

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

DECISION

**in Appeal under Section 42ZA(9) of the
Solicitors (Scotland) Act 1980 as amended**

by

**GRANT ROSS MACLEAN, Berrymans Lace
Mawer LLP, trading as BLM, 1 George Square,
Glasgow**

Appellant

against

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

First Respondents

and

**SAMANTHA CLARK, 151 Monteith Drive,
Glasgow**

Second Respondent

1. An Appeal dated 30 June 2021 was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42ZA(9) of the Solicitors (Scotland) Act 1980 by Grant Ross Maclean, Berrymans Lace Mawer LLP trading as BLM, 1 George Square, Glasgow (hereinafter referred to as "the Appellant") against the Determination and Direction made by the Council of the Law Society, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the First Respondents") dated 13 May 2021. The First Respondents' determination upheld a complaint of unsatisfactory professional conduct made by Samantha Clark, 151 Monteith Drive, Glasgow (hereinafter referred to as "the Second Respondent") against the Appellant. The First Respondents censured the Appellant and Directed him to pay a fine of £1,000 and compensation of £2,500.
2. In accordance with the Rules of the Tribunal, the Appeal was formally intimated to the First Respondents and the Second Respondent. Answers were lodged for the First

Respondents. The Second Respondent intimated to the Tribunal Office that she did not wish to participate in these proceedings.

3. In terms of its Rules, having considered the appeal and Answers, the Tribunal set the matter down for a virtual procedural hearing on 21 January 2022 and notice thereof was duly served on the parties.
4. At the virtual procedural hearing on 21 January 2022, the Appellant was present and represented by Jonathan Brown, Advocate, instructed by Anne Kentish, Solicitor, Edinburgh. The First Respondents were represented by their Fiscal, James Campbell, Solicitor, Edinburgh. The Second Respondent was not present having previously intimated to the Tribunal Office that she did not intend to enter proceedings. The Tribunal continued the procedural hearing to 17 March 2022. Notice of the continued procedural hearing was served on parties.
5. On 8 March 2022, the continued procedural hearing due to take place on 17 March 2022 was adjourned on the First Respondents' motion to 22 April 2022. Notice of the continued procedural hearing was served on parties.
6. At the virtual continued procedural hearing on 22 April 2022, the Appellant was present and represented by Jonathan Brown, Advocate, instructed by Anne Kentish, Solicitor, Edinburgh. The First Respondents were represented by their Fiscal, Elaine Motion, Solicitor Advocate, Edinburgh. The Second Respondent was not present having previously intimated to the Tribunal Office that she did not intend to enter proceedings. The Appellant and the First Respondents indicated that they had agreed to invite the Tribunal to quash the Professional Conduct Sub Committee's decision and to make no award of expenses due to or by either party. The Tribunal continued the procedural hearing to 10 May 2022 for the First Respondents to liaise with the Second Respondent and explain the current position to her so that she had an opportunity to enter the process. Parties agreed that formal notices of the continued procedural hearing were not necessary in the circumstances.
7. At the virtual continued procedural hearing on 10 May 2022, the Appellant was present and represented by Jonathan Brown, Advocate, instructed by Anne Kentish, Solicitor, Edinburgh. The First Respondents were represented by their Fiscal, Elaine Motion, Solicitor Advocate, Edinburgh. The Second Respondent was present to observe

proceedings but had indicated by email to the Tribunal Office that she did not intend to enter these proceedings. The Tribunal granted the parties' motion to deal with the appeal at this continued procedural hearing as if it was a substantive hearing. Parties made submissions.

8. Having given careful consideration to the submissions made by the Appellant and the First Respondents, together with the documents before it, the Tribunal quashed the Determination, the Censure accompanying the Determination, and the Directions of the First Respondents.
9. The Tribunal pronounced an Interlocutor in the following terms:-

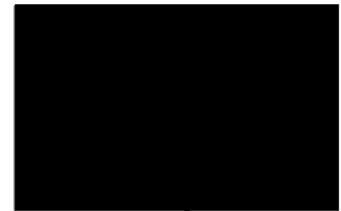
By Video Conference, 10 May 2022. The Tribunal in respect of the Appeal under Section 42ZA(9) of the Solicitors (Scotland) Act 1980 by Grant Ross Maclean, Berrymans Lace Mawer LLP trading as BLM, 1 George Square, Glasgow ("the Appellant") against the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh ("the First Respondents") dated 13 May 2021 upholding a complaint of unsatisfactory professional conduct made by Samantha Clark, 151 Monteith Drive, Glasgow (hereinafter referred to as "the Second Respondent") against the Appellant, censuring the Appellant and Directing him to pay a fine and compensation; Quash the Determination, Quash the Censure accompanying the Determination, and Quash the Direction of the First Respondents; Make no finding of expenses due to or by either party; and Direct that publicity will be given to this decision and that this publicity should include the name of the Appellant and the Second Respondent.

(signed)

Kenneth Paterson
Vice Chair

10. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Appellant, the First Respondents and the Second Respondent by recorded delivery service on 22 JUNE 2022 .

IN THE NAME OF THE TRIBUNAL



Kenneth Paterson
Vice Chair

NOTE

At the hearing on 10 May 2022, the Tribunal had before it the Appeal dated 30 June 2021, documents lodged by the Appellant with the Appeal, Answers for the First Respondents, two Inventories of Productions for the Appellant and two Inventories of Productions for the First Respondents. The Second Inventory of Productions for the First Respondents consisted of correspondence between the First Respondents and the Second Respondent. In that correspondence the Second Respondent indicated that she did not wish to become a party to the appeal as she did not want to expose herself to the risk of a finding of expenses against her, although she was very dissatisfied about the situation.

At the start of the hearing the Chair noted that no decision had yet been taken by the Tribunal although the Appellant and First Respondents were agreed that the Appeal should be upheld. It was the Tribunal's view that it should be independently satisfied regarding the appropriate disposal of the Appeal. The Chair suggested that the Tribunal set a substantive hearing to deal with this issue. However, Mr Brown moved the Tribunal to deal with the Appeal as if it was a substantive hearing that day. Parties wished to avoid any more unnecessary expense. Ms Motion was content for the matter to be concluded as soon as possible. The Tribunal decided to hear submissions on the substantive issues.

SUBMISSIONS FOR THE APPELLANT

Mr Brown noted that it was very rare for an appeal of this nature to be conceded by the First Respondents. This was the first "check" in the system. The First Respondents properly and correctly sought external advice from an eminent practitioner in a case where things had gone wrong. Mr Brown accepted the Tribunal's independent role as guardian of the public interest. However, the First Respondents should not "flog a dead horse" and ought to concede appeals where appropriate.

According to Mr Brown, it was an inescapable conclusion that there was a core problem with this case. 310 pages of indexed documents and eight pages of closely reasoned submissions were not seen at every level of the investigation. This was a human error which occurred at the start of the pandemic. Only 170 pages were provided to the Reporter. These did not include the index or the submissions made on behalf of the Appellant. The Reporter was not a full-time employee of the Law Society and did not recognise the error. It was not corrected at the supplementary report stage. There was an assumption that the PDF document contained the whole papers. Detailed forensic analysis has revealed that less than half of the papers were available to the Reporter. They were therefore

deprived of cogency. This leads to the inevitable conclusion that the proceedings were not fair. In Mr Brown's submission, the Reporter's conclusions are plainly wrong but explicable by him not having the proper papers before him. The decision cannot be defended and therefore it cannot stand. It was parties' joint position that it would not be appropriate for the matter to be started again and the Tribunal ought to look at the merits of the decision itself.

Firstly, Mr Brown addressed the taxation issue which also had significant wider impact. The Auditor's fee was estimated to be £1,600. The Reporter found that the Appellant had inappropriately interfered with the Second Respondent's right to taxation. However, it was not a question of saying the firm decides who is going to pay for the taxation. The Auditor has discretion to allocate the fee between the parties. However, it has to be paid upfront to "get it through the door". It must be paid first and argued about later. On the Reporter's analysis, the firm would have to pay out more money for a taxation when there was already a substantial balance owed. Mr Brown said it could not be a conduct offence to say that a third-party outlay should be paid by the client. Solicitors do not have to pay other outlays for their clients, for example fees for counsel or experts. The funds are obtained from the client. Taxation is no different, or alternatively, it is not a conduct matter to inform the client the taxation fee will not be paid upfront by the solicitor.

Secondly, Mr Brown said there was a patent misdirection regarding the tone of the correspondence. There was a difference between client correspondence during an ongoing solicitor-client relationship, and correspondence with a former client regarding an emerging dispute. Solicitors in the latter situation are entitled to take a robust line. It would be absurd to suggest that a solicitor can sue or sequester in pursuance of a fee but could not write a firm letter. Such a proposition is contrary to the body of authority and there is no Tribunal decision to that effect. Of course, there are also boundaries in relations with former clients, but these were not breached in this case, and the Reporter's comments in this regard were wrong.

Thirdly, Mr Brown referred to the failure to send to the client another copy of the complaints process. A copy was sent with the terms of engagement but the Appellant failed for a period to re-send it when requested by the Second Respondent. This was admitted from the outset. He apologised and the problem was rectified within weeks once the Scottish Legal Complaints Commission (SLCC) process was already underway. This would never have "got over the hurdle" of a conduct issue on its own.

Mr Brown noted the enormous delay and cost in having this matter resolved. Three reports were produced and the PCSC met twice. The matter has been hanging over the Appellant for some time.

He has had a substantial absence from work related to this complaint. Mr Brown submitted that the Tribunal could satisfy its public interest function and properly give effect to it by upholding the appeal.

SUBMISSIONS FOR THE FIRST RESPONDENTS

Ms Motion noted that she had been asked to represent the First Respondents in this matter as an external Fiscal. She has represented the First Respondents before the Tribunal since 1993 and does regulatory work for other clients. In her view the inescapable conclusion was that the appeal must be upheld. This will cause the Second Respondent some distress, but she must give proper advice.

Ms Motion noted that a very detailed analysis had been carried out of the documents provided to the Reporter. There was a clear concern that at least some of the papers were not contained within documents given to him. It may not amount to 170 pages, but it is certain that some material was not included. In the interests of natural justice and fairness, the decision cannot stand.

Ms Motion asked the Tribunal to consider whether the matter should be remitted back to the Professional Conduct Sub Committee (PCSC) or dealt with by the Tribunal. She said analysis of the substantive issues meant that it was more likely than not that no similar decision would be made if all the facts were known and analysed. The failure to provide a copy of the complaints process was *de minimis*. The tone of the correspondence was not unacceptable in its context. There had been a misunderstanding of the taxation position and the Reporter and PCSC members did not have all the information before them.

FURTHER SUBMISSIONS FOR THE APPELLANT

Mr Brown noted that the practice of the firm had been to have all fees assessed by law accountants. All fee notes therefore contained a breakdown which detailed meetings etc. The Second Respondent asked for a time and line account. The Appellant queried why she needed that. The Auditor of Glasgow Sheriff Court had made it clear in previous decisions that he must have sufficient information to tax a fee but the accounts as prepared in this case were sufficient for that purpose. There is a mismatch here. The Second Respondent might have thought she needed a time and line account for taxation but she did not. This issue only emerged again later in the complaint as refined by the SLCC. The matter was ultimately settled before taxation without a time and line account ever

being prepared. However, in Mr Brown's submission, the Appellant never got to the stage of refusing to provide a time and line account.

DECISION

The Second Respondent was a former client of the Appellant. A dispute arose over fees. The Second Respondent made a complaint to the SLCC. Four heads of complaint were referred to the First Respondents. Three of these were found established by the Professional Conduct Sub Committee (PCSC) of the First Respondents. These were as follows:

"5. Mr Maclean and/or Berryman's Lacey Mawer LLP failed to provide me with a time and line account despite my request for this on/around 23 October 2018, 27 October 2018, 28 November 2018 and 18 December 2018.

6. Mr Maclean and/or Berryman's Lacey Mawer LLP failed to provide a copy of their complaints procedure despite my request for this on 27 October 2018.

16. Mr Maclean and/or Berryman's Lacey Mawer LLP acted inappropriately on 17 December 2018 by advising me to pay them £1,600 in order for them to arrange for their file to be passed to the auditor at Glasgow Sheriff Court for taxation purposes."

The PCSC made a determination that the conduct of the Appellant amounted to unsatisfactory professional conduct in relation to these three heads of appeal. The PCSC censured the Appellant and directed him to pay a fine of £1,000 and compensation of £2,500.

Unsatisfactory professional conduct is defined in Section 42 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."

Unsatisfactory professional conduct lies on a spectrum between inadequate professional services and professional misconduct.

Section 42ZA(9) of the Solicitors (Scotland) Act 1980 provides that a solicitor may, before the expiry of the period of 21 days beginning with the day on which a determination or, as the case may be, the direction is intimated to him, appeal to the Tribunal against the determination and/or direction of the PCSC. The Appellant exercised this right of appeal.

The Tribunal's powers when considering an Appeal under Section 42ZA(9) are contained within Section 53ZB(1). That section provides that the Tribunal may quash or confirm the determination being appealed against. If it quashes the determination, the Tribunal shall quash the censure accompanying the determination. It may also quash, confirm or vary the direction being appealed against. There are other provisions with regard to training, fines and compensation. Parties made reference to the possibility of this case being remitted to the PCSC in the event of the appeal being upheld. However, the Tribunal considered that its powers were limited to those contained in Section 53ZB(1) of the 1980 Act. If it considered that the appeal ought to be upheld, it would consider the issue of unsatisfactory professional conduct itself.

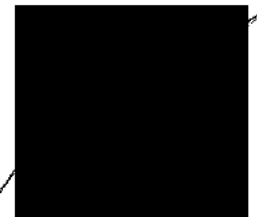
In Hood, Petitioner [2017] CSIH 21, it was said that the Court should be slow to interfere with the PCSC's decision on an evaluative question and should only do so in three main situations. The first is where the PCSC's reasoning discloses an error of law, which may be an error of general law or an error in the application of the law to the facts. The second is where the PCSC has made a finding for which there is no evidence or which is contradictory of the evidence. The third is where the PCSC 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 PCSC could properly reach. The Tribunal bore in mind what a competent and reputable solicitor would have done in the circumstances. The finding or refusal to find unsatisfactory professional conduct follows on from that evaluative question. The Tribunal noted that the PCSC is comprised of six legal and six lay members. Its views on professional conduct matter should be afforded respect, although in this particular case, parties were agreed that the PCSC decision should be quashed.

The Tribunal considered that failure to have all relevant papers before the PCSC was a fundamental error which led to it arriving at a decision which no reasonable Sub Committee could reach. Although there was some disagreement between the parties about the number of missing pages, natural justice and fairness dictates that all documents submitted by parties ought to have been available firstly to the Reporter and then the PCSC. The Appeal was properly conceded on this basis by the First Respondents.

The Tribunal agreed with parties that the PCSC's determinations finding unsatisfactory professional conduct in respect of the three heads of complaint ought to be quashed. It accepted the explanation made on the Appellant's behalf that he did not refuse to provide a time and line account, merely queried why that was necessary in the circumstances (Issue 5). Failure for a short period to provide a copy of the complaints procedure was not sufficient on its own to constitute unsatisfactory professional conduct, particularly when the process had been explained at the start of the solicitor client relationship and the Second Respondent was in communication with the Appellant, who was the person who dealt with the complaints for the firm (Issue 6). It was not unsatisfactory professional conduct to advise a client or former client that an outlay for taxation must be paid upfront (subject to the ultimate discretion of the Auditor to allocate the fee at the conclusion of the taxation) (Issue 16).

Having upheld the Appeal and quashed the determination of the First Respondents, the Tribunal also quashed the censure accompanying the determination and the directions which were based on the determination (fine and compensation). The Tribunal appreciated that this would be a disappointment to the Second Respondent but was the correct outcome in the circumstances. If there was no finding of unsatisfactory professional conduct against the Appellant, no award of compensation was appropriate.

Parties made a joint motion that the Tribunal found no expenses due to or by either party. They understood that the matter would be given publicity. Therefore, the Tribunal made no award of expenses. It directed that publicity should be given to the decision and that publicity should name the parties but need not name any other person as identifying them might be likely to damage their interests.

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Kenneth Paterson
Vice Chair