 November 2021.

The Fiscal highlighted that the matter had been redetermined by a different and independent PCSC. It did not uphold the Appellant's allegations in relation to the complaints before it. A standard letter intimating the decision was sent to the Appellant on 19 August 2022. That letter made it absolutely clear that any appeal had to be made within 21 days. No appeal was submitted. There was no attempt to adjust the present appeal to attempt to include the latest PCSC determination.

In the Fiscal's submission the present appeal was completely superseded by the redetermination. This occurred because the Appellant had sought a redetermination through his handling complaint. The issue was not of the First Respondents' making.

The Fiscal referred the Tribunal to its rules. Rule 22 made it compulsory that appeals are lodged within 21 days. If they are lodged outwith that period, then the Tribunal shall dismiss the appeal. This is mandatory and the Tribunal has no discretion to do otherwise.

The Fiscal suggested that any attempt to lodge a fresh appeal or adjust the present appeal should be refused. The appeal has fallen. This is now the fifth procedural hearing in this case which has been going on for a long time. The original decision is of no effect. Any decision in relation to it would be academic and the Tribunal should not undertake such an exercise. Although the second PCSC came to the same conclusion as the first PCSC, they were different decisions and required separate appeals.

The Fiscal said the onus was on the Appellant to appeal. He should have lodged two appeals and they could have been conjoined. The definitions of "re-consider" and "re-determination" are the same. A separate PCSC re-considered and re-determined the issue. She asked the Tribunal not to take account of any submissions about things which were not part of this appeal. She said that the reports were not

important. The PCSC determinations were the relevant documents. The Tribunal had the determinations before it. Just because the separate PCSCs had the same outcome, that does not mean they were the same decision. The second decision is not currently under appeal.

According to the Fiscal, the Tribunal was obliged to dismiss the appeal. She noted that the Court of Session frequently refuses to accept appeals arising from this Tribunal after the appeal period has expired. The Appellant did not challenge the process. He made no enquiries of how he should proceed. He ought to have taken protective measures to preserve his position.

SUBMISSIONS FOR THE SECOND RESPONDENT

Ms Irvine indicated that the Second Respondent was not opposed to the argument made by the First Respondents. It was the Appellant's responsibility to lodge a second appeal and move the Tribunal to conjoin them. Her client is "stuck in the middle". The matter is dragging on and on with no conclusion in sight. It is a third-party complaint and legal professional privilege is being exercised by the company. The Second Respondent cannot disclose privileged material to the Tribunal.

SUBMISSIONS FOR THE APPELLANT

Mr Milne confirmed that the First Respondents' motion was opposed. He said the Appellant had been experiencing intermittent health problems and had not been able to discuss the matter with him until 1030 hours on the morning of the hearing. It was by then too late to share anything useful with the other parties. He confirmed he had instructions to represent the Appellant at the procedural hearing. He noted that the Fiscal acted for the First Respondents. She therefore ought to have known of the handling complaint lodged against them. Mr Milne noted that the point of sisting the case was to allow the handling complaint to proceed.

Mr Milne said the handling complaint decision directed the PCSC to have regard to and properly consider the material at paragraphs 79 and 80 of the original report. The second reporter made recommendations which were adopted by the PCSC. The PCSC did not change its opinion in any material respect. They found that the complaints were not made out. Mr Milne's position was that the second PCSC decision was a re-consideration of the original decision, not a re-investigation.

Mr Milne noted that the Second Respondent had sent an email from his office account to his personal account. The Appellant wishes to lead evidence that the Second Respondent attempted to delete

evidence of this. The reporter and PCSC overlooked this point. Mr Milne noted that the email chain in question contains details of exchanges regarding intellectual property. He said it was a vast oversimplification to say that the documents contained publicly available data. The content of the emails is important. The Tribunal might wonder why such information was being sent on the final day of employment. The Appellant wishes to lead evidence from former directors regarding the ownership of the intellectual property, from the cyber security manager at the company and from American lawyers.

Mr Milne said it was not part of this complaint, but there was evidence that the Second Respondent had emailed papers to a non-executive director of the company six months after his exit from the company. He knew the company was going into the insolvency process. The Second Respondent's conduct was not appropriate for a Scottish solicitor. He ought to be given the opportunity to explain why he did that. That can only happen if the Tribunal sets a hearing.

Mr Milne said the First Respondent's position is an oversimplification of the situation. The latest decision does not say it is a substitution requiring to be freshly appealed. The current appeal is timeous and ongoing. The handling complaint does not invalidate the decision. The Fiscal ought to invite the Tribunal to substitute the findings of the second PCSC for the original decision. To do otherwise makes the whole process too complex. There would be two appeals and that makes no sense. The second decision should take the place of the first decision. The PCSC came to the same conclusions but in a slightly different way. In Mr Milne's submission, the new decision was not a re-determination, rather it was a direction to reconsider the first decision.

According to Mr Milne, the letter of 19 August 2022 from the First Respondents to the Appellant was a misinterpretation of what the First Respondents had been directed to do by the SLCC. It looks as if the PCSC have treated it as a new decision, but he did not think that was correct. The situation had been mischaracterised.

Mr Milne noted that the Fiscal had not cited any case law. He suggested the Tribunal was in uncharted territory. The status of the reconsideration was a matter of dispute.

In the event the Tribunal was not with him, Mr Milne wished to have more time to research whether the Tribunal had a discretion to waive the time limit. Often Tribunals have a discretionary power to extend a time limit, and this is generally done if there is no prejudice to others. Mr Milne contended that there was no prejudice to the First Respondents.

Mr Milne said the correspondence of 19 August 2022 was a *pro forma* letter. The situation was highly unusual. In his submission, the Tribunal should not read too much into the letter. The First Respondents had been sloppy. The PCSC had not determined the complaint, it had reconsidered a previous decision. It did not feel right to Mr Milne to criticise an Appellant who successfully made a handling complaint.

DECISION

The First Respondents moved the Tribunal to dismiss the case. The Second Respondent supported this position. The Appellant opposed the motion. The question for the Tribunal was whether the appeal could proceed in circumstances where the matter had been re-determined or re-considered by the First Respondents. The Respondents' position was that it could not. They said that the second decision of the PCSC was a new determination which the Appellant ought to have appealed in accordance with the information provided in the First Respondents' letter to him of 19 August 2022. The Appellant argued that this was not fair as the decision was essentially the same and the Appellant should not have to appeal again just because a handling complaint was determined in his favour.

The Tribunal considered the relevant statutory provisions and applicable rules. It also considered the First Respondents' determinations and all the surrounding circumstances of the case. It declined the Appellant's request for more time to research the issue. The First Respondents' motion had been intimated to parties a week in advance of the hearing and parties ought to have prepared accordingly.

Section 42ZA(10) of the Solicitors (Scotland) Act 1980 provides that,

"A complainer may, before the expiry of the period of 21 days beginning with the day on which a determination under subsection (1) or (2) not upholding the complaint is intimated to him, appeal to the Tribunal against the determination."

The Scottish Solicitors' Discipline Tribunal Rules 2008 provides that any appeal shall be lodged with the Clerk within the time limit allowed by the statutory provision under which the appeal is made (Rule 21(g)). Rule 22(1) of those same rules provides that,

"Where the Tribunal considers that an appeal is not made timeously, the Tribunal shall dismiss the appeal and inform the appellant accordingly."

The Tribunal noted that the PCSC made its first determination on 28 January 2021. An appeal was lodged timeously on 16 March 2021. A handling complaint was lodged on 21 May 2021. The First Respondents agreed to reconsider two of the complaints. A second reporter was tasked with investigating


the matter. A differently constituted PCSC considered the case again on 14 July 2022. That PCSC noted that it *“adhered to the original decision and determined to take no action in respect of the two issues before it.”*

Taking all the circumstances into account, the Tribunal was satisfied that the appeal under consideration related to the decision of the PCSC of 28 January 2021. That decision (insofar as it related to the complaints the SLCC had asked the First Respondents to re-consider) was superseded by the PCSC decision of 14 July 2022. The matter had been re-investigated. A second reporter had produced reports. The matter was considered by a differently constituted PCSC. The list of papers considered by the second PCSC does not include the original reports or the first PCSC’s determination. The second determination approached the two matters referred to it of new. It gave different and more extensive reasons for coming to its decision than those set out by the first PCSC. The First Respondents’ letter to the Appellant of 19 August 2021 informed him of his right of appeal in relation to the new decision. The Appellant did not protect his position by lodging a new appeal and was now out of time to do so. The Tribunal was left with an appeal which related to a decision which was now defunct in relation to the issue under appeal. There was a mechanism by which the Appellant could have brought the matter back to the Tribunal. However, the Appellant had chosen not to exercise his right of appeal set out in the First Respondents’ letter of 19 August 2022. In all these circumstances, the Tribunal was of the view that the First Respondents’ motion should be granted, and the appeal dismissed.

Parties made submissions on publicity and expenses. The Fiscal noted that one award of expenses had already been made. She moved for expenses insofar as they had not already been awarded on the usual scale. She asked for the usual order for publicity. Ms Irvine sought expenses. She asked the Tribunal to avoid publishing the name of the Second Respondent. He has a high-profile role in the tech industry. Publication of the decision would be damaging to him in his professional role. Even although the Tribunal has not found him guilty of any wrongdoing, the decision created an opportunity to damage his reputation. The complaint refers to a matter which is now five years old. A published decision will reignite the issue and bring his name into the public domain. This would be unfortunate when the Tribunal has made no finding against him. Mr Milne accepted that expenses follow success. He had no submissions to make on publicity or expenses. He asked for a written note of the Tribunal’s reasons in this case.

The Tribunal noted that the Respondents had been successful. It therefore found the Appellant liable in the expenses of the Respondents and of the Tribunal including expenses of the Clerk on the usual basis, to the extent that expenses had not already been awarded in the case. It directed that publicity would be

given to this decision and that this publicity should include the names of the Appellant, the First Respondents, and the Second Respondent. The Tribunal is bound by paragraphs 14, 14A and 23 of Schedule 4 to the Solicitors (Scotland) Act 1980. Accordingly, the Second Respondent must be named in this decision, even although the Tribunal has made no finding against him.



Colin Bell
Chair