

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

INTERLOCUTOR

in Complaint


by

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

against

JOHN DAVID MAIR, 5 Whittingehame
Gardens, 1097 Great Western Road, Glasgow
(hereinafter referred to as "the Respondent")

By Video Conference, 18 September 2024. The Tribunal Repels the Respondent's preliminary pleas relating to time bar, res judicata and public interest; Reserves any preliminary issues relating to the relevancy or specification of the Complaint to the full hearing; Fixes a virtual procedural hearing to take place on 24 October 2024 at 11am; Directs the Complainers to lodge any documentary productions they intend to rely upon at the full hearing by 12 October 2024; Directs the Respondent to provide the Tribunal with a postal address to which they can be contacted; and Reserves the question of expenses for today's hearing.


Beverley Atkinson
Vice Chair

NOTE

This Complaint was set down for virtual preliminary hearing on 18 September 2024 to consider the preliminary pleas raised by the Respondent. The Complainers were represented by their Fiscal, Gavin Whyte, Solicitor, Edinburgh. The Respondent participated in the virtual hearing by way of audio only, on a mobile telephone.

The Fiscal confirmed to the Tribunal that he had disclosed 860 documents to the Respondent by Egress email on 17 September 2024. The Fiscal expected to lodge only 24 of these documents as productions for any full hearing.

The Respondent indicated that they were unable to access Egress on their mobile phone and so had not received the documents sent.

The Tribunal drew the Respondent's attention to its direction requiring them to lodge a written Note of Argument by 23 August 2024. The Respondent explained that they had been unable to respond due to a number of health issues and that, as they had not received the documents they had requested, they had nothing to add to the written submissions in the Answers. The Respondent confirmed to the Tribunal that they were able to proceed with the preliminary hearing and considered that it was in the interests of justice to proceed today. The Respondent invited the Tribunal to deal with the preliminary issues on the basis of the submissions in their Answers and explained that they would answer any questions the Tribunal had as best they could.

The Respondent advised the Tribunal that they now had a new GP and their mental health had improved greatly, to the extent that they considered they were able to deal with these matters today. Whilst they had difficulties with their eyesight and did not have access to the papers themselves, they considered that they had nothing new to add to the submissions made in the Answers. The Respondent's only reservation, in proceeding today, was whether or not it was appropriate for Mr Whyte to appear for the Complainers as the Respondent had made a complaint to the Law Society of Scotland about him.

After an adjournment to consider how best to proceed, the Tribunal indicated to the Respondent that it had identified three preliminary issues within the Answers that it considered it could deal with today. These could be summarised as (1) time bar; (2) res judicata; and (3) whether or not it was in the public interest for the Tribunal to proceed. The Tribunal advised that it considered

that issues of relevancy, specification (or fair notice) were better dealt with at a full hearing. The Respondent was advised that the Tribunal could proceed to deal with these three issues today or, alternatively, all of the preliminary issues could be reserved to be dealt with at the full hearing. The Tribunal expressed concern that the Respondent did not have access to the Complaint and Answers. The Respondent invited the Tribunal to deal with the three preliminary issues it had identified today and emphasised that it was their position that this would help everyone to move on.

The Fiscal indicated he was happy to proceed with the preliminary hearing but wished to take further instructions from the Complainers before for so doing.

After a brief adjournment, the Fiscal confirmed that he was in a position to proceed.

SUBMISSIONS FOR THE RESPONDENT

The Tribunal took the Respondent through the three issues.

Time Bar

The Respondent was asked if they could refer the Tribunal to any case law, legislation or other authority imposing a time limit on a Complaint proceeding before that Tribunal. The Respondent indicated that they were unable to refer to any specific case law or legislation but referred to what they called the “six-year period of prescription” in civil proceedings and time limits for criminal prosecutions. They confirmed that they had nothing to add to their written pleadings.

Res Judicata

The Tribunal invited the Respondent to explain why they considered that the issue of professional misconduct had already been dealt with by another forum or court. The Respondent referred the Tribunal to proceedings that had taken place in the Court of Session, a police investigation and before Sub Committees of the Law Society. They stated that they had asked to be prosecuted in the High Court in relation to these matters. They emphasised that they had been suspended from practice by a Sub Committee of the Law Society. The Respondent confirmed they could not assist the Tribunal any further.

Public Interest

The Tribunal invited the Respondent to address it on any case law, legislation or other authority that stated that the Tribunal was entitled to consider the public interest when deciding on whether it was competent to proceed with the Complaint. The Respondent submitted that no member of the public had complained to the Law Society, the police or to the Court of Session about their conduct.

SUBMISSIONS FOR THE COMPLAINERS

In response, the Fiscal submitted that these proceedings were not criminal but regulatory and there was no specific time limit within which a complaint had to be raised. The Fiscal noted that the Respondent referred to Section 63(2) of the Solicitors (Scotland) Act 1980 in the Answers. However, the Fiscal submitted that that section related to criminal proceedings for offences committed under that Act. He emphasised that this Complaint was not a criminal matter.

In regard to the issue of res judicata, the Fiscal submitted that the Respondent had referred to different forums dealing with different matters. He clarified that the suspension imposed upon the Respondent was imposed by the Client Protection Sub Committee.

With regards to the issue of public interest, the Fiscal confirmed that no member of the public had complained. He drew the Tribunal's attention to the averments of misconduct in the Complaint and submitted it was in the public interest to proceed.

He invited the Tribunal to hold that there was no merit in any of the three issues.

SUPPLEMENTARY SUBMISSIONS FOR THE RESPONDENT

In response, the Respondent insisted that these were criminal proceedings operating under criminal procedure and this was the approach that had been taken in the written pleadings.

DECISION

The Tribunal gave very careful consideration to whether the preliminary hearing should proceed. The hearing was fixed to consider the Respondent's preliminary pleas. The Respondent was adamant that the hearing should proceed and had submitted that it was in the interests of justice

that it should do so. The Respondent was given the opportunity to invite the Tribunal to defer all of the preliminary issues to a full hearing but declined to do so. The Tribunal identified three issues it considered could be dealt with at this hearing and, given the Respondent's submissions, concluded the hearing should proceed.

The first issue discussed was time bar. The Respondent had been emphatic that these proceedings were criminal proceedings and subject to the rules of criminal procedure.

This Tribunal is a body created by statute and operates under the Solicitors (Scotland) Act 1980 and its associated rules. These are regulatory proceedings, not criminal proceedings. There is no time limit provided within the 1980 Act for the bringing of a Complaint to the Tribunal.

In the Answers, reference was made to Section 63 of the 1980 Act. That provision relates to criminal prosecutions for offences under the 1980 Act and not disciplinary proceedings before this Tribunal.


The second issue discussed was that of *res judicata*. There was some overlap of the Respondent's submissions on this point and the issue of time bar. To succeed in this plea the Respondent required to demonstrate that the same "*media concludendi*" (points in controversy) between the same parties had already been concluded in a competent forum. The Respondent had mistakenly conflated these proceedings with a criminal prosecution. The Respondent referred to a police investigation, the proceedings in the Court of Session relating to the appointment of a Judicial Factor, and the suspension of their practising certificate imposed by the Client Protection Sub Committee of the Law Society. None of these met the test for a plea of *res judicata* to succeed.

The final issue discussed was whether it was in the public interest for this Complaint to be allowed to proceed. No authority was produced to support the proposition that this Tribunal was entitled to dismiss the Complaint on that basis. Even if the Tribunal had such authority, which the Tribunal did not accept, the Tribunal did not agree that it was not in the public interest for this Complaint to proceed.

The Tribunal repelled the preliminary pleas based on all three issues.

The Tribunal considered that the remaining preliminary issues relating to relevancy and specification of the Complaint, to include matters of fair notice and disclosure, should be continued for consideration at the full hearing of the Complaint.

Unfortunately, while the Tribunal was deliberating its decision, the Respondent's connection with the hearing failed and could not be re-established. In these circumstances, having not heard submissions on the requirements for the full hearing, the Tribunal considered it appropriate to fix a virtual procedural hearing for parties to make submissions in relation to the likely duration and whether the full hearing should be in person or virtual. A hearing was fixed to take place on 24 October 2024 at 11am. Given the history of proceedings before the Tribunal, it directed the Fiscal to lodge any documentary productions the Complainers intend to rely on at the full hearing by 12 October 2024 and directed the Respondent to provide the Tribunal with a postal address at which they could be contacted. (The Respondent had confirmed a mobile telephone number and email address in the course of this hearing.) The issue of expenses for today's hearing was reserved.



Beverley Atkinson
Vice Chair