

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

DECISION

**in Appeal under Section 42ZA(10) of the
Solicitors (Scotland) Act 1980 as amended**

by

**LAURA HUDSON, 29 Griffiths Avenue, Camden
South, New South Wales 2570, Australia**

Appellant

against

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

First Respondents

and

**STEPHEN KENNEDY, McIntyre & Co., 38
High Street, Fort William**

Second Respondent

1. An Appeal dated 13 March 2021 was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42ZA(10) of the Solicitors (Scotland) Act 1980 by Laura Hudson, 29 Griffiths Avenue, Camden South, New South Wales 2570, Australia (hereinafter referred to as "the Appellant") against the Determination made by the Council of the Law Society, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the First Respondents") dated 11 February 2021 and intimated to the Appellant on 9 March 2021 to take no action in respect of complaints made by the Appellant against Stephen Kennedy, McIntyre & Co., 38 High Street, Fort William (hereinafter referred to as "the Second Respondent").
2. In accordance with rule 23(2) of the Tribunal Rules 2008, an amended appeal was lodged by the Appellant on 23 March 2021.

3. In accordance with the Rules of the Tribunal, the amended appeal was formally intimated to the First Respondents and the Second Respondent. Answers were lodged for the First Respondents together with a letter intimating an intention to seek an award of caution. No Answers were lodged for the Second Respondent.
4. Having considered the Appeal and the Answers for the First Respondents, the Tribunal set the matter down for a virtual procedural hearing on 16 June 2021 and notice thereof was duly served on the parties.
5. By email dated 14 May 2021, the Second Respondent intimated that he did not intend to enter the process.
6. At the virtual procedural hearing on 16 June 2021, the Appellant was present and represented herself. The First Respondents were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Second Respondent was not present nor represented. The Fiscal confirmed that he no longer intended to make a motion for caution. Both parties confirmed that they were ready to proceed to a full hearing and that the hearing was suitable to be heard by way of video conference. It was agreed that written submissions would be lodged. The Fiscal offered to produce his first. The Tribunal fixed a virtual hearing for 3 August 2021.
7. At the virtual hearing on 3 August 2021, the Appellant was present and represented herself. The First Respondents were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Second Respondent was not present nor represented. Both parties had lodged written submissions in advance of the hearing. Both parties made oral submissions.
8. Having given careful consideration to all of the documents lodged and the oral submissions from both parties, the Tribunal:-
 - (a) In relation to the first complaint, quashed the Determination of the First Respondents to take no action and upheld the complaint; and
 - (b) In relation to the second complaint, confirmed the Determination of the First Respondents to take no action.

9. Having heard further submissions in relation to compensation, expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 3 August 2021. The Tribunal in respect of the Appeal under Section 42ZA(10) of the Solicitors (Scotland) Act 1980 by Laura Hudson, 29 Griffiths Avenue, Camden South, New South Wales 2570, Australia (“the Appellant”) against the Determination made by the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh (“the First Respondents”) dated 11 February 2021 and intimated to the Appellant on 9 March 2021 to take no action in respect of complaints made by the Appellant against Stephen Kennedy, McIntyre & Co., 38 High Street, Fort William (“the Second Respondent”); (a) in relation to the first complaint, Quash the Determination to take no further action and Uphold the complaint; and (b) in relation to the second complaint, Confirm the Determination to take no further action; In terms of Section 53ZB(2)(b) of the Solicitors (Scotland) Act 1980 Consider that the Appellant has been directly affected by the conduct and Direct the Second Respondent, Stephen Kennedy, McIntyre & Co., 38 High Street, Fort William to pay compensation to the Appellant of £500 in relation to inconvenience resulting from the conduct; 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 but need not identify any other person.

(signed)

Catherine Hart
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 **6 OCTOBER 2021**.

IN THE NAME OF THE TRIBUNAL



Catherine Hart
Vice Chair

NOTE

This Appellant had made complaints about the Second Respondent to the Scottish Legal Complaints Commission. These complaints were referred to the Law Society of Scotland. The Professional Conduct Sub Committee (“the PCSC”) of the Law Society considered both complaints on 11 February 2021. The complaints were in the following terms:-

- “1. Mr Stephen Kennedy and/or the firm of McIntyre & Co. inappropriately advised the executor of the estate Mr M in the letter dated 18 November 2019 that I had contacted the firm about my late mother's Will and when the estate would be finalised, when I had been told that my contact with the firm would be confidential and when I had not authorised them to make Mr M aware of my enquiry.
2. Mr Stephen Kennedy and/or the firm of McIntyre & Co stated in the letter to Mr M dated 18 November 2019 that they had indicated to me that they would write to Mr M, when in fact I was never advised that they would write to Mr M.”

The PCSC determined to take no action in respect of these complaints.

The Appellant thereafter in terms of Section 42ZA(10) of the 1980 Act lodged an appeal against these Determinations which, following a request from the Tribunal under Rule 23(2) of the Tribunal Rules, was then shortly thereafter replaced by an amended appeal. This amended appeal listed some nine grounds of appeal, which are summarised in the Appellant's written submissions, repeated hereafter. The hearing on 3 August 2021 was set down for the Tribunal to deal with the substance of the appeal. The Appellant was present and represented herself. The First Respondents were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Second Respondent took no part in proceedings, having previously intimated to the Tribunal that he did not intend to enter the process. Both the Appellant and the First Respondents had previously confirmed that the appeal could appropriately be dealt with by way of the virtual platform Zoom and so the hearing was heard by way of video conference.

The Tribunal had before it the Appeal, Answers, Productions, written submissions and an email from the Second Respondent setting out his position.

The Fiscal raised an objection with regard to the relevancy of the part of the Appellant's written submissions making reference to a conflict of interest. It was accepted that this was not part of the

Appellant's complaints and after discussion, the Appellant confirmed that she was not seeking any finding of unsatisfactory professional conduct in relation to a conflict of interest. The Fiscal confirmed that he was happy to proceed on the basis that the conflict mentioned was part of the background to the original complaints only.

The Tribunal proceeded to hear submissions from both parties.

SUBMISSIONS FOR THE APPELLANT

The Appellant intimated that she would have little to add to her written submissions which were as follows:-

"1. Background

1.1 This is an appeal under section 42ZA(10) of the Solicitors (Scotland) Act 1980 against the decision of the Council of the Law Society that the solicitor (Stephen D Kennedy) is not guilty of unsatisfactory professional conduct ('UPC')

1.2 In this submission I will present: -

- The relevant facts
- The Law Society's Reporter and Sub Committee's approach and subsequent errors in their decision making.
- That the appeal should be allowed for reasons including that the Sub Committee came to several unreasonable and incorrect conclusions when assessing the complaint.

1.3 I have produced, along with this submission, a copy of the decision in Appeal under Section 42ZA(10) of the Solicitors (Scotland) Act 1980 as amended by Rosalyn MacDonald (Appellant) against The Council of the Law Society of Scotland (first respondent) and Hilary MacAndrew (Second Respondent).

Council has produced a copy of the decision of the Inner House of the Court of Session in Hood, Petitioner {2017} CSIH 21 ("Hood") and a definition of, and synonyms for, the word "disreputable" taken from Oxford Dictionary online publications.

2 Test for UPC

- 2.1 Council have stated that the definition of UPC is set out at section 46(1) of the Legal Profession and Legal Aid (Scotland) Act 2007. It goes on to state that the court, in Hood, at paragraph 16, distinguished UPC from inadequate professional services and make it clear that there is an element of repute involved in UPC. (to address that, I have also attached definitions of "disreputable")
- 2.2 Both reports submitted note that the "balance of probabilities" should apply. However, we are all in complete agreement that the solicitor did share my enquiry with Mr M, which is a breach of the Rules of Conduct. Within the Section 42ZA(10) appeal submitted by Rosalyn MacDonald, the Tribunal have also noted that "The ultimate question was what a competent and reputable solicitor ought to have done in the circumstances". (page 10, paragraph 1)

3 Law Society duty to investigate and determine UPC complaint

- 3.1 I agree with comments made by Council . However, it should also be considered that the SLCC stated, in their report dated February 2020, that
- "In particular, an investigation may establish whether the complainer could in fact be regarded as a prospective client, whether she was owed a duty of confidentiality by the practitioner on this basis and/or on the basis that the complainer had been advised that her email enquiry was confidential, whether there has been a breach of the Conduct Rules"*

Neither the Law Society's reporter nor Sub Committee have considered the Rules of Conduct, which is unreasonable.

It has been agreed and accepted that I approached the solicitor as a potential client which, according to Code of Conduct Rule B2.1 Conflict of Interest would apply: -

The term "*client*" is also defined as "*prospective client*" so confidentiality rules would apply.

In addition, and with regard the same rule of conduct (Rules B2.1.7.1&2), the solicitor stated, in the comments that he submitted late to the Sub Committee in January 2021, that Mr M was an "established client" (a person for whom you have or your practice unit has acted for on at least one previous occasion) of his firm since 2008. (That was a serious omission from his previous correspondence. In response to my complaint to his office, he had merely stated that he had previous dealings with Mr M, which is not the same thing.)

The solicitor's first and only response to me should have been to declare a conflict of interest.

To have declared a conflict of interest initially would answer the "ultimate question" discussed in point 2.2. I remind the Tribunal that this solicitor has been in practice for 30 years.

For the Sub Committee not to have considered this is unreasonable. For the conflict of interest to have been previously undeclared was a deliberate breach of Conduct Rules so should be seen as UPC as a minimum.

4 Relevant Facts

- 4.1 Regarding point 6.2 of the Council's argument, where it states "If the appellant's case is taken at its highest, it amounts to this"

I submit that this, and any other complaint, must be taken at it's highest. To do anything else sets quite a precedent; The Law Society would then be stating that it is okay to break the Rules of Conduct under certain circumstances and would then have to provide a list of what those circumstances might be.

- 4.2 The Sub Committee concluded that "the error regarding the error [in sending] the letter to Mr M was one off and inconsequential in nature and resulted in no prejudice to the appellant."

This is entirely incorrect and an assumption that the Sub Committee cannot make - it is unreasonable and incorrect.

The actions of the solicitor have had very difficult consequences and I was left wondering who I could trust, if not my mother's solicitor.

The date of this hearing, 3 August 2021, is two years to the day that my mother passed away and I am no further forward in finding out what happened to her estate. I simply could not take the chance that this would happen again. To date, the Law Society seem to be saying that this is acceptable behaviour so it is conceivable that it could have happened with any solicitor I consulted.

Mr M has not engaged a solicitor about the executry of our mother's estate - if he had done, I would have been contacted. A sum of money remains missing and no accounts have ever been produced. In Scotland, confirmation of death can only be granted by the local Sherriff provided the estate value is under £37,000. My mother's estate, in terms of monetary and property, was over that value. As I understand it, her house remains in her name.

I'm not sure how her estate could legally have been settled, if indeed it has.

I also submit that, given we now know Mr M was an 'established client' of the firm, to know that the solicitor passed information regarding an enquiry from a prospective client to an established client would absolutely have an impact on the reputation of the solicitor. The definition of disreputable has been stated as "not respectable in character".

The SLCC confirmed that on page 7 of their report where they applied the Conduct Rule B1.2 and said "a solicitor must be trustworthy and act honestly at all times so that their personal integrity is beyond question."

For a solicitor to deliberately go against the Law Society's Rules of Conduct makes them disreputable. If we are still discussing "errors", that would suggest the solicitor is not aware of the Rules of Conduct and would require basic training.

- 4.3 Council have stated that the Tribunal follows the Hood principles in determining whether it can, on appeal, interfere with a determination by the Council. It further states that none of the factors mentioned in Hood are present; this is not correct.

Section 17 of Hood states "The second is where the Tribunal or sub-committee has made a finding for which there is no evidence, or which is contradictory of evidence. The third is where the Tribunal or 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 Sub Committee have made a fundamental error in its approach to the case by not considering the Conduct Rules.

In their deliberations, the Sub Committee said that "it appeared to the Sub Committee that the complainer and the solicitor had been, at least to some extent, at cross purposes."

This is not reasonable or correct and the email from the solicitor dated December 2019 clearly showed that there were no cross purposes.

The Sub Committee went on to say, "it appeared to the Sub Committee that the only way of securing an answer for the complainer was to ask the executor."

Please again refer to the Rules of Conduct discussed above -the Sub Committee should have considered those Rules; therefore, this is not reasonable.

The Sub Committee said, "it was not clear that the reference to costs in the complainer's email of 8 November was a specific reference to the solicitor's costs."

The SPECIFIC question asked was "if I need to ask him to formally ask the questions, what costs would be involved?" For the Sub Committee to say that could be anything less than it was and could be in any way misunderstood is unreasonable. Council have accepted that the solicitor may not have read my email to the end.

The Sub Committee then said, "the references to the executor's confidentiality clearly implied that the solicitor was writing to the executor."

The solicitor had written "to date, we have not had received any instructions from your brother to deal with the administration of your late mother's estate. Accordingly, we are not, at this time, in a position to provide you with any information as we have no instruction and also having regard to the confidentiality rules which apply."

There is nothing in that statement which suggests that the solicitor was writing to Mr M. For the Subcommittee not to consider two very clearly written questions, but then to state that they think something else was implied, and therefore okay, is not reasonable.

(Please also note that the email to me, and the letter to Mr M, were sent out on the same day, so even if the email had been clear, given the time difference in place, there was no

time for me to stop the solicitor from doing that. Again, I would also remind the Tribunal that the letter the solicitor wrote to Mr M in no way reflected what I asked him.)

In any event, the Rules of Conduct override all the Sub Committee's statements.

If the solicitor is either not aware of the relevant Rules of Conduct, or consciously makes the decision not to abide by them, then that must be considered, as a minimum, UPC.

4.4 Applying these arguments to this case, the Tribunal is respectfully invited to allow the appeal under Section 53ZB(2)."

The Appellant submitted that the role of the Law Society was the protection of clients and prospective clients. It was accepted in this case that she was a prospective client and should have been given the right of privacy and confidentiality. She argued that the PCSC had not considered the rules of conduct.

She had written to the Second Respondent, told him her concerns and he had gone on to write to the person she was concerned about. She had written to the Second Respondent setting out her concerns and asking him for an idea of his costs if she needed him to take any action. In her submission, the PCSC did not consider the rules of conduct.

She argued that the perceived level of breach of the rules should not matter. The PCSC's assumption of the consequences of the breach were incorrect.

The Tribunal asked the Appellant in what capacity she had communicated with the Second Respondent. The Appellant explained that the Second Respondent had been her mother's solicitor. She had been concerned that her brother had not approached a lawyer regarding her deceased mother's estate. She had written to the Second Respondent for his guidance and an idea of his costs if she needed him to formally ask the necessary questions.

The Tribunal enquired what prejudice or consequences she considered she had sustained as a result of the Second Respondent's conduct. The Appellant responded that she felt that the Law Society took the view that his conduct had been acceptable. She had hoped that the Second Respondent, as her mother's solicitor, could help in a situation that had become a bit of a shambles. Rather, he had passed her enquiry on to the executor about whom she was concerned. Consequently, there was little that she

had been able to do and was now in the unfortunate position of not knowing how to fix the question of her mother's estate. This had left her reluctant to seek legal advice from anyone else.

The Tribunal asked the Appellant if the problems with her mother's estate were a direct result of the Second Respondent's conduct. The Appellant explained that his actions had set a chain of events in motion. She had had no contact with her brother since this. She had nowhere to go and no one she could trust. She considered that if the Second Respondent had dealt with her enquiry properly, things might have gone very differently.

The Tribunal invited the Appellant to clarify where she felt the PCSC had made an error of law, made a finding for which there was no evidence or had taken an approach that no reasonable PCSC could have taken.

The Appellant explained that the PCSC did not at any point refer to the rules of conduct. The terms "client" and "prospective client" are defined in the rules. The only query raised by the SLCC was whether she should have been regarded as a prospective client. Neither the reporter to the PCSC or the PCSC itself referred to the rules of conduct. The PCSC had expressed the view that it would have been difficult for the Second Respondent to answer the questions she had asked without writing to the executor but this was not true. The Second Respondent should not have written to the executor. Nor had the PCSC taken a fair or reasonable view on the consequences of the Second Respondent's conduct. The consequences should be irrelevant. The rules of conduct required her to be given the duty of confidentiality. The PCSC had made a fundamental error in addressing her complaint.

The Tribunal invited the Appellant to clarify her second complaint. The Appellant responded that the second complaint became irrelevant when considering the rules of conduct. The issue raised in the second complaint was that the correspondence the Second Respondent had sent did not correlate with what had actually happened.

Whilst she accepted that the issues she raised may not seem much when not sitting in her chair, she invited the Tribunal to hold that the issue of confidentiality was a serious one for the legal profession. In raising this appeal, her aim had been to ensure that something like this would not happen again.

SUBMISSIONS FOR THE FIRST RESPONDENTS

The Fiscal confirmed that he adopted his written submissions which were as follows:-

“1. Background

1.1 This is an appeal under section 42ZA(10) of the Solicitors (Scotland) Act 1980 against the decision of the Council of the Law Society that the solicitor (Stephen D Kennedy) is not guilty of unsatisfactory professional conduct('UPC').

1.2 The appeal should be refused for the reasons contained in the Law Society's Answers to the appeal. This submission is made in support of those Answers.

1.3 In this submission I will consider:-

- the definition of UPC, and how a first instance decision is made by the Law Society;
- the right of appeal, and the powers of this Tribunal in hearing the appeal;
- the relevant facts in this matter; and
- the Law Society Sub Committee's approach and decision at first instance.

1.4 I will conclude by submitting that the appeal should be refused and that the determination of 9 March 2021 to take no further action should be confirmed.

1.5 I have produced, along with this submission, copies of the decision of the Inner House of the Court of Session in Hood, Petitioner [2017] CSIH 21 ("Hood") and of a definition of, and synonyms for, the word "disreputable" taken from Oxford Dictionary online publications.

2 Test for UPC

2.1 The definition of UPC is set out at section 46(1) of the Legal Profession and Legal Aid (Scotland) Act 2007 as follows:-

'Conduct by a solicitor which is not of the standard which could reasonably be expected of a competent and reputable solicitor but which does not amount to professional misconduct and which does not comprise merely inadequate professional services.'

The court, in Hood, at paragraph 16, distinguished UPC from inadequate professional services and make it clear that there is an element of repute involved in UPC.

1.2 The standard of proof as applying to UPC decisions is whether the conduct is proved on the balance of probabilities.

3 Law Society duty to investigate and determine UPC complaint

3.1 Section 2(1) of the 2007 Act defines a conduct complaint as one which suggests either professional misconduct or unsatisfactory professional misconduct. Unless such a complaint is deemed to be frivolous, facetious or totally without merit, the Scottish Legal Complaints Commission must remit it to the relevant professional organisation, in this case the respondents: 2007 Act, Section 6.

3.2 Section 42ZA (1) sets out the respondent's duties in connection with a complaint of UPC. It provides:-

'(1) Where a conduct complaint suggesting unsatisfactory professional conduct by a practitioner who is a solicitor is remitted to the Council under . . . the 2007 Act, the Council must having

(a) investigated the complaint under section 47(1) of that Act and made a written report under section 47(2) of that Act;

(b) given the solicitor an opportunity to make representations, determine the complaint.'

3.3 Therefore there is a four stage process:-

1. Investigate
2. Report
3. Give the solicitor an opportunity to make representations
4. Determine the complaint

3.4 That process was followed in this matter.

4 Complainer's right of appeal against finding of UPC

4.1 Section 42ZA (10) sets out the complainer's rights of appeal in connection with a finding of UPC or rather the absence of such. It provides:-

"(10) 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 conduct complaint is intimated to him, appeal to the Tribunal against the determination."

The appellant has chosen to exercise that right of appeal.

5 Powers of the Tribunal in UPC appeal

5.1 Section 53ZB(1) sets out the Council's powers in connection with an appeal under section 42ZA(9):-

*"53ZB Powers of Tribunal on appeal: unsatisfactory professional conduct
(1) On an appeal to the Tribunal under section 42ZA(9) the Tribunal-
(a) may quash or confirm the determination being appealed against ... "*

5.2 The Council invites the Tribunal to confirm the determination in accordance with section 53ZB(1).

6. Relevant facts

6.1 It is important to refer to the grounds of appeal to determine which facts may or may not be relevant to the appeal. There does not appear to be any suggestion that the subcommittee did not follow the process set out at paragraph 3.3 above. To the extent that there may be a factual dispute surrounding paragraph 1 of the appeal the Council is content to allow that matter to rest on the terms of the appellant's email referred to therein.

6.2 If the appellant's case is taken at its highest it amounts to this: (a) the appellant contacted the solicitor as a potential client (b) the solicitor misunderstood the import of the appellant's first email, because due to carelessness or otherwise he may not have read it to the end and (c) despite the appellant's reasonable expectation of privacy, the solicitor made M aware of the email contact.

6.3 Whether or not the sub-committee misdirected itself as to the facts, they concluded that the error regarding the error [in sending] the letter to M was one off and inconsequential in nature and resulted in no prejudice to the appellant. It is submitted that even if the subcommittee was in error (about the import of the email) and the appellant's case is taken at its highest that

would still be the correct analysis of the facts. There was no meaningful prejudice to the appellant. Most importantly, the conduct of the solicitor could not be said to go to his repute: the conduct cannot be characterised as disreputable.

6.4 The Concise Oxford English Dictionary offers the following definition:- disreputable "not respectable in appearance or character; sleazy or shabby"

Synonyms for disreputable include scandalous, dishonourable, contemptible, unworthy, questionable, seedy, crooked and dodgy.

In no way can the solicitor's conduct be said to fall into any of these categories.

6.5 The circumstances in which the appellate body will interfere with the decision maker at first instance are set out by the court in Hood at paragraph 17. This tribunal follows the same principles in determining whether it can, on appeal, interfere with a determination by the Council. None of the factors mentioned in Hood is present here save that the sub-committee may have, to the extent suggested in the grounds of appeal, fallen into error as to fact and in particular to the import of the appellant's email. Nonetheless their conclusion was the correct one. The conduct was not disreputable and the test for UPS is not met.

6.6 If this tribunal accepts that there was an error which was material it should proceed to make its own decision on the merits. It would be bound to draw the same conclusions as are set out in the immediately preceding paragraph.

6.7 Applying those tests to this case the Tribunal is respectfully invited to confirm the determination (see paragraph 5.2 above) and to refuse the appeal.

6.8 I will address you separately in relation to the question of expenses in due course."

The Fiscal reminded the Tribunal that the written submissions had been lodged in reverse order. Consequently, his written submissions did not address all matters raised in the Appellant's.

The Appellant had been asked about the consequences of the Second Respondent's conduct. The Fiscal invited the Tribunal to look at the effect of the conduct with some scrutiny. If the Second Respondent had been able to act for the Appellant, he would have had to raise these issues with the

executor. When the Appellant was advised that the Second Respondent could not act, she could have approached another solicitor.

The Fiscal drew the Tribunal's attention to paragraph 2.2 of the Appellant's written submissions. There the Appellant had quoted from a Tribunal decision. The Fiscal emphasised that this quote should be taken in context and it should be noted that it was preceded by reference to the case of Hood, Petitioner [2017] CSIH 21. He submitted that the Tribunal could only give its own consideration to the conduct if the appeal met the criteria set out in that case. In his submission, the Appellant had not satisfied the Hood test.

The Fiscal argued that the suggestion that, because the PCSC had not specifically mentioned the conduct rules, somehow they were not considered was misconceived. He submitted that the conduct rules simply codified rules of professional conduct which had existed long before the rules themselves. He argued that it was not necessary for the PCSC to make specific mention of the rules and that it was sufficient to look at the questions that they had to determine. He referred the Tribunal to the case of Hood which sets out the standard of conduct to be expected of solicitors. He submitted that it was not necessary for the PCSC to embark upon a detailed analysis of the rules and that it was sufficient for the PCSC to extract the essence and apply that to the case.

The Fiscal submitted that not every breach of a conduct rule must at the minimum be considered unsatisfactory professional conduct. There was no evidence in this case that could properly lead to the conclusion that the breach in this case was a deliberate one. He argued that the Tribunal must look at the context in which the conduct occurred. A breach of a rule may amount to unsatisfactory professional conduct or indeed professional misconduct but not every breach must. The PCSC was entitled to come to the view that the test for unsatisfactory professional conduct was not met.

He submitted that the Hood test for reopening the PCSC's decision had not been met. Furthermore, the conduct complained of was not disreputable and could not meet the test for unsatisfactory professional conduct. He invited the Tribunal to confirm the Determination and refuse the appeal.

The Tribunal invited the Appellant to respond to the Fiscal's submissions.

The Appellant emphasised that at no point had the Second Respondent stated to her that he could not act for her.

She considered that her case was different to that of Hood. Confidentiality had to be seen as the starting point for any enquiry to a solicitor. It was essential to the trust between a solicitor and client. Any competent and reputable solicitor would be very aware of the obligations of confidentiality.

The Tribunal drew the Appellant's attention to her submission that the Fiscal had conceded that she was a prospective client and was owed a duty of confidentiality. The Tribunal enquired of the Appellant where that concession was made within the paperwork. The Fiscal clarified that it was his position that "it was tolerably clear that the Appellant was a potential client".

The Tribunal asked the Fiscal if it was his position that Rule B1.6 (duty of confidentiality) of the 2011 Practice Rules applied to this case. The Fiscal responded that the issue was complicated and referred the Tribunal to *Paterson & Ritchie: Law Practice & Conduct for Solicitors* at paragraph 6.13. He confirmed that he accepted that the modern view was that prospective clients were owed a duty of confidentiality.

DECISION

In these proceedings it was not open to the Tribunal simply to reconsider the two complaints that had been before the PCSC. The Tribunal considered that the starting point was the criteria set out in the case of Hood, Petitioner [2017] CSIH 21 at paragraph 17 where it was said:-

"When a professional disciplinary body considers a question of that nature, it must bring professional expertise to bear. The body may also, deliberately, have lay members included, so that questions of professional discipline do not become a matter solely for the profession but take account of the views of those with a different experience of the world. We were informed that the relevant subcommittee of the respondents had nine members, five lay members and four solicitors. The Discipline Tribunal had four members, two solicitors and two lay members. Given the composition of the two bodies, we are of opinion that the Court should be slow to interfere with their decision on an evaluative question. Cases where the Court may interfere occur in three main situations. The first is where the Tribunal's or 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 Tribunal or sub-committee has made a finding for which there is no evidence, or which is contradictory of the evidence. The third is where the Tribunal or 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 Tribunal or sub-committee could properly reach."

The Tribunal required to consider both complaints separately.

The Appellant's first complaint was essentially that the Second Respondent breached his duty of confidentiality owed to the Appellant. The Appellant's position was that as a prospective client of the Second Respondent, she was entitled to confidentiality in terms of Rule B1.6 of the 2011 Practice Rules. She complained that the Second Respondent's letter to the executor, her brother, telling him that she had contacted the Second Respondent about the estate breached that duty. She argued that the PCSC erred in considering her complaint in that it did not consider Rule B1.6.

Before the Tribunal, Mr Lynch made a well-founded concession that the Appellant was a prospective client and went on to concede that, in the modern world, a prospective client was owed a duty of confidentiality. It was his position that just because the PCSC had not specifically referred to the duty of confidentiality in its decision that did not mean that the PCSC had not considered it. He argued that the duty of confidentiality was an age old principle that was so well understood that it could be inferred that the PCSC had given it consideration.

The Tribunal gave very careful consideration to the PCSC's decision. It was concerned that at no stage did the PCSC refer to the Appellant as a prospective client. Furthermore, the only discussion in the decision referring to confidentiality related to the question of the confidentiality or security of the firm's portal. The Tribunal concluded that, on a plain reading of the decision, it was impossible to draw an inference that the PCSC had considered the duty of confidentiality owed to the Appellant as a prospective client either under Rule B1.6 or at common law. The Tribunal was satisfied that this amounted to an error of fact and law and entitled the Tribunal to reconsider the complaint.

The Tribunal was satisfied that the facts disclosed that the Second Respondent had breached his duty of confidentiality to the Appellant by writing to the subject of her concerns without her instructions to do so. In fairness to Mr Lynch, this did not appear to be disputed, rather he argued that this rule breach was not sufficiently serious to amount to unsatisfactory professional conduct.

Unsatisfactory professional conduct is defined by statute 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”.

Mr Lynch argued that this breach of the rules did not breach the standard required and in support of this referred to a dictionary definition of “disreputable” and a number of synonyms for disreputable. It is important to note that the test for unsatisfactory professional conduct refers to “reputable”. The Oxford Concise Dictionary defines reputable as “having a good reputation”. The same online resource as used by Mr Lynch provides synonyms for reputable, this includes “well thought of”, “respected”, “reliable”, “dependable”, “trusted”, “trustworthy”, “conscientious”, including many others.

The PCSC concluded in its report that there was no evidence of bad faith or recklessness (the report refers to this as on the part of the complainer but the Tribunal assumed that the PCSC was referring to the Second Respondent).

Whilst the Tribunal agreed with Mr Lynch in his submission that not every breach of the rules need amount to unsatisfactory professional conduct or indeed misconduct, it took the view that the obligation of confidentiality owed by a solicitor to his clients, including prospective clients, is a fundamental and underpinning obligation that allows the public to have trust that they can safely and confidentially approach a member of the profession for advice. The Tribunal considered that the conduct of the Second Respondent in this case was a serious issue with the potential to damage the reputation of the profession. The Tribunal considered that it was likely that the Second Respondent had written to the executor without stopping to consider in what capacity he was acting. Having regard to the concerns in relation to confidentiality expressed by the Appellant within her correspondence and her specific reference to her being estranged from the executor, the Tribunal considered that this was a serious error and conduct which would not reasonably be expected of a competent and reputable solicitor. Accordingly, the Tribunal was satisfied that the test for unsatisfactory professional conduct was met. The Tribunal quashed the Determination of the PCSC and upheld the complaint of the Appellant.

The second complaint appeared to relate to the standard of communication of the Second Respondent. After carefully considering all of the submissions and the PCSC’s report, the Tribunal found no basis to interfere with the PCSC’s decision. The Tribunal, therefore, confirmed the Determination of the PCSC.

Section 53ZB(2)(b) of the 1980 Act provides that if the Tribunal quashes the Determination and upholds a complaint it “*may, where it considers that the complainer had been directly affected by the conduct, direct the solicitor to pay compensation of such amount, not exceeding £5,000, as it may specify to the complainer for loss, inconvenience or distress resulting from the conduct.*”


The Tribunal reconvened and invited both parties to make submissions regarding compensation, expenses and publicity.

The Appellant confirmed that she had not incurred any expenses. She understood that the Tribunal decision would be published and had no objection to her name being included. She explained that she had not given much consideration to the issue of compensation. She confirmed that she was happy to accept whatever figure the Tribunal found to be appropriate but invited the Tribunal to bear in mind that this had been a long and stressful process.

The Fiscal had no comment to make regarding compensation or publicity and submitted that the appropriate order regarding expenses was one of no expenses due to or by either party.

The Tribunal gave careful consideration to all of the information before it and was satisfied that the Appellant had been directly affected by the Second Respondent’s conduct. The Appellant had made reference to unresolved issues with her mother’s estate. The Tribunal considered that these problems were too remote to be considered to have resulted from the conduct of the Second Respondent. It was however apparent that the Appellant had been caused inconvenience by the conduct. She had required to deal with procedure before the SLCC, the Law Society and now the Tribunal. Having regard to all of the circumstances, the Tribunal considered that the appropriate and fair award was one of £500.

The Tribunal agreed that no award of expenses should be made to either party. With regard to publicity, the Tribunal determined that the usual order of publicity was appropriate, naming the solicitor involved and the Appellant. However, given the personal nature of the subject matter of the complaint, the Tribunal considered it appropriate not to name any other individual.



Catherine Hart
Vice Chair