

**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**

**IAN WILLIAM DONALDSON, 26 Viewfield  
Terrace, Dunfermline**

**Appellant**

**against**

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

**First Respondents**

**and**

**MR and MRS X**

**Second Respondents**

1. An Appeal dated 15 September 2016 was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42ZA(9) of the Solicitors (Scotland) Act 1980 by Ian William Donaldson, 26 Viewfield Terrace, Dunfermline (hereinafter referred to as "the Appellant") against the Determination and Direction made by the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the First Respondents") dated 11 August 2016 upholding complaints of unsatisfactory professional conduct made by Mr and Mrs X (hereinafter referred to as "the Second Respondents") against the Appellant and directing the Appellant to pay compensation.
2. In accordance with the Rules of the Tribunal, the Appeal was formally intimated to the First and Second Respondents, who both lodged Answers.
3. Having considered the Appeal with the Answers, the Tribunal resolved to set the matter down for a procedural hearing on 16 December 2016 and notice thereof was served upon all parties.

4. At the procedural hearing on 16 December 2016, the First Respondents were represented by Paul Marshall, Solicitor, Edinburgh, who by consent also appeared for the Appellant and the Second Respondents. Mr Marshall moved the Tribunal to sist this Appeal pending the outcome of other proceedings outstanding before the Court of Session. This motion was granted.
5. A motion having been lodged on behalf of the First Respondents to recall the sist and the Appellant having intimated his opposition, the Tribunal resolved to set the Appeal down for a procedural hearing on 29 January 2018. Formal Notices were served on all parties.
6. At the procedural hearing on 29 January 2018, the Appellant was present and represented himself. The First Respondents were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. The Second Respondents were neither present nor represented. The Appellant intimated that he was no longer insisting upon any preliminary matters. The motion to recall the sist was accordingly granted. The Appellant invited the Tribunal to fix a full hearing of the Appeal and indicated an intention to lead evidence. Accordingly, a full hearing was set down for 23 April 2018.
7. Formal Notices of this hearing were issued to all parties.
8. At the hearing on 23 April 2018, the Appellant was present and represented himself. The First Respondents were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. The Second Respondents were not present, having previously written to the Fiscal and Tribunal Clerk confirming that they did not intend to appear and did not want to be part of the substantive Appeal. A Minute of Agreement between the parties agreeing the facts for the purposes of the hearing was lodged with the Tribunal. The First Respondents had lodged a List of Productions. The Appellant lodged two documents and asked that they be allowed to be received late. The Fiscal having no objection to this, the Tribunal allowed the Productions to be received late. The Appellant confirmed that he was not leading any evidence and intended to proceed by way of submissions only. The Tribunal proceeded to hear submissions from both parties. In the course of his submissions, the Fiscal for the First Respondents moved the Tribunal to adjourn the hearing to allow him to make further enquiries to enable him to answer questions that had arisen in the course of the hearing. In the interests of justice, the Tribunal continued the hearing to 10 May 2018.



9. At the continued hearing on 10 May 2018, the Appellant was present and represented himself. The First Respondents were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. The Second Respondents were not present. The Tribunal heard further submissions from the First Respondents and the Appellant. Additionally, the First Respondents lodged two further Inventories of Productions.
10. Having given careful consideration to the detailed submissions made by the Appellant and the First Respondents, together with the documents before it, the Tribunal quashed the Determination and Direction of the Law Society in respect of both heads of complaint.
11. Having heard further submissions in relation to expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 10 May 2018. The Tribunal having considered the Appeal under Section 42ZA(9) of the Solicitors (Scotland) Act 1980 by Ian William Donaldson, 26 Viewfield Terrace, Dunfermline (“the Appellant”) against the Determination of the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh (“the First Respondents”) dated 11 August 2016 upholding a complaint of unsatisfactory professional conduct made by Mr and Mrs X against the Appellant and Directing the Appellant to pay compensation; Quash the Determination and Direction of the First Respondents; Make no award of expenses; and Direct that publicity will be given to this decision and that this publicity should include the name of the Appellant and any other party referred to in paragraph 14A of Schedule 4 to the Solicitors (Scotland) Act 1980.

**(signed)**

**Nicholas Whyte**  
**Chairman**

12. A copy of the foregoing together with a copy of the Decision certified by the Clerk to the Tribunal as correct were duly sent to the Appellant and the First and Second Respondents by recorded delivery service on 19 July 2018 .

**IN THE NAME OF THE TRIBUNAL**



**Nicholas Whyte**  
**Chairman**



**NOTE**

The full hearing of this Appeal was carried out over two days, 23 April 2018 and 10 May 2018. On both dates the Appellant was present and represented himself and the First Respondents were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. The Second Respondents were absent on both occasions having previously intimated their intention not to be involved.

On the first day of the hearing, the Tribunal had before it the Appeal by the Appellant, Answers for the First and Second Respondents, and List of Productions for the First Respondents. On the day of the hearing, the Appellant was permitted to lodge two Productions late, the First Respondents having no objection. Parties had entered into a Minute of Agreement agreeing the facts for the purposes of the hearing. The Appellant confirmed that he was not leading evidence and that he wished to proceed by way of submissions only. The Tribunal proceeded to hear submissions from both parties.

**SUBMISSIONS FOR THE APPELLANT**

The Appellant described his career confirming that he had received full conveyancing training and had over 30 years' experience.

He explained that as soon as he had advised, what he described as, "his erstwhile" client of the outcome of the SLCC decision, he had said that he would pay the money. Then when the Appellant had advised him that the Law Society had increased the sanction, he had said that he would pay that as well as he considered the whole situation to be his fault. The Appellant stated that this appeal was one taken on a matter of principle. The decision was wrong, both in fact and law. He submitted that the facts of the case were quite different to those narrated by the Second Respondents. They were selective in the information provided and misled those dealing with the matter.

The Appellant explained that his point was that the finding that the Second Respondents had been gazumped was not nearly correct. The basis for the finding was inaccurate. The suggestion that a higher offer was accepted was wrong. No offer to this day has been accepted. He submitted that "gazumping" required a second higher offer to actually be accepted.

The Appellant directed the Tribunal to the letter from the seller of October 2015. Undoubtedly the Law Society had this letter as the Appellant had obtained his copy from them. Despite what the Fiscal had

said, there was no indication in the decision of the Sub Committee of the First Respondents' that anything that his client had said was considered by it.

The Appellant said it was clear from that letter that the Second Respondents had made certain assurances that could not be met. The decision to accept the second offer was his client's and not the Appellant's. At no stage did the Appellant issue a qualified acceptance to this second offer.

The Appellant directed the Tribunal to the email from his client of April 2018. He submitted that this indicated that the property was still available. His client suggested in his email that the Second Respondents had in fact bought the property that they had wanted all along and, despite telling him that they could not afford to offer any higher price for his property, they had paid £200,000 more for the house that they in fact purchased.

The Appellant submitted that if the Second Respondents were not in fact gazumped then this complaint fell.

He emphasised that he had told his client at the outset that if he did not accept the offer from the Second Respondents then the Appellant would have to withdraw. This in fact he did, after attempting to allow everyone a fair opportunity to purchase the property.

The Appellant submitted that his client's email referred to other conditions of the offer which were not and would never be acceptable to him, such as the date of entry. The Second Respondents were never disadvantaged by anything that the Appellant had done. It would have made no difference to them if he had withdrawn immediately, rather than when he finally did.

He submitted the appropriate test here was whether the third parties had suffered some disadvantage due to his actings. He was adamant that he had done nothing to disadvantage the Second Respondents. He had not induced the second offer or had anything at all to do with the second offerors. Consequently, he could not be said to have breached any obligation to a third party.

The Appellant suggested that if the original Tribunal (sic) had taken account of the letter of October they would have made further investigations into the truth. The indications were in fact that they did not consider the letter or take it into account. The original decision was therefore taken on an incomplete set of facts.



The Appellant explained that conveyancing practice in Scotland has significantly changed over the years. Scotland once prided itself on a system where missives were concluded early. Now that is not the case and missives are not concluded until very late in the transaction. Transfer of heritable property requires probative written documents. A verbal or informal written document is in no way contractual. Often where an offer has been successful, the seller's solicitor will telephone the purchaser's solicitor to say it has been successful. In reality, this takes the matter no further forward as the indication that the offer is acceptable must be read as being acceptable subject to other conditions such as for instance the date of entry or other moveables. This verbal indication is only a tentative acceptance and lots of water can flow under the bridge thereafter.

The Appellant invited the Tribunal to consider that here, according to his client, there were other matters that were not acceptable to him. It was clear that the parties had fallen out. It was clear that the Second Respondents would have known at the earliest opportunity that they were not going to get the property. None of that flowed from the Appellant. All that had happened here was that the Appellant had given an indication that his client was happy with the Second Respondents' offer. He had contacted their solicitor and immediately ducked out of the transaction as soon as his client indicated that he would not accept the offer.

The Appellant had set the closing date with the agreement of the Second Respondents' solicitor. He had told their solicitor in advance that if his client did not accept the offer, then the Appellant would withdraw. That is what he did.

The Second Respondents indicate in their complaint that "Mr Donaldson allowed our offer to be gazumped". The Appellant explained that he was not aware of any legal definition of gazumping. However, he believed that it required that the seller's solicitor tell the other party the price that had been offered so that the other party could beat it.

He argued that this decision was wrong on two facts. The first was that the second offer was never accepted. The second was that there was no gazumping, not just because the offer was not accepted but also because he had not had any contact with the second purchasers.

The Appellant also took issue with the second ground of complaint that was upheld where it referred to a conflict of interest. He disputed that there was any conflict of interest involved in the situation. He

emphasised that he had fixed the closing date to assist the Second Respondents. If he had withdrawn at the very outset then that would have left them high and dry. He argued that the Second Respondents would in fact have been worse off if he had withdrawn from acting at the beginning.

The Chairman asked the Appellant for clarification as to the precise grounds of his appeal. He indicated to the Appellant that the Tribunal required to look at the decision of the Sub Committee to consider whether there were errors in law or fact.

Mr Donaldson responded that he was looking at the Answers for the Law Society. Firstly, he indicated that the Sub Committee had erred by failing to take into account the information provided by his client in his letter. Secondly, he argued that the Sub Committee had erred in law in finding that gazumping had in fact taken place where the other offer had not been accepted.

The Chairman drew the Appellant's attention to the Minute of Agreement and invited him to address the Tribunal in relation to paragraphs 4 and 5.

The Appellant indicated that where the Minute of Agreement referred to "accepted" it should really be read as "acceptable". The telephone conversation had merely been an indication that the offer was acceptable subject to the usual complications. The Appellant indicated that he did not deny that he had given indications that the offer was acceptable. His client had later indicated that he wanted to accept the other offer. The Appellant had refused. His client was uncertain about the bona fides of the other offeror. The idea of setting up the closing date was to set up a platform from which his client would sell to the Second Respondents.

The Chairman asked the Appellant if it would not have been possible to sort the matter out by discussing the other conditions with the Second Respondents to see if these could be resolved. The Appellant responded that his client was having conversations with the Second Respondents the whole time.

The Chairman asked the Appellant how the fixing of a closing date was ever going to be a solution. The Appellant responded that his client had told him to ignore the Second Respondents' offer. The closing date was all the Appellant's doing. In the background the Second Respondents and his client were talking and he had hoped were resolving their differences.



In answer to a question from a member of the Tribunal, the Appellant explained that he believed that the offer was an emailed one.

The Appellant was asked by the Tribunal if he considered that the gazumping rules applied if the offer was only emailed and therefore not probative. The Appellant responded that he had received the offer in some form but he was certain it was not the principal. He immediately had told the seller that he had received the offer. The seller had instructed him to accept the offer as the seller was desperate to sell his house.

In response to a further question from the Tribunal, the Appellant confirmed that he had phoned the Second Respondents' solicitors to give an indication that the offer was acceptable.

The Tribunal asked the Appellant if it was after this that conversations took place between the parties during which it was apparent that they could not agree certain points. The Appellant responded that this was an understatement. There were other issues involved such as the possible purchase of an outhouse by the Second Respondents which would be fully developed for them by the seller. This was one of the issues that the parties had fallen out about.

The actual transaction involved the sale of a fully developed house. The Appellant did not have an actual offer, only an intimation of one, he thought by email. He believed he was obliged to withdraw when the potential for gazumping arose. He had dreamed up the closing date. He accepted he could have proceeded in a different way. He asked the Tribunal to bear in mind that the competing offer was £50,000 higher. As soon as the potential for gazumping had arisen, he had withdrawn. When he received instructions in clear and plain terms he had withdrawn. The Appellant drew the Tribunal's attention to the nature of the Law Society's "guidance".

He submitted that the original Tribunal (sic) was wrong in law as he had not accepted instructions to accept the second offer. The guidance made reference to the seller's solicitor continuing to act "until negotiations fall through". As far as he had been aware, the seller was continuing to speak to the Second Respondents' direct. He accepted that he had telephoned the Second Respondents' solicitor, who was a friend, to indicate the original offer was acceptable. But as he had not been involved in accepting the higher offer, he submitted that the Sub Committee had misdirected themselves in law in holding that there had been gazumping.

He referred to answer 2 for the Law Society. He explained that he had stayed on in the transaction to try and sort it out. The finding that he did not withdraw immediately in his submission did not mean that he departed from the standard to be expected of solicitors.

In answer to a question from the Tribunal, the Appellant explained that the discussions between the purchasers and sellers were a continuing process in the background.

The Appellant drew the Tribunal's attention to the comparison of his case with the case of Scott Allan within the Sub Committee's decision. He submitted that his case was in no way similar to the Allan case. He submitted that there had been no gazumping.

He argued that the Second Respondents had not suffered any disadvantage or any disrespect from him. He argued that unsatisfactory professional conduct required some conduct that caused harm or detriment to another.

The Chairman asked the Appellant to consider whether or not he wanted to comment on the application of Rule B1.14.1 to the circumstances. The Appellant responded that it was impossible to consider the whole matter without considering the practicalities of conveyancing. The Appellant emphasised that he had not received a formal offer and that what he had done was give a verbal indication that the offer he had received was acceptable which had to be read in the circumstances as acceptable subject to other matters resolving. Nothing was said at that stage which bound the seller. The question was whether he had gone too far and misled the other side in any way. At the stage that he had made this verbal indication, it was made in good faith. Subsequent to that conversation, the seller had changed his mind. In order to ensure that he was not breaching that rule, the Appellant had made contact with the other solicitor and told him he was concerned. There was no suggestion that the Appellant had not told the other solicitor or had failed to clarify the matter. The Appellant had insisted from the start that the offer from the Second Respondents should be accepted. He did not go back on that indication at any stage. It was his intention to honour that and so he had withdrawn.

The Chairman sought clarification from the Fiscal with regard to the relevance of Rule B1.14.1. The Fiscal accepted that it was in his answers but did not in fact appear to be part of the Sub Committee's decision. He therefore did not insist on that reference.



## **SUBMISSIONS FOR THE FIRST RESPONDENT**

The Fiscal drew the Tribunal's attention to the Minute of Agreement. He submitted that the Tribunal was also entitled to take into account other information before it. He emphasised that it was not stated in the Minute of Agreement that gazumping had actually taken place. An offer was made, a higher offer was received. The seller indicated he wanted to accept the higher offer. A closing date was set. The Second Respondents' offer was not accepted.

The Fiscal then referred to his written submissions which were as follows:

### **"Summary of Law Society's submission**

- 1.1 This is an appeal under section 42ZA(9) of the Solicitors (Scotland) Act 1980 against the decision of the Council of the Law Society that the solicitor is guilty of unsatisfactory professional conduct ('UPC').
  - 1.2 This 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 test for 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 this appeal should be refused and the original determination of UPC confirmed.
- 2**     Test for UPC
- 2.1 The test for UPC is contained at section 46(1) of the Legal Profession and Legal Aid

(Scotland) Act 2007:-

*'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.'*

2.2 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 42ZA (1) sets out the Council'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. '*

3.2 Therefore we can see there is a four stage process:-

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

3.3 That process was followed in this matter.

### 4 Solicitor's right of appeal against finding of UPC

4.1 Section 42ZA (9) sets out the solicitor's rights of appeal in connection with a finding of UPC. It provides:-

*"(9) A solicitor in respect of whom a determination upholding a conduct complaint has been made under subsection (1)...may, before the expiry of the period of 21 days beginning with the day on which the determination or, as the case may be, the direction is intimated to him, appeal to the Tribunal against the... determination ..."*

## **5** Powers of the Tribunal in UPC appeal

5.1 Section 53ZB(1) sets out the Council's (sic) 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..."*

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

## **6** Relevant facts

6.1 The factual position is straightforward and not in dispute.

- Mr Donaldson's clients placed their property on the market.
- The [Second Respondents] made a verbal offer to the sellers on 3 June 2015 which the sellers accepted that day.
- The [Second Respondents'] solicitor made a written offer to Mr Donaldson on 4 June 2015.
- On the same day, having taken his clients' instructions, Mr Donaldson confirmed that offer was accepted by e-mail.
- On the following day Mr Donaldson received another, higher offer, for the property and he made his clients' aware of this.
- His clients wished to accept the higher offer.
- In an attempt to resolve matters Mr Donaldson fixed a closing date and invited parties to submit offers.



- A closing date was fixed for Friday, 26 June 2015 at 12 noon.
- Both parties made offers for the property.
- The [Second Respondents] had increased their offer by £500. The other party made a higher offer.
- Mr Donaldson withdrew from acting for the sellers after the closing date.

## 7 Sub Committee determination of 11 August 2016

7.1 When this matter was before the Sub Committee there were two conduct issues before it numbered 1 and 4:-

*1. Despite us making a verbal offer to the seller directly on 3 June 2015 and our solicitor submitting a formal written offer on 4 June 2015, and also despite Mr Donaldson sending an email to our solicitors on 4 June 2015 accepting our offer, Mr Donaldson allowed our offer to be gazumped and the seller to accept a higher offer from another party, which had been submitted after our offer had been accepted.*

*4. Mr Donaldson unduly delayed in withdrawing from acting on behalf of his client despite being aware of the conflict of interest, as he stated in his e-mail of 24 June that he had no intention of withdrawing and he did not actually withdraw from acting until 30 minutes after the closing of offers for the property on 26 June 2015.*

7.2 In considering these two conduct issues the Sub Committee had regard to the reports prepared by the Law Society's complaints investigator.

7.3 It found on the information before it that the facts in the two conduct issues were proved.

7.4 The Sub Committee noted that the two issues were inter-related and proceeded to consider them together in determining whether the conduct could amount to either professional misconduct or the lesser conduct failure - unsatisfactory professional conduct.

- 7.5 The Sub Committee was satisfied that Mr Donaldson should have immediately withdrawn from acting when his clients communicated that they wished to accept the second, higher offer. The Sub Committee was satisfied that this amounted to unsatisfactory professional conduct.
- 7.6 The Sub Committee took full account of the solicitor's explanation that he was trying his best to rectify the situation through the fixing of a closing date, but they referred to the Law Society's Guidance to the profession on "*Gazumping, Gazundering and Closing Oates*" (*sic*) which provides:-
- "Where a solicitor for a seller has intimated verbally or in writing to the solicitors for a prospective purchaser that their client's offer is acceptable - whether after a closing date or otherwise - the seller's solicitor should not accept subsequent instructions from the seller to accept an offer from another party unless and until negotiations with the original offeror have fallen through for bona fide reasons unconnected with the possible offer from another party. The solicitor should advise the seller to instruct another solicitor if he wishes to accept the later offer."*
- 7.7 The Guidance describes the precise situation which Mr Donaldson found himself in, and provides a clear explanation of what he should have done next. He didn't follow this Guidance. He did not withdraw from acting when the seller advised the he wished to accept the later offer.
- 7.8 Of course Law Society Guidance is not the same as a Practice Rule. The Law Society's website explains in its section on *Purpose and Status of Guidance* that:-
- "Meticulous adherence to every point in the Guidance is not mandatory in the same way as it is for a Rule, but non-compliance will be taken into account should it be alleged that there has been a breach of a Rule, inadequate professional service, unsatisfactory professional conduct or professional misconduct. If you have chosen to depart from the Guidance in a particular situation, you will be required to justify your decision if a claim or complaint is made."*



- 7.9 Therefore it was appropriate for the Sub Committee to consider the Guidance when considering the question of unsatisfactory professional conduct or professional misconduct, as it was in this matter.
- 7.10 The Sub Committee clearly weighed the severity of the matter carefully. They did not consider the solicitor's conduct to be so serious as to amount to professional misconduct but they recognised that continuing to act, even with the best of intentions, did not help the situation.
- 7.11 The Sub Committee considered the following factors when considering the disposal options open to it:-
- It noted the solicitor was extremely experienced.
  - It did not consider that re-training was necessary.
  - It did not consider that a fine was necessary.
- 7.12 The Sub Committee did consider that an award of compensation to the [Second Respondents] was appropriate given the inconvenience and distress caused by the experience.

## 8 Conclusion - the appeal should be refused

- 8.1 In summary this was a carefully considered decision by the Professional Practice Sub Committee which:-
- Identified the relevant facts
  - Considered the solicitor's explanation
  - Considered the relevant Guidance to the profession
  - Considered the tests for professional misconduct and unsatisfactory professional conduct
  - Determined that unsatisfactory professional conduct was the appropriate finding, giving reasons for that decision
  - Considered the available disposals
  - Determined what was the appropriate disposal, giving reasons for that decision

8.2 Having taken the relevant facts into account and having followed the process outlined above, in my submission there is no reason to depart from the Sub Committee's decision in this matter.

8.3 This appeal should be refused and the original determination confirmed.”

The Fiscal emphasised that it was accepted by the Sub Committee that what the Appellant was attempting to do by fixing a closing date was to resolve matters.

The Fiscal stated that the statement from the Appellant's client did not affect the Minute of Agreement in any way. The letter of 23 October 2015 accorded with the key elements of the Minute of Agreement. The second letter of 20 April was written some three years after the event and should be treated with great care. However, it too did not cut across the Joint Minute.

The Fiscal submitted that the Tribunal should take care that there was no technical definition of gazumping within the guidance. Whether or not gazumping had actually taken place was irrelevant, the Sub Committee had followed the terms of the guidance. The facts in the Minute of Agreement are consistent with the facts considered by the Sub Committee.

The Fiscal argued that the issue of whether the offer was probative or not was not relevant. The guidance itself refers to matters being indicated “verbally or in writing”. He argued that the guidance should be looked at together and not as a two part test. Here the solicitor had intimated that the offer was acceptable. When the second offer came in and the client indicated that he wanted to accept that, the Appellant should have withdrawn and should not have fixed a closing date.

The Sub Committee's decision was made on the basis of the Appellant's failure to follow guidance. The investigator's report makes reference to Practice Rule B1.14.1. The Fiscal emphasised that he was not making any argument based on that Practice Rule.

The Chairman invited the Fiscal to look at the terms of the Sub Committee's decision and asked whether the Fiscal's submissions were consistent with the Sub Committee upholding ground of complaint 1 where the Fiscal was accepting that no gazumping had taken place. The Fiscal explained that the terms of the complaint were cut and pasted into the Sub Committee's decision. The reference to gazumping was made by the Second Respondents.



A member of the Tribunal asked the Fiscal if it was not in the Sub Committee report that it found in fact that someone was gazumped. The Fiscal explained that the Tribunal could see how reference to gazumping was made in the decision but it was not part of the central facts.

The Chairman asked the Fiscal to have regard to the terms of issue 4 (the second head of complaint) before the Sub Committee, which referred to a conflict of interest.

The Fiscal responded that the Sub Committee had considered both issues together. All of the key elements were within the body of the decision. The decision was one of a finding of unsatisfactory professional conduct. The Tribunal's powers were to quash or confirm that decision. Notwithstanding the language of the complaint that was carried over into the decision, the Tribunal could identify the reasoning of the Sub Committee for its decision by reading its deliberations. The Fiscal submitted that the Tribunal was not restricted to a narrow review of the facts before the Sub Committee but was entitled to consider the whole facts before it.

A member of the Tribunal asked the Fiscal to confirm whether, if the second offer was not accepted, the second sentence of the guidance applied. The Fiscal responded that it was his position that it did. His argument was that the Appellant had departed from the guidance by doing something that did not accord with it. The purpose of the guidance was that where an offer had been accepted, that needed to be protected. The Appellant's departure from the guidance here had the same effect as if he had accepted the second offer. The first stage is that an offer is made and then accepted. Once that offer had been accepted, there is no requirement for the solicitor to accept the second offer for the requirement to withdraw from acting to apply. The fixing of a closing date undermined the accepted offer and so the harm struck at by the guidance was still created.

A member of the Tribunal asked the Fiscal whether or not the current case bore similarities to the case of Scott Allan that was referred to within the Sub Committee's report.

The Fiscal responded that he did not consider that to be central to the determination of the Sub Committee. Although it had been referred to, it was not at the heart of the decision. In answer to a question from a member of the Tribunal, he conceded that the Sub Committee report indicated that it was similar to this case. In answer to a question from a member of the Tribunal, the Fiscal indicated that it was not significant that the Sub Committee decision referred to the Guidance as rules.

The Tribunal asked the Fiscal for submissions on the comments made by Paterson & Ritchie in “Law, Practice and Conduct for Solicitors” at pages 412 and 413. In particular, they invited submissions with regard to whether or not a formal offer in this case was received.

The Fiscal drew the Tribunal’s attention to the terms of the Minute of Agreement where it stated that “a formal written offer” had been sent. It appeared to him at this stage that other matters had arisen which might require that he produce the actual terms of the offer referred to. He believed that it would be possible to obtain this information from the Second Respondents’ then solicitors. He had contacted the solicitor who had advised that he believed that the offer was faxed and then sent in principal in the legal post. He submitted that unless the Appellant was prepared to agree that a formal written offer was sent and if that point remained in dispute then he would require to make a motion to adjourn.

The Chairman asked the Fiscal if the significance was not whether a formal offer was sent but whether it was received. The Fiscal responded that the indication that an acceptance was emailed suggested that the offer was received and the Minute of Agreement referred to a formal written offer.

The Appellant indicated that he was fairly sure that the offer was received by fax. He was unable to say whether the principal offer was received on 5 June. He had no way of checking this.

The Fiscal indicated that he felt it was appropriate that the matter be explored further and that there was a danger in rushing to a conclusion. He invited the Tribunal to adjourn the hearing.

Having careful regard to the submissions before it, and the possible significance of this issue, the Tribunal concluded unanimously that fairness required that the hearing be adjourned. The parties were advised that the motion was granted without the Tribunal indicating that this was an issue that was critical. The parties were advised that the Tribunal considered that matters required to be properly addressed and that the Tribunal would wish submissions on the effect of the case of Park, Petitioner [2009] CSOH 122 on the Law Society Guidance. The hearing was continued to 10 May 2018.

When the Tribunal resumed on 10 May 2018, the Fiscal for the First Respondents sought to lodge two additional Lists of Productions. Initially, the Appellant objected to the late lodging of these Lists but in the course of submissions indicated that he withdrew that objection in the interests of his appeal



concluding that day. The Tribunal allowed the Lists of Productions to be received, but reserved the question of what weight would be given to the Productions referred to.

The Fiscal confirmed that two issues had arisen at the last calling of the case. The first was the question of how the offer to purchase the property was communicated to the Appellant and the Fiscal had sought an adjournment in order to produce further information in that regard. The second was the question of the effect of the case of Park, Petitioner.

The Fiscal submitted that the Sub Committee's decision in this case was concerned with the conduct of the Appellant where he received an offer by email which he had then indicated was "acceptable". The Fiscal indicated that although in the Minute of Agreement it was suggested that the offer was "accepted" he was content that that be read as "acceptable". After the indication that the offer was acceptable, the Appellant's client had received a higher offer and the Appellant had fixed a closing date. It was the Fiscal's submission that the Appellant should have withdrawn from acting at that stage. He accepted that the Sub Committee did not address in its deliberations the significance of the offer to purchase being an email. He argued that the fact that the Sub Committee had not considered whether this was a binding missive did not prevent the Committee from reaching the decision that it did. Accordingly, he argued that the Tribunal should confirm the Determination of the Sub Committee for that reason. The Fiscal referred to his Answers and submitted that the purpose of the guidance on gazumping was to protect a solicitor's integrity where the client wanted to go back on his original instructions. He argued that the guidance did not allow the solicitor to carry on acting in such circumstances but required the solicitor to withdraw from acting. The Sub Committee had considered this guidance, had accepted that the Appellant did not withdraw from acting and concluded that this conduct amounted to unsatisfactory professional conduct. He accepted that the property had not been sold to another but explained that this was not the mischief struck at by the guidance.

The Fiscal referred to the House of Commons interpretation of gazumping and suggested that this was a workable definition for the current case. He confirmed that it was not claimed in this case that gazumping had actually taken place.

The Fiscal conceded that the Sub Committee indicated in the Schedule that the complaints made were proved but argued that the Tribunal could see from the rationale of the decision of the Sub Committee that it was not held that gazumping had actually taken place. The Tribunal asked the Fiscal to consider what complaint the Appellant had been asked to address. In order to answer that question, the Fiscal



indicated he required to take the Tribunal through the decision itself. The Fiscal explained that the mischief struck at in his submission was the Appellant fixing a closing date having previously intimated to the potential purchasers' solicitors that the offer made was acceptable. He argued that the Appellant was required to withdraw from acting at the point when his client advised him that he wanted to accept the second offer. He submitted that there was a difference between the requirements of a legally binding contract and the situation where a solicitor went back on something he had said earlier. The fixing of the closing date had the effect of knocking out the original offer. This represented the solicitor going back on his word. He argued that this was clearly the reasoning of the Sub Committee. In support of this argument, the Fiscal referred to Paterson & Ritchie at paragraph 13.04.

The Fiscal suggested that the case of Park, Petitioner was of little assistance in this particular matter. That case he suggested was about whether or not missives were concluded. Before looking at the case of Park, Petitioner he invited the Tribunal to consider his Production 2, an extract from Gretton & Reid "Conveyancing". He also referred to the case of McIntosh-v-Alam 1998 SLT (Sh Ct 19). He conceded that for missives to be binding there needed to be delivery. In this case he argued that missives did not require to be binding but submitted that if the Tribunal was not with him in that proposition then it should consider the terms of the affidavit of the Second Respondents' solicitor. He went on to refer to the Appellant's email to the SLCC of 25 September 2015, which was in response to the complaint made. He submitted that this email made it plain that the Appellant's position had consistently been that he had accepted the offer made. The Fiscal also suggested that this email disclosed that the Appellant indicated that the fixing of the closing date had been his client's idea.

The Fiscal confirmed that it remained his position that this was a case of the Appellant breaching the Law Society guidance. At the previous calling of the case the Tribunal had referred the Fiscal to his Answers wherein he had referred to the Practice Rule B1.14.1. The Fiscal conceded that this Practice Rule was not explicitly referred to within the Sub Committee decision but he invited the Tribunal to look at the decision in more detail. The Sub Committee referred to the complaint investigator's report. The Appellant had full access to that report. The investigator's report referred to both the gazumping guidelines and the Practice Rule. The Sub Committee were clearly more concerned with the guidelines but they did refer to the investigator's reasoning with which they said they agreed. From the investigator's report it could be seen that the matter of concern was the statement by the Appellant of a position which he later went back on. The Fiscal conceded that it would have been preferable for the Sub Committee Schedule to make explicit reference to this Practice Rule.



The Tribunal directed the Fiscal's attention to the Determination made on page 4 of the Schedule to the Sub Committee where both heads of complaint were upheld. The Tribunal asked the Fiscal if it was to ignore this. The Fiscal argued that the Determination of the Sub Committee was one of "unsatisfactory professional conduct". He accepted that the reasons for this were not well expressed but suggested that if the Tribunal drilled into the decision making process it could divine the reasoning of the Sub Committee and that was what the Tribunal should focus upon. He accepted that the reference to the Second Respondents' language within the two heads of complaint caused difficulty. He invited the Tribunal to consider the deliberations of the Sub Committee and the rehearsal of the key facts upon which they formed their decision. He argued that it was simply an anomaly that the Schedule rehearsed the wording of the complaints made. He submitted that the written decision gave the Sub Committee's reasoning, their eventual judgment that the Appellant should have withdrawn immediately and that his failure to do so amounted to unsatisfactory professional conduct. The reasons for that decision he argued could be recognised from the contents of the Sub Committee's deliberations.

The Tribunal drew the Fiscal's attention to the precise wording of the guidelines where it stated that the solicitor should not "accept" a higher offer. The Fiscal submitted that the Tribunal had to read further into the guidelines where it stated that a solicitor should withdraw to protect his integrity. This also was explained in *Paterson & Ritchie*. The Appellant fixing the closing date in this case had the effect of knocking out the original offer and facilitated the mischief struck at by the guidance.

The Tribunal asked the Fiscal if the Determination of the Sub Committee as recorded within its Schedule, disclosed an error of fact by finding that there had in fact been gazumping. The Fiscal disputed that and invited the Tribunal to look at the facts referred to within the Sub Committee deliberations. He argued that the Sub Committee had not found that the second offer was accepted. He submitted that if the Tribunal drilled into the language of the decision it could see that the Sub Committee had found the facts correctly.

## **RESPONSE BY APPELLANT**

The Appellant indicated that his Appeal had been against the Committee decision as recorded on page 4 of the Schedule. He argued that it now seemed that he was being accused of something completely different.

He submitted that the suggestion that he should have withdrawn from acting when the clients changed their mind was preposterous. He argued that the faxed offer was only an indication that an offer was coming and that no offer was actually made until the principal was delivered.

He referred the Tribunal to the terms of the affidavit of the Second Respondents' solicitor and suggested that this did not disclose any evidence that the offer had actually been delivered.

The Appellant submitted that there was a world of difference between saying something was accepted and something was acceptable. When his clients indicated that they had it in mind to accept the other offer the Appellant had not done anything in that regard. He submitted that he had not gone back on his word but had told the Second Respondents' solicitor exactly what was going on. At no stage had he communicated with the other offerors. The original offer had remained on the table and was never actually rejected.

The second head of complaint referred to there being a conflict of interest. The Appellant explained that he had not withdrawn from acting on the basis that he was trying to resolve the matter. He was adamant that he had not in any way misled anyone. He advised the Tribunal that he had told his clients that if they would not accept the Second Respondents' offer he would have to withdraw from acting. He submitted that the fixing of the closing date had not taken the original offer off the table. He did not consider that he had caused any harm to any party.

It was his position that the second offer had arrived before the principal written copy of the first offer had done.

In response to a question from the Tribunal, the Appellant indicated that he did not consider that by fixing a closing date he had facilitated the gazumping of the Second Respondents because the second higher offer had already been received prior to the closing date. He had fixed the closing date as an opportunity for the Second Respondents to win the contest. He was aware that there were a number of communications going on between his clients and the purchaser. His intention had been to provide a mechanism to allow the Second Respondents to purchase the property. Albeit his clients had suggested to him that they preferred the higher offer, it was his position that the original offer remained on the table and was never specifically rejected.



He confirmed to the Tribunal that he had spoken regularly with the Second Respondents' solicitor. Although he could not remember specifically, he believed that it was the Second Respondents' solicitor who had suggested the fixing of the closing date.

The Appellant indicated that he believed he had not gone back on his word. It was always his position that his clients had to deal with the Second Respondents. His discussions with the solicitor for the Second Respondents confirmed his endeavours to persuade his client that was what he had to do. His decision to withdraw was taken at the stage where he was unable to persuade his client to do so.

The Fiscal drew the Tribunal's attention to the Minute of Agreement and his Production 10 disclosing that the closing date was the suggestion of the Appellant.

The Tribunal asked parties to clarify whether or not the direction to pay compensation was also the subject of appeal. The Fiscal responded that he invited the Tribunal to adhere to the Direction of the Sub Committee as well as the Determination. The Appellant confirmed that he was also appealing the Direction as he was not sure what the compensation had been given for as he had not upset or caused distress to any individual.

## **DECISION**

In this case, the Council of the Law Society made a Determination that the conduct of the Appellant in respect of two heads of complaint amounted to unsatisfactory professional conduct. The two heads of complaint were as follows:-

“

1. Despite us making a verbal offer to the seller directly on 3 June 2015 and our solicitor submitting a formal written offer on 4 June 2015, and also despite Mr Donaldson sending an email to our solicitors on 4 June 2015 accepting our offer, Mr Donaldson allowed our offer to be gazumped and the seller to accept a higher offer from another party, which had been submitted after our offer had been accepted.
4. Mr Donaldson unduly delayed withdrawing from acting on behalf of his client despite being aware of conflict of interest, as he stated in his email of 24 June 2015 that he had no intention of withdrawing and he did not actually withdraw from acting until 30 minutes after the closing date of offers for the property on 26 June 2015.”

The Appellant had lodged lengthy written grounds of appeal which were unfortunately not focussed in their original form but which became so during the parties' submissions.

As an Appeal, it was not open to the Tribunal to simply consider afresh the complaints made against the Appellant. That is not the Tribunal's function in such cases. The case of Hood, Petitioner 2017 CSIH 21 sets out clearly the legal grounds upon which the Tribunal can review the decision of the Council. One of those grounds is described as the Sub Committee having made an error of law, either of general law or application of that law to the facts.

In this case the First Respondents concede that, with regard to the first head of complaint, no gazumping had in fact taken place and that with regard to the second head of complaint, there had in fact been no conflict of interest.

The Fiscal for the First Respondents had invited the Tribunal to "drill into" the Sub Committee's report, "divine its reasoning" and uphold the finding of unsatisfactory professional conduct on that basis. This appeared to the Tribunal to be a submission that it was to ignore the wording of the two heads of complaint that had been upheld. The Tribunal had great difficulty with this approach. The Schedule for the Sub Committee specifically stated that it "determined that the conduct of the Appellant in respect of the two heads of complaint amounted to unsatisfactory professional conduct". Within the deliberations section of the Sub Committee report, with reference to head of complaint 1, the report stated "The Sub Committee was satisfied that the factual basis of this issue was capable of being proved beyond reasonable doubt". The Fiscal himself conceded that this was plainly wrong in law and in fact.

During submissions other references had been made to errors within the Sub Committee report. The Sub Committee had referred to "Rules" on gazumping rather than guidance.

The Appellant had argued that the Sub Committee made no reference within its deliberations to the communication from his former client and information provided therein.

Extensive submissions were made to the Tribunal on the relevance of the case of Park, Petitioner [2009] COSH 122 and its effect upon the precise wording of the gazumping guidelines. This in turn led to discussion of the basis upon which the finding of unsatisfactory professional conduct had been made and the significance of the guidelines on gazumping versus the Practice Rule B1.14.1. In its Schedule the Sub Committee makes specific reference only to the guidance on the gazumping. In his




Answers, the Fiscal for the First Respondents had made reference to the Practice Rule. In his argument on the first day of the Appeal, the Fiscal had indicated that he was not insisting upon his reference to the Practice Rule. However, on the second day of the hearing, the Fiscal had argued that the Sub Committee's decision was in fact that the conduct was in breach of the Practice Rule given that the Sub Committee has agreed with the complaints investigator's report which had made the conclusion that the conduct breached both the guidelines and the Practice Rule. The Tribunal did not consider that the case of Park Petitioner was relevant to the matters that it was considering. That case concerned the requirements for missives to be held as concluded and binding. That was not the issue in this Appeal.

The submissions raised important issues of fair notice of the complaints to be answered by the Appellant together with transparency and clarity of the Determination by the Sub Committee of unsatisfactory professional conduct. The Tribunal's powers were restricted to quashing or confirming the Sub Committee's Determination. Having given careful consideration to all of the submissions, the Tribunal concluded it could not confirm a Determination which it considered contained significant errors of law and fact. In coming to its decision, the Tribunal considered the case of Hood, Petitioner and decided that it was not appropriate to accept the submissions of the Fiscal and uphold the decision of the Sub Committee on grounds that were not considered by the Sub Committee when it had been established, and conceded by the Fiscal, that the decision of the Sub Committee, on the grounds it did consider, was wrong in law and on the facts. Therefore, the Tribunal concluded that the appropriate order was to quash the Determination and Direction of the Sub Committee. It is important to emphasise that this does not suggest that the Tribunal approves of the Appellant's conduct in this case but simply reflects the errors made by the Sub Committee taken together with the issues of fair notice to the Appellant. The Law Society Guidance on this matter sets out the appropriate way for a solicitor to act in these circumstances and it is important that this is followed. In this case the Appellant found himself in a difficult position and it was reasonable for the First Respondents to investigate his actions. However, the two issues before the Sub Committee did not correctly identify the relevant matters for investigation resulting in the Sub Committee making a finding of unsatisfactory conduct on grounds that were clearly not established and the Fiscal had very fairly conceded this. The issue should have been whether or not the actions of the Appellant in fixing a closing date after an offer had been received and after he had intimated to the offering agents that it was acceptable, was contrary to the Guidance and amounted to unsatisfactory professional conduct. If the Sub Committee had made a finding of unsatisfactory professional conduct on such an issue then it is possible the outcome of this Appeal could have been different.

The Tribunal thereafter invited the parties to make submissions with regard to expenses and publicity. The Appellant in his words indicated “he did not want to make a big song and dance about it” but made a motion for expenses against the First Respondents on the basis that he had been successful. The Fiscal asked the Tribunal to make no award of expenses. He invited the Tribunal to accept that these were significant matters and that it was correct that the Law Society should contest the Appeal. He made reference to the case of Baxendale-Walker v Solicitors Disciplinary Tribunal [2011] EWHC 2254.

The Tribunal gave careful consideration to the procedure before it and concluded that the appropriate award was one of no expenses due to or by either party. With regard to publicity, the Tribunal directed that publicity would include the name of the Appellant and only any other individual referred to within Paragraph 14A of Schedule 4 to the 1980 Act.



**Nicholas Whyte**  
**Chairman**