

**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

**ROSALYN MACDONALD, Aghmhor, Station Road,
Watten, Wick**

Appellant

against

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

First Respondents

and

**HILARY A B MACANDREW, Grant Smith Law
Practice, Old Buildings, Balmellie Street, Turriff**

Second Respondent

1. An Appeal dated 20 May 2020 was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42ZA(10) of the Solicitors (Scotland) Act 1980 by Rosalyn MacDonald, Aghmhor, Station Road, Watten, Wick (hereinafter referred to as "the Appellant") against the Determination made by the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the First Respondents") on 16 April 2020 not to uphold a complaint of unsatisfactory professional conduct against Hilary A B Macandrew, Grant Smith Law Practice, Old Bank Buildings, Balmellie Street, Turriff (hereinafter referred to as "the Second Respondent").
2. In accordance with the Rules of the Tribunal, the Appeal was formally intimated upon the First Respondents and the Second Respondent. Answers were lodged for the First Respondents and Second Respondent.
3. Having considered the Appeal and Answers, the Tribunal set the matter down for a virtual procedural hearing on 29 July 2020 and notice thereof was duly served on the parties.

4. At the virtual procedural hearing on 29 July 2020, the Appellant was present and represented herself. The First Respondents were represented by their Fiscal, Elaine Crawford, Solicitor, Edinburgh. The Second Respondent's agent had intimated to the Tribunal Office that although she had lodged Answers, the Second Respondent did not intend to take any further part in proceedings. The Tribunal fixed another virtual procedural hearing for 15 September 2020. Notices of the virtual procedural hearing were served on the parties.
5. At the virtual procedural hearing on 15 September 2020, the Appellant was present and represented herself. The First Respondents were represented by their Fiscal, Elaine Crawford, Solicitor, Edinburgh. The Second Respondent was not present or represented. Prior to this virtual procedural hearing, parties had signed a Joint Minute of Admissions agreeing all of the Appellant's Productions, except Production 31. Parties indicated that no witnesses would be required at the hearing which would proceed by way of submissions. Parties confirmed the hearing could take place remotely. The Tribunal fixed a virtual hearing for 24 November 2020.
6. At the virtual hearing on 24 November 2020, the Appellant was present and represented herself. The First Respondents were represented by their Fiscal, Elaine Crawford, Solicitor, Edinburgh. The Second Respondent was not present or represented. Parties made submissions. The Tribunal confirmed the Determination of the First Respondents.
7. The Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 24 November 2020. The Tribunal having considered the Appeal under Section 42ZA(10) of the Solicitors (Scotland) Act 1980 by Rosalyn MacDonald, Aghmhor, Station Road, Watten, Wick ("the Appellant") against the Determination of the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh ("the First Respondents") dated 16 April 2020 not to uphold a complaint of unsatisfactory professional conduct made by Hilary A B Macandrew, Grant Smith Law Practice, Old Bank Buildings, Balmellie Street, Turriff (hereinafter referred to as "the Second Respondent"); Confirm the Determination of the First Respondent in respect of the complaint; Find the Appellant liable in the expenses of the First Respondents and of the Tribunal, including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of

Session on an agent and client, client paying basis in terms of Chapter 3 of the last published Law Society's Table of Fees for General Business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Appellant and the solicitor against whom the complaint was made.

(signed)

Catherine Hart
Acting Vice Chair

8. 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 and First and Second Respondents by recorded delivery service on 27 JANUARY 2021.

IN THE NAME OF THE TRIBUNAL



Catherine Hart
Acting Vice Chair

NOTE

At the virtual hearing on 24 November 2020, the Tribunal had before it the Appeal, Answers for both Respondents, two Inventories of Productions for the Appellant, an Inventory of Productions for the First Respondents, a List of Authorities for the First Respondents and a Joint Minute of Admissions. By way of the Joint Minute, parties agreed that the Productions lodged by the Appellant were true and accurate copies of the principals with the exception of Production 31.

The appeal related to heads of complaint 12, 21, 25, 28, 34 and 37. The Second Respondent represented the Appellant in relation to family law matters. Complaint 12 related to an alleged failure by the Second Respondent to obtain information about financial assets. Complaints 21 and 34 related to an alleged failure to lodge what the Appellant described as “perjury documents” with the court but charging the Appellant for work which was not done in relation to identifying evidence of perjury. Complaint 25 related to a complaint that the Second Respondent had misled the Appellant by seeking the opinion of a commercial law advocate rather than a family law advocate as advised. Complaints 28 and 37 related to failures to provide terms of business to the Appellant.

SUBMISSIONS FOR THE APPELLANT

The Appellant made submissions based on her grounds of appeal. The appeal and submissions helpfully followed the numbering of the heads of complaint in the documentation.

With reference to complaint 12, the Appellant said she had discussed getting the financial information with the Second Respondent at their first meeting. She referred to emails she sent in 2013 and 2014 displaying her frustration that this financial information had not been obtained. The Second Respondent advised she was going to obtain the information and in 2015 said she had lodged a motion for specification. On 26 March 2015, the Appellant told the Second Respondent the financial information was incomplete. According to the Appellant, the Second Respondent admitted she did not deal with the specification but instead set a proof date. The Second Respondent attended court on the Appellant’s behalf for months but did not deal with the motion for specification. The Appellant said there was no evidence the Second Respondent had ever lodged a motion for specification, and that the correspondence was deliberately misleading. The Appellant raised questions as to why the Second Respondent was again looking for financial information in May 2015. She did not believe the motion was continued several times. The Second Respondent did not progress matters and the Sub Committee was misled regarding when or if the specifications were served. The Appellant was dissatisfied that the

Second Respondent proposed to settle the matter out of court without having complete information. She said the Second Respondent refused to have the proof adjourned. The Appellant said she wanted to adjourn the proof but that did not happen. There was no evidence regarding the conversation the Second Respondent said she had with the Appellant about going ahead with the proof. The Second Respondent told the Appellant she had all the financial information. The Appellant said there was no evidence the banks were slow to reply to the specification.

In conclusion, in relation to complaint 12, the Appellant said the reporter misled the Sub Committee. The Sub Committee failed to obtain evidence of things that happened. There was no evidence a motion for specification of documents was lodged. There was no evidence the Second Respondent was trying to get the bank statements. The Sub Committee did not address why the specifications were not served until three working days before the proof, leaving insufficient time to get the relevant information. According to the Appellant, the report relied heavily on the Appellant agreeing to go ahead with the proof. However, the Appellant did not have any of this information and the Second Respondent never had any intention of getting the financial information. She did not believe the Second Respondent acted in her best interests. The Second Respondent was trying to avoid court. She prepared a schedule of assets despite not knowing the full extent of the assets. She proposed an out of court settlement without knowing the assets.

In relation to complaints 21 and 34, the Appellant explained that she could not agree to the final interlocutor. It was based on errors contained in the Second Respondent's written submissions. A letter was supposed to be lodged with the court but it did not specifically ask for a procedural hearing. The Appellant questioned whether the Second Respondent had lodged the first set of documents. She pointed to apparent conflicts in the report. She believed the Second Respondent delayed lodging the first set of documents until after the interlocutor was issued. She said the interlocutor specifically said nothing was lodged on the Appellant's behalf. She said that according to the date stamp, the two inventories were lodged together. The Appellant said the Second Respondent was still refusing to return her files.

In relation to complaint 25, the Appellant referred the Tribunal to the biography of the advocate the Second Respondent engaged to provide an opinion. She said it was obvious he was a commercial law advocate. She was misled when the Second Respondent told her he was a family law advocate. She did not consent to the engagement of a commercial law advocate. She disagreed with the Second Respondent's view that the opinion was substantial.

In relation to complaints 28 and 37, the Appellant claimed she had never received the Second Respondent's terms of business. She said the letter apparently enclosing the terms of business was sent as an attachment to an email. The Appellant had never seen the purported copy terms of business before. She said that document did exist but that it was "not real". There was no evidence the Appellant ever signed terms of business. She disagreed that there was not a foundation for a complaint if terms of business were sent but not received. She said the document enclosing the terms of business was not genuine.

SUBMISSIONS FOR THE FIRST RESPONDENTS

In relation to complaint 12, the Fiscal said it was clear from the circumstances and the evidence in the report that the matter was not straightforward. The financial information was not forthcoming despite repeated requests. The evidence before the Sub Committee was that the solicitor lodged the motion for specification in February 2015 and the court continued consideration of the motion on a number of occasions to allow parties to disclose information themselves. When that did not happen, the court granted the specification, allowing the Second Respondent to send it to the banks. There was evidence in the Second Respondent's file that she sent the specifications at the start of June. The banks queried the wording. The specifications were required because the other party did not provide the information. There was therefore evidence that there were delays caused by the other party and the banks. The Sub Committee was entitled to come to the conclusion that a motion for specification of documents was lodged and action taken. There is no evidence that the panel was misled. The Appellant did not raise anything to show a lack of evidence before the Sub Committee or that it made the wrong decision based on what was before it.

With reference to complaints 21 and 34, the Fiscal said there was evidence in the report that the solicitor had sent letters and documents to the court on 11 March 2016. Further documents date stamped as received on 24 March 2016 were sent to the court on that same day. The Sheriff issued the interlocutor on the same day. The Sheriff's comment regarding nothing being lodged for the Appellant was clearly meant to refer to the joint minute.

With reference to complaint 25, the Fiscal suggested this was a judgment for the Second Respondent to make and the Sub Committee were correct to accept she had exercised that judgment appropriately. No information before the Sub Committee was incorrect. The Sub Committee accepted what the Second Respondent said regarding the advocate's experience and her knowledge of him.

With reference to complaints 28 and 37, the Fiscal said there was evidence in the Second Respondent's file that terms of business had been sent to the Appellant. The Sub Committee was entitled to come to the conclusion that on the balance of probabilities the letter was sent, whether or not the Appellant received it. One letter was sufficient to cover all matters.

The Fiscal reminded the Tribunal of the tests in Hood. She submitted that none of these tests had been met by the Appellant.

FURTHER SUBMISSIONS FOR THE APPELLANT

The Appellant submitted that if the Second Respondent had lodged the application for specification of documents at the start of proceedings, there would not have been an issue getting the documents. In terms of Hood, she said there was a fundamental error in the Sub Committee's approach. There was a lack of evidence on some points and evidence to the contrary regarding other points found established by the Sub Committee. If she had been given a copy of the terms of business for the original report, she would have been able to supply the true copy. This was therefore an error of approach by the Sub Committee. The Second Respondent specifically said a family law advocate had been engaged. There was no evidence regarding what was before the court. All that is known is that the Sheriff said he did not get anything. The Appellant said she should therefore succeed on the basis of lack of evidence, decisions contrary to the evidence, and fundamental error.

DECISION

The Second Respondent represented the Appellant in relation to family matters. The Appellant complained about the Second Respondent's conduct. Six heads of complaint alleging unsatisfactory professional conduct were relevant for the purposes of this appeal. These were as follows:-

12. Ms MacAndrew and/or Grant Smith Law Practice failed to obtain information about my husband's financial assets despite my repeatedly asking them to do so, my providing them with evidence that he was hiding assets and them informing me this had been done.
21. Ms MacAndrew and/or Grant Smith Law Practice in May 2016 charged me for work that was carried out in relation to identifying my husband's perjury, despite this work not having been done.

25. Ms MacAndrew and/or Grant Smith Law Practice misled me by stating on 13 January 2016 that they had sought the opinion of a family law advocate to assess the prospects of appeal when they had actually appointed a commercial law advocate instead.
28. Ms MacAndrew and/or Grant Smith Law Practice failed to provide me with a copy of their terms and conditions.
34. Ms MacAndrew and/or Grant Smith Law Practice failed to lodge the perjury documents or anything on my behalf for the Joint Minute, which took place in March 2016.
37. Ms MacAndrew and/or Grant Smith Law Practice failed to issue their terms and conditions.

The Sub Committee of the Law Society determined to take no action in respect of any of these complaints.

Unsatisfactory professional conduct is defined 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*". It lies on a spectrum between inadequate professional services and professional misconduct.

Section 42ZA(10) the Solicitors (Scotland) Act 1980 provides that a complainer may, before the expiry of the period of 21 days beginning with the day on which a determination not upholding the conduct complaint is intimated to him, appeal to the Tribunal against the determination and/or direction of the Sub Committee. The complainer appealed to the Tribunal against the decision of the Sub Committee not to find unsatisfactory professional conduct. The Tribunal's powers when considering an Appeal under Section 42ZA(10) are contained within Section 53ZB(2) of the 1980 Act. It provides that the Tribunal may quash the determination being appealed against and make a determination upholding the complaint or it may confirm the determination. If it quashes the determination, there are compensation provisions in Section 53ZB(2)(b).

The Tribunal noted that it should apply the "balance of probabilities" standard of proof to appeals. The Tribunal considered the principles in Hood v Council of the Law Society of Scotland 2017 SC 386 which it has applied in other 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 Tribunal or Sub Committee could properly reach. The ultimate question was what a competent and reputable solicitor ought to have done in the circumstances.

In relation to complaint 12, the Tribunal was satisfied that the Second Respondent had not failed to obtain the financial information as instructed by the Appellant. The Tribunal could see that from the Appellant's perspective, it might have seemed that progress was very slow. However, it is clear that the Second Respondent was attempting to negotiate with the solicitor on the other side. This was appropriate. When negotiations failed to bear fruit, the Second Respondent appropriately lodged a motion for commission and diligence with a specification of documents. The action called in court a number of times and the Sheriff encouraged parties to disclose their financial information. Consideration of the motion was continued to various hearings. Once the application was made, the parties were in the Sheriff's hands. Just because the Appellant wanted the specification earlier did not mean it was in the Second Respondent's power to deliver it. The Tribunal could see this was an enormously frustrating experience for the Appellant and the background was a highly emotional and contentious event. However, this is the reality of litigation. Lots of decisions taken by the court are made without parties' concurrence or even in the face of opposition. The specifications were served and the Second Respondent's actions thereafter were appropriate. The Sub Committee was entitled to take the view it did. The Tribunal was of the view that a competent and reputable solicitor would have acted in the same way.

In relation to complaint 25, the Tribunal noted that the advocate's professional profile online is strongly suggestive of commercial expertise. However, this is not to say that he did not have appropriate family law experience. If the Second Respondent had instructed him before in family matters and judged him to be an appropriate person to provide an opinion, that was a judgment call for her. The Tribunal noted the advocate in question provided the opinion and did not suggest he did not have appropriate experience to do so. The Sub Committee was entitled to draw the conclusions it did. The Second Respondent's conduct was not a departure from the standards of competent and reputable solicitors.

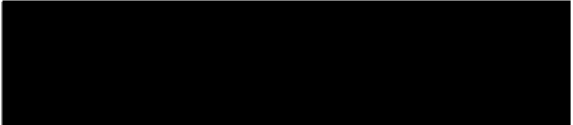
In relation to complaints 21 and 34, the Tribunal considered there was evidence to justify the Sub Committee's conclusion that the Second Respondent had forwarded two sets of documents to the

Sheriff Clerk on 11 and 24 March. The Second Respondent wrote to the Sheriff Clerk on both occasions setting out the Appellant's position. The Appellant's suggestion that the Second Respondent deliberately held off lodging the documents is not evidenced. The Sheriff's comment about the Appellant failing to lodge anything is a reference to her failure to agree a joint minute and not an assertion that the Appellant's "perjury documents" had not been lodged. The Second Respondent acted as a competent and reputable solicitor would have acted. The Sub Committee was entitled to reach its decision on this matter.

In relation to complaints 28 and 37, the Tribunal was satisfied that the Sub Committee was entitled to reach the conclusion that a copy of the Second Respondent's terms of business were sent to the Appellant and that the terms of business were sufficient to cover both cases. The Sub Committee was entitled to find that terms of business were sent to the Appellant. She may not have received them, but she acknowledged that she did not receive all her mail at this time. The Second Respondent's actions in sending the terms of business were those of a competent and reputable solicitor. There was no evidence that the terms of business letter had been created later.

Having carefully considered matters, the Tribunal was of the view that a competent and reputable solicitor could have acted in the same way as the Second Respondent. Therefore, the Tribunal confirmed the Determination of the Sub Committee in respect of the Appellant's complaints.

The Fiscal moved for expenses and the usual order regarding publicity. The Appellant opposed those motions. The Tribunal decided the appropriate award of expenses was one in favour of the First Respondents. Publicity will be given to the decision and that publicity should name the parties but need not name any other person.



Catherine Hart
Acting Vice Chair