

**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

WESLEY MITCHELL, Glenwarren, Shanmullagh,  
Ballinamallard (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

HUGH COLIN SOMERVILLE, 39 Bridge Street,  
Musselburgh (hereinafter referred to as "the Second  
Respondent")

By Video Conference, 1 September 2022. The Tribunal, having considered the parties' written and oral submissions; Makes no award of compensation; Finds the First Respondents liable in the expenses of the Appellant to the extent of £1,000; and Directs that publicity will be given to the decisions of the Tribunal of 23 September 2021, 9 November 2021, 26 January 2022, 15 March 2022 and this decision of 1 September 2022, and that this publicity should include the names of the Appellant and Second Respondent but need not identify any other person.



**Ben Kemp  
Vice Chair**

## **NOTE**

On 17 June 2022, the Tribunal quashed the decision of the Professional Conduct Sub Committee (PCSC) in relation to Issue 3 and upheld that complaint, in part. It confirmed the PCSC's determination to take no action in relation to Issue 5. The Tribunal's written decision was issued to parties. The Tribunal invited parties to lodge written submissions on the remaining issues to be determined, namely compensation, publicity and expenses. The hearing was continued to 1 September 2022.

At the continued hearing on 1 September 2022, the Appellant was present and represented himself. The First Respondents were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Second Respondent was not present or represented. His representative had previously indicated to the Tribunal that he did not intend to enter these proceedings. The Tribunal had before it the documents previously lodged and listed in the decision of 17 June 2022. In addition, it had written submissions from the Appellant and the First Respondents. The parties also made oral submissions.

## **SUBMISSIONS FOR THE APPELLANT**

The Appellant moved the Tribunal to award him the maximum amount of compensation based on the "traumatic chain of events" that followed from issue 3, leading to the almost full-time involvement of the Appellant with Ms B from 16 May 2012 until her admission to hospital just before Christmas 2012. In his oral submission he explained in detail his involvement with Ms B and what that had entailed in 2012. He said that the misconduct led to a chain of circumstances. It was a catastrophic mistake. The Second Respondent set a ball rolling and it could not be stopped. Things got worse and worse. If the Second Respondent had obtained a medical report, no will would have been created that day. All of Ms B's fears and anxieties (which were transported on to the Appellant and others) would not have occurred. They would have had to deal with the trauma of the death but not Ms B's feelings that she had been bullied and abandoned. There was an abuse of trust and an attempt to cover-up the mistake. The Appellant clarified that he was not claiming for financial loss, only inconvenience and distress, although he also noted that his ministry work could not be developed as a result of having to deal with Ms B and various public authorities. He also had to withdraw from a board position in 2013.

The Appellant submitted that publicity ought to be given to the case and that publicity should name the parties to the appeal and also Ms A and Ms B. In his oral submission he said the case had been unique and complicated due to it being a third-party complaint. The Appellant had been following directions from Ms B regarding the management of her affairs. His appeal was a continuation of her complaint. The sisters were high profile and well known in the area. Their work had been the subject of BBC

documentaries. People had an interest in what had happened to their estate and the quagmire it became. There are lessons to be learned and there is a wider perspective to be gained regarding vulnerable clients.

The Appellant moved for expenses. He submitted that the usual principle should apply whereby expenses follow success. He suggested that expenses were reserved at each stage so the Tribunal could consider the case as a whole in the light of its final decision. He noted that the First Respondents' motion to dismiss the appeal was refused on 22 June 2021. On 23 September 2021, the Tribunal had noted that the motion which it dealt with on that date had been important and had involved novel considerations. On 9 November 2021, the Tribunal refused the First Respondents' motion regarding relevance and specification and repelled their preliminary pleas. Their motions for caution and to sist a mandatory were refused. In the Appellant's submission, expenses should be awarded to him. In his oral submission, the Appellant referred to the genesis of the whole case being Issue 3 and what happened on 16 May 2012. This was not just 10% success. In his oral submission, the Appellant said that the solicitor client scale should apply to any award of expenses. He had spent time preparing for and attending the Tribunal hearings. He had consulted with others.

## **SUBMISSIONS FOR THE FIRST RESPONDENTS**

The Fiscal said that compensation was entirely a matter for the Tribunal. However, he noted the Appellant's limited level of success. The Appellant's submissions that he should be entitled to the maximum award of compensation clearly had no merit. In his oral submissions, the Fiscal noted that the Tribunal could only award compensation for the matter which had been upheld. There must be a direct effect. He noted that the reporter had recommended a finding of unsatisfactory professional conduct in relation to the whole of issue 3. However, the reporter had not recommended compensation because the Appellant was not directly affected by the conduct. The Fiscal also noted that Ms B signed another will on 2 July 2012. Even if events transpired as the Appellant set out, she still revised her wishes and put them in a new will.

The Fiscal suggested that publicity should be given to the decision. However, only the Second Respondent and the Appellant should be identified.

The Fiscal for the First Respondents noted that the Appellant had only been successful to a nominal extent. Three of his four grounds of appeal had been dismissed. The remaining ground was only upheld in part. The First Respondents sought an award of expenses on the usual scale restricted to 90% to reflect the Appellant's partial success. The Fiscal asked the Tribunal to take the procedural history of the case into account and the fact that three separate awards of expenses had been reserved during the process. The case had taken more than a year to conclude, and several delays had been due to the

Appellant who had also failed to obtemper interlocutors of the Tribunal. The Appellant was unsuccessful on 23 September 2021, 9 November 2021 and 26 January 2022. Therefore, the Fiscal submitted that those awards of expenses which had been reserved ought to be awarded to the First Respondents. The Fiscal referred the Tribunal to Baxendale-Walker-v-Law Society 2008 1 WLR 426. In his oral submissions, the Fiscal suggested that the solicitor client scale would not be appropriate in circumstances where the Appellant was not a solicitor. If expenses were to be awarded, the party litigant scale should be employed.

## **DECISIONS ON COMPENSATION, PUBLICITY AND EXPENSES**

Section 42ZA(10) of the Solicitors (Scotland) Act 1980 provides that a complainer may appeal to the Tribunal against the Law Society's determination not to uphold a conduct complaint. The Tribunal's powers when upholding such appeals are contained within section 53ZB(2) of the 1980 Act. The Tribunal may, as it did in this case, quash the determination being appealed against and make a determination upholding the complaint. If it does so, it may, where it considers that the complainer has 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. Therefore, to be compensated, the complainer must have been directly affected by the unsatisfactory professional conduct. A direct effect is one which would not have happened but for the unsatisfactory professional conduct. The standard of proof to be applied in these cases is that of balance of probabilities. The Tribunal has a discretion to award compensation and is not obliged to do so.

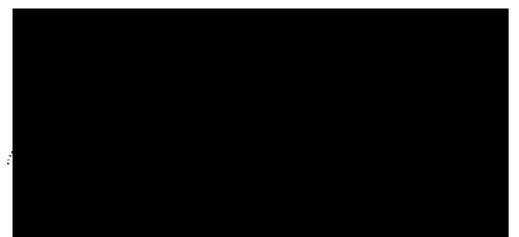
On the last occasion, the Tribunal had found the factual basis of Issue 3 established to the extent that the Second Respondent had acted inappropriately on 16 May 2012 when he attended at Ms B's house and signed a new will for her by way of notarial execution. However, the Tribunal had not been satisfied that the appeal in relation to the remaining elements of Issue 3 were made out. The Tribunal expressed no view on Ms B's actual capacity on 16 May 2012. It merely noted that the presence of clear warning signs should have caused a competent and reputable solicitor to pause, analyse capacity, consider getting a medical opinion, and carefully record and justify all decisions made.

The Tribunal carefully considered the Appellant's request for compensation. It was satisfied that there was no basis upon which to make any award for financial loss. In particular, the Tribunal noted that Ms B had subsequently made another will. The Appellant had therefore not suffered financially because of the Second Respondent's conduct. The Appellant's submission that he had lost out on some other ministry work was not evidenced. He said he had been unable to take up a board position in 2013, but did not demonstrate any financial loss as a result. This also occurred after Ms B had made her revised will.

The Appellant said he was inconvenienced and distressed as a result of Ms B's distress which in turn was caused by the Second Respondent. The Tribunal noted that the Appellant attended to Ms B in his professional capacity as pastor. He was not the client, and it was not his will. A significant amount of Ms B's distress was caused by the bereavement. While this was no doubt a trying experience for the Appellant, the Tribunal was not convinced that the Second Respondent had caused the Appellant recompensable inconvenience or distress when he attended at Ms B's house and signed a new will for her by way of notarial execution.

With regard to publicity, the Tribunal decided to maintain the same approach it had taken throughout this case. Publicity will be given to all the written decisions produced in this case. Parties will be named. However, the deceased sisters who were clients of the Second Respondent will not be named, and will instead be identified as Ms A and Ms B. There is no need to identify these individuals in this decision which is essentially a disciplinary matter involving the Second Respondent. Publication of their names may be detrimental to the interests of their friends and others connected with their work.

The Tribunal looked at the issue of expenses broadly and decided to make a specific award in the Appellant's favour to reflect the overall success and conduct of the case. Overall, the Appellant was the successful party, and an award was appropriate on that basis. This was a legitimate appeal which was partially upheld. However, the process had been very convoluted. The Appellant had been unsuccessful in some of his motions, as had the First Respondents. Some of the delays in the case were down to the Appellant. Taking all the circumstances into account, the Tribunal decided to make an award to the Appellant but considered that this ought to be reduced to reflect his own participation and the delay attributable to him. It was not appropriate to make the award on an agent and client, client paying scale when the Appellant was not a solicitor. Instead, the Tribunal considered the pragmatic and fair approach was to make an individual award of £1,000 to the Appellant to be paid by the First Respondents. The First Respondents' motion for expenses was refused.



**Ben Kemp**  
**Vice Chair**