

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

I N T E R L O C U T O R

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

by

WESLEY MITCHELL, Glenwarren,
Shanmullagh, Ballinamallard (hereinafter
referred to as "the Appellant")

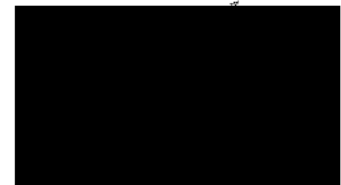
against

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

and

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

By Video Conference, 23 September 2021. The Tribunal, having considered parties' submissions on the Appellant's motion for (1) production of documents under Rule 28 of the Scottish Solicitors Discipline Tribunal Rules 2008 and (2) further time to adjust; Refuses said motion; Reserves all questions of publicity and expenses meantime; and Continues the case to the virtual preliminary hearing fixed for 29 September 2021.



**Kenneth Paterson
Vice Chair**

NOTE

On 6 July 2021, the Appellant lodged a written motion with the Tribunal. In terms of that motion, the Appellant sought:

- (1) An order that the First Respondent produce:
 - (1.1) An unredacted copy of the Law Society's report of 16 March 2020;
 - (1.2) Copy files submitted from the solicitor's firm to the Law Society;
 - (1.3) Copy of the Law Society's file of papers;
 - (1.4) Copies of relevant papers extracted from the Scottish Legal Complaints Commission file, which were said to have been disclosed to the Second Respondent;
- (2) Further time to adjust the Appeal and Answers.

The First Respondents opposed the motion. The Tribunal set the matter down for a virtual procedural hearing on 14 September 2021. Notice of that hearing was served on the parties. The notice provided that documents should be lodged 14 days in advance of the virtual procedural hearing. The Fiscal for the First Respondents lodged, within the time limit, a written submission in opposition to the motion and two supporting documents (page 10 of the SLCC Guidelines relating to First Tier Complaints Handling and the Law Society's Guidance on Rule B1.6 of the Law Society's Practice Rules 2011).

On the morning of 14 September 2021, the Appellant attempted to lodge written submissions and two supporting documents said to be a Deed of Revocation of 10 March 2013 and an undated and notarially executed will of 16 May 2012. When the matter called, the Fiscal objected to the Tribunal receiving these documents out of time. The Tribunal considered the matter and refused the Appellant's motion for it to receive documents at this stage. It noted that parties were to make oral submissions and the Appellant could read out his written submissions at the appropriate time.

SUBMISSIONS FOR THE APPELLANT

The Appellant submitted that production of an unredacted copy of the Law Society's report of 16 March 2020 was necessary to enable the Tribunal to properly consider the complaints. He said that over 40% of the evidence and conclusions were redacted. It was necessary to have

that information to support his grounds of appeal following the case of Hood, Petitioner [2017] CSIH 21. The reporter had found that issue 3 was capable of amounting to unsatisfactory professional conduct. This was disregarded by the Sub Committee. It is impossible for the Tribunal to properly examine the complaints, considerations and decisions of the Sub Committee without the unredacted report and papers.

The Appellant said it was not the case that the clients wished to keep the information confidential. They frequently waived confidentiality to their associates and friends regarding their distress, suffering and dissatisfaction at how their affairs were being handled.

The Appellant accepted the Fiscal's position in his written submission that Rule B1.6 of the Law Society of Scotland Practice Rules 2011 applied, but said that the Lord President's comments in Micosta-v-The Shetland Islands Council 1983 SLT 483 regarding fraud or illegal acts were relevant. Issue 3 directly concerns the transaction in question, regarding the instructions and execution of a will by a client which she did not have capacity.

The Appellant submitted it was in the interests of justice for disclosure of relevant and material information to be produced to the Tribunal. He therefore moved the Tribunal to grant his motion and to allow a short period to adjust the appeal prior to the preliminary hearing.

SUBMISSIONS FOR THE FIRST RESPONDENT

The Fiscal referred to the written submissions produced to the Tribunal in advance of the procedural hearing. It was the First Respondent's position that there was nothing listed in the Appellant's motion which falls within the definition of being necessary for the proper consideration of the appeal (Rule 28). The appeal can only deal with the Sub Committee's decision, applying the criteria in Hood, Petitioner [2017] CSIH 21. The Appellant cannot seek a reinvestigation of the original complaint. He appears to be proceeding on a fundamental misunderstanding of the process and what the Tribunal can consider. The papers held by the First Respondent and the SLCC are not necessary for a proper consideration of the matter. The motion was irrelevant and should be refused.

The Fiscal opposed the motion for further adjustment of the appeal. The Appellant was already in default of the Tribunal's last order of 22 June 2021 regarding adjustments.

In the event the Tribunal considered any parts of the Appellant's motion at paragraph 1 to be relevant, the Fiscal said the Tribunal must consider privilege and client confidentiality. The solicitor's files are privileged and confidential. Both clients are dead, but the confidentiality of their instructions endures. The Tribunal cannot interfere. The redactions in the report have been made for good reason and the Appellant is not entitled to see any confidential information which is legally privileged, which the clients wished to remain confidential and did not waive during their lives.

The Fiscal submitted that no justification had been advanced as to why the Appellant was seeking these documents or was entitled to view them. It was "a fishing exercise". The Fiscal referred the Tribunal to page 10 of the SLCC Guidelines in relation to First Tier Complaint Handling. He also referred the Tribunal to Rule B1.6 of the Law Society of Scotland Practice Rules 2011 and the guidelines to that rule. There was absolutely no suggestion of fraud or an illegal act so there was no question of the Tribunal being able to supersede client confidentiality. Therefore, on the secondary basis, the motion should be dismissed.

During an exchange between the Fiscal and the Tribunal, the Fiscal repeated the offer he had made on a previous occasion to make a copy of the unredacted report available to the Tribunal only, but not the Appellant.

DECISION

The Tribunal carefully considered the Appellant's motion and the submissions made by both parties. It took account of Rule 28 which provides that:

"(1) The Tribunal may, on the application of either the Appellant or any Respondent or on its own initiative require any part to produce any document in their custody or under their control within such period as the Tribunal may determine if it is of the opinion that it is necessary for the proper consideration of the complaint that the document should be made available.

(2) Parties are not obliged by such an order to produce any document which they would be entitled to refuse to produce in proceedings in any court in Scotland."

This Tribunal applies the principles in Hood, Petitioner [2017] CSIH 21 to its own appeals cases. In that case, it was said that the Court should be slow to interfere with the Sub Committee's decision on an evaluative question and should only do so in three main situations.

The first is where the 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 Sub Committee has made a finding for which there is no evidence, or which is contradictory of the evidence. The third is where the 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 Sub Committee could properly reach.

The Tribunal noted that the papers considered by the Sub Committee were listed on the second page of the Sub Committee's determination. These were (1) report; (2) report redacted; (3) email received (solicitor rep) dated 27 March 2020; (4) supplementary report; (5) paper containing comments from Appellant; and (6) email from the Second Respondent's solicitor dated 9 September 2020.

In order to assess the Sub Committee's decision making, the Tribunal could see that it might be necessary to examine the documents listed on the second page of the Sub Committee's determination and considered by it. However, the items listed at 1.2, 1.3 and 1.4 of the Appellant's motion went far beyond this. No justification was advanced by the Appellant for requiring these documents. The Tribunal was not satisfied that these items were necessary for the proper consideration of the complaint as required by Rule 28. Accordingly, parts 1.2, 1.3 and 1.4 of the Appellant's motion were refused.

The Tribunal noted that the unredacted report referred to at part 1.1 of the Appellant's motion had been before the Sub Committee and that the Sub Committee referred to the report in its determination. The Tribunal was of the opinion that production of this report was necessary for the proper consideration of the appeal. The Tribunal noted however that in terms of Rule 28(2), parties were not obliged to produce any document which they would be entitled to refuse to produce in court proceedings in Scotland. The First Respondents claimed that the redactions in the report related to privileged and confidential information.

The Appellant had no way of countering this argument, since the unredacted report had never been provided to him. The Fiscal offered to provide a copy to the Tribunal only. The Tribunal was of the view that it would be inappropriate for it to proceed to hear the substantive appeal on the basis of information which had been given to it but was not disclosed to the Appellant.

However, the Tribunal was of the view that it, as a body independent of the Law Society, should satisfy itself that the redacted material was privileged. Justice should be seen to be done both by the Appellant and the wider public. It therefore accepted the First Respondent's offer to view the unredacted report for this limited purpose only. The Tribunal was satisfied this approach was similar to that in civil proceedings (Narden Services Limited-v-Inverness Retail and Business Park Limited [2008] CSIH 14) and the procedure followed by the First-Tier Tribunal in relation to HMRC cases (The Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009).

At the conclusion of proceedings on 14 September 2021, the Tribunal directed the Fiscal to produce the unredacted report to the Tribunal Office by 17 September 2021. The report was lodged timeously and was considered by the same Tribunal members who sat on 14 September 2021. The Tribunal met again on 23 September 2021.

The Tribunal noted the general proposition that a document is inadmissible if it is privileged. Privilege applies to communications between a solicitor and client made for the purpose of obtaining or giving legal advice. Privilege is not merely a rule of evidence, but a substantive right founded on an important public policy (Morgan Grenfell and Co. Limited-v-Special Commissioners of Income Tax [2001] UKHL 21). The right belongs to the client, not the solicitor. There are limited exceptions to privilege which relate to whether the solicitor was instructed, whether an alleged communication was made at all and whether the alleged communication was made to further a fraudulent or illegal purpose. No statutory exception to privilege applied to Tribunal proceedings. Privilege is not affected by the death of the client.

The Tribunal examined the unredacted report. It was satisfied that all redactions related to communications between the Second Respondent (a solicitor) and his clients, or their attorney, made for the purpose of obtaining or giving legal advice. The Tribunal therefore refused part 1.1 of the Appellant's motion on the basis that the redacted information was privileged.

The Tribunal noted that much of the redacted information was summarised elsewhere in the report, for example, in the submissions made by the Second Respondent's representative. Although the redactions were extensive, the Appellant was aware of much of what was contained therein either from his own personal knowledge or from the unredacted material contained elsewhere in the report.

The redactions in the report are extensive. The Tribunal could see why the Appellant wished to have sight of the unredacted report. However, in complaints by third-parties, privilege issues are likely to arise, and judgements must be made. This case was complicated by the deaths of the clients concerned as they could not be asked to waive privilege. The Tribunal was aware that its decision might make it more difficult for the Appellant to present his case. It might also make the Tribunal's role at any substantive hearing much more difficult as that Tribunal would have to apply the Hood criteria to a decision without knowing all the information that was before the Sub Committee. In these circumstances, it may be impossible for the First Respondent to justify the Sub Committee's decision without the unredacted report. However, these potential issues are for another stage in proceedings and none of these considerations or difficulties were sufficient to override privilege which is a fundamental and absolute right of a client which must be respected by the Tribunal.

The Tribunal refused part 2 of the Appellant's motion for further time to adjust. The Appellant has had ample time to adjust his appeal and has not done so. No new information has arisen which would require adjustment since the motion for production of documents was refused.

Therefore, in conclusion, part 1.1 of the Appellant's motion was refused as the unredacted report contained privileged information. Parts 1.2, 1.3 and 1.4 of the Appellant's motion were refused as these papers were not available to the Sub Committee and were not necessary for the proper consideration of the appeal. As a consequence of the Tribunal's refusal of Part 1 of the Appellant's motion, there was no new information arising requiring a further period of adjustment. Part 2 of the Appellant's motion was therefore also refused.

The Tribunal members who sat on 14 and 23 September 2021 recused themselves from any further involvement in this case. The unredacted report will not be provided to the members sitting at the next preliminary hearing.

The Fiscal moved for expenses. Although the Appellant's motion had been refused, the issue had been an important one and the point involved novel considerations for the Tribunal. It was not persuaded at this stage that expenses for the procedural hearing should be awarded against the Appellant. The Tribunal will be in a better place to determine the appropriate award of

expenses at the conclusion of proceedings. Therefore, all questions of expenses and publicity were reserved meantime.



Kenneth Paterson
Vice Chair