

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

DECISION

**in relation to Competency,
Publicity and Expenses**

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

by

**JOHN HARDEY, also known as
Adrian Russo, 73 Stonefield Road,
Blantyre, Glasgow**

Appellant

against

**THE COUNCIL OF THE LAW
SOCIETY of SCOTLAND, 26
Drumsheugh Gardens, Edinburgh
First Respondents**

and

**ALAN COWAN, Solicitor
Advocate, Messrs Simpson &
Marwick, 58 Albany Street,
Edinburgh**

Second Respondent

1. An Appeal was lodged with the Scottish Solicitors' Discipline Tribunal under provisions of Section 42ZA(10) of the Solicitors (Scotland) Act 1980 by John Hardey, 73 Stonefield Road, Blantyre (hereinafter referred to as "the Appellant") against the decision by the Council of the Law Society (hereinafter referred to as "the First Respondent") dated 3rd March 2011, not to uphold a complaint of unsatisfactory professional conduct in respect of Head of Complaint 1A, Head of Complaint 1B and Head of Complaint 6 against Alan Cowan, Solicitor Advocate, Messrs

Simpson & Marwick, 58 Albany Street, Edinburgh (hereinafter referred to as “the Second Respondent”)

2. After hearing evidence and receiving detailed submissions from parties over a number of days, the Tribunal pronounced an interlocutor on 27 September 2012 Quashing the Determination of the Law Society in respect of Head of Complaint 1A and Upholding Head of Complaint 1A and Confirming the Determination of the Law Society in respect of Head of Complaint 1B. The Appellant did not proceed with his Appeal in respect of Head of Complaint 6. The Tribunal made no award of compensation.
3. The decision of the Tribunal of 27 September 2012 was appealed by the Second Respondent to the Court of Session. The Court of Session quashed the decision of the Tribunal insofar as it related to Head of Complaint 1A. The Court of Session Directed that no award of expenses be made against the Appellant or the First Respondent in respect of the Tribunal’s expenses but remitted the question of expenses of the First and Second Respondents in relation to the proceedings before the Discipline Tribunal back to the Tribunal
4. In the time between the Tribunal decision of 27 September 2012 being issued and the date of the Court of Session’s remit of 14 May 2014 back to the Tribunal to consider the question of expenses, one lay member of the Tribunal who had been sitting on the case’s term of appointment had come to an end.
5. The Tribunal accordingly proposed to have a Tribunal constituted of the three members who were involved in the previous decision of the Tribunal plus a new lay member, reconvene to consider the issue of expenses and publicity. The Appellant objected to the competency of such a course of procedure. The Tribunal accordingly invited written submissions from parties with regard to competency.

6. The Tribunal then reconvened on 5 November 2014 comprising two legal members and one lay member who were previously involved in the case and one new lay member. The Appellant was present and represented himself. The Law Society were represented by their fiscal Paul Reid, Solicitor Advocate, Glasgow and Mr Cowan was represented by Mr Dunlop, Senior Counsel.
7. The Tribunal heard submissions from all parties with regard to the competency of it proceeding to deal with the issue of expenses and publicity.
8. After having heard submissions from all parties the Tribunal Repelled the Appellant's Motion that it was not competent for the Tribunal to proceed to deal with expenses and publicity.
9. The Tribunal then heard submissions from all parties in connection with expenses and publicity.
10. The Tribunal accordingly pronounced an Interlocutor in the following terms:-

Edinburgh 5 November 2014. The Tribunal Repel the Appellant's Motion in respect of competency; Find the Appellant John Hardey also known as Adrian Russo, liable in the whole expenses properly incurred by the Law Society and Mr Cowan in relation to this case before the Tribunal, including today, 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 Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; Refuse the Second Respondent's motion for sanction of the cause as suitable for the employment of Senior Counsel and Direct that publicity will be given to the decisions issued in this case, which publicity will include the names of the parties and may, but has no need to include the names of anyone other than the parties, and which

publicity will include a reference to the decision issued by the Court of Session in respect of the case

(signed)

Malcolm McPherson

Vice Chairman

11. 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

IN THE NAME OF THE TRIBUNAL

Malcolm McPherson

Vice Chairman

NOTE

This matter related to a Section 42ZA Appeal lodged by the Appellant with the Tribunal in connection with a determination made by the First Respondent dated 3 March 2011 not to uphold a complaint of unsatisfactory professional conduct against the Second Respondent. The Tribunal comprising two solicitor members and two lay members (hereinafter referred to as “the First Tribunal”) heard evidence and submissions from all parties over a number of days and issued an Interlocutor and written reasoned Findings on 27 September 2012. The First Tribunal quashed the Determination of the Law Society in respect of Head of Complaint 1A and Upheld Head of Complaint 1A making a finding of unsatisfactory professional conduct against Mr Cowan. The First Tribunal confirmed the Determination of the Law Society in respect of Head of Complaint 1B. No award was made in connection with compensation. Before the First Tribunal dealt with expenses and publicity the Second Respondent appealed the decision of the First Tribunal to the Court of Session. The Court of Session found that the First Tribunal had erred in making a finding of unsatisfactory professional conduct against the First Respondent in respect of Head of Complaint 1A and quashed the Tribunal’s decision insofar as it related to Head of Complaint 1A.

On 14 May 2014 the Court of Session remitted the question of expenses relating to the proceedings before the First Tribunal but directed that there be no award of expenses against the Appellant or the First Respondent in respect of the Tribunal’s expenses.

By the time the Court of Session issued the Interlocutor on 14 May 2014, one of the lay members of the First Tribunal was no longer a member of the Tribunal. The Appellant submitted a Motion to the effect that it was not competent for the Tribunal to reconvene with the original three members plus a new member to now consider the issue of expenses and publicity.

The Tribunal asked for a copy of the two Motions referred to in the Court of Session Interlocutor dated 14 May 2014. It was clarified that the wording “remit section (a) of the said Motions” in the Interlocutor of 14 May 2014 was referring to Motions A contained in the form of Motion for the First and Second Respondents.

SUBMISSIONS BY THE APPELLANT IN RELATION TO COMPETENCY

The Appellant lodged two written notes of submission with the Tribunal as detailed below.

Mr Hardey referred to his written submissions, Note of Submissions on Competency found at Appendix A, which are referred to for their whole terms which are held as incorporated herein *brevitatis causa*.

The Appellant advised that he did not have much to add to his written submissions. The Appellant also lodged a synopsis of his submissions which is repeated below.

SYNOPSIS OF APPELLANT'S SUBMISSIONS ON COMPETENCY

Mr Hardey referred to his written submissions, Synopsis on Submission on Competency found at Appendix B, which are referred to for their whole terms which are held as incorporated herein *brevitatis causa*.

The Appellant pointed out that when the First Tribunal issued its decision it asked for submissions on expenses and publicity to be made. The Appellant submitted that this meant that the issue of expenses and publicity had already been crystallised and the same Tribunal would require to deal with these issues. The Appellant pointed out that in terms of statute there would be no right of appeal in respect of a decision that this Tribunal would now make on expenses. The Appellant submitted that this was unfair and led to a loss and deprivation of his right of appeal which would violate the European Convention on Human Rights.

SUBMISSIONS FROM THE FIRST RESPONDENT

Mr Reid referred to his written submissions (as undernoted) in connection with the competency of the proposed way forward being to have a Tribunal constituted of the three remaining members of the First Tribunal plus another new lay member.

Mr Reid emphasised that in terms of Rule 40 of the Tribunal Rules the Tribunal could determine its own procedure. In respect of Rule 53 it was clear that differently constituted Tribunals could be constituted to deal with different parts of a case.

Mr Reid's written submissions:

1. In this matter I have been asked to provide written submissions regarding a proposal by the Discipline Tribunal as to its further procedure in relation to outstanding matters. The composition of the Tribunal which heard the substantive part of this matter has altered. The appointment of a lay member came to an end and he is no longer able to sit in the conclusion of the process. It is proposed that a procedural hearing be fixed before a Tribunal comprising three of the original members and an additional lay member. The reason the Tribunal requires to be composed in this fashion is to address the outstanding issue of expenses and publicity.
2. In my opinion this is a sensible course to follow and I have no objection to what is proposed.
3. The Tribunal is a creature of statute as a consequence of which its constitution and powers rely upon the terms of statute.
4. In this regard I would invite attention to the terms of the Solicitors (Scotland) Act 1980 as amended, in particular Schedule 4 which concerns itself with the constitution procedure and powers of the Tribunal.
5. I would refer to paragraph 5 of the said schedule which provides "the Tribunal shall be deemed to be properly constituted if at least 4 members are present and at least 2 solicitor members are present and at least 2 non-lawyer members are present".
6. In my submission for the Tribunal to be properly constituted there requires to be 4 members of the Tribunal present, 2 of which require to be solicitor members and 2 of which require to be lay members. What the Tribunal

proposes, namely the substitution of a lay member would ensure the Tribunal was properly constituted in accordance with the terms of the Act.

7. The rules of procedure which regulate proceedings before the Tribunal are found in the Scottish Solicitors Discipline Tribunal Rules 2008. In this respect I would refer to the following Rules:-
 - (a) Rule 40(1) which provides that subject to the provisions of the 1980 Act and the 1990 Act and of these Rules, the procedure for dealing with a case including the procedure at any hearing shall be such as the Tribunal may determine.
 - (b) Rule 51 which provides “without prejudice to paragraph 1(b) to schedule 4 to the 1980 Act, if a member of the Tribunal is after the commencement of the hearing absent, the proceedings may be heard by the remaining members of the Tribunal who are present provided that the Tribunal is still properly constituted as provided for in terms of paragraph 5 of schedule 4 to the 1980 Act.
 - (c) Rule 54(3) subject to paragraph 4, the particular Tribunal constituted to deal with any part of a case is not required to deal with all the proceedings relating to that case and accordingly different particular Tribunals may be constituted to deal with different parts of that case.
8. In my submission having regard to the procedural rules of the Tribunal, it is well within their powers to constitute a Tribunal comprising 3 members of the original panel together with an additional lay member thereby complying with the constitutional requirements provided for in terms of the 1980 Act. The proposal to substitute a lay member is within the discretion afforded to the Tribunal in terms of Rule 40.
9. One must consider the purpose behind which the Tribunal is being constituted. This is a matter of some age. It relates to behavior occurring on or about 3rd December 2008 in respect of a court action which commenced in June 2005.

10. The present Appeal by Mr Hardey commenced in or about April 2011. Thereafter during the currency of its existence before the Tribunal, the matter called before the Tribunal for a variety of matters on a number of occasions being 7th July 2011, 10th October 2011, 7th November 2011, 9th January 2012 and 11th June 2012.
11. Eventually a decision was issued by the Tribunal in or about October 2012. Parties were invited to make written submissions regarding the issue of expenses and publicity within a period of 21 days from 1st October 2012. Prior to such submissions being received, an Appeal was marked by Mr Cowan as a consequence of which the process was removed from the Tribunal and thereafter dealt with by the Inner House.
12. The Inner House has concluded its deliberations and found in favour of Mr Cowan as a consequence of which they quashed the decision of the Discipline Tribunal.
13. A Motion was lodged by both Mr Cowan and the Law Society for expenses of the Tribunal process. The court thought it appropriate that the matter be remitted back to the Tribunal for their adjudication.
14. I stand to be corrected by the Clerk to the Tribunal however it may be the case that in the early stages of the Appeal before the Tribunal a differently constituted Tribunal dealt with certain procedural matters. I cannot be categorical in this respect as I do not note the Members of the Tribunal nor have I had sight of their Interlocutors. The same constitution or Tribunal dealt with the evidential aspect of the Appeal.
15. The only issue outstanding is the matter of expenses and publicity. In my submission this is a part of the process which can be dealt with by a differently constituted Tribunal as indicated in Rule 54(3). In particular having regard to the fairly narrow issue which they require to address namely the awarding of expenses and publicity. There is little which can be advanced insofar as publicity is concerned given the terms of the 1980 Act. The only issue of controversy may be the matter of expenses. This also will be of little

complication given the complete failure of the Appeal instigated by Mr Hardey.

16. I refer also to the authority *Michalak –v- General Medical Council, reported 2011 EWHC 2307*. A copy is attached. Although an English Authority and therefore not binding on the Tribunal, it should be afforded a degree of respect.
17. A similar situation arose here. The claimant was a doctor who appeared before a Fitness to Practice Panel. The hearing commenced. After the hearing of evidence a medical member of the Panel became ill and he was unable to resume participation in a subsequent hearing. As a consequence during the course of the hearing, another medical member was substituted so as to return the Panel to the quorate number. It was decided that the substitution was proper and in the interests of justice.
18. The issue of the substitution of the medical member was considered by the court. Membership of the GMC is provided for in terms of statute. The court interpreted the clause concerning composition as not being expressly limited to the appointment of a Panel at the outset of proceedings. The court considered the power was not limited and could in principal be used to appoint Panel Members at any time. Its rationale recognized the interests of practicality and the proper administration of disciplinary proceedings and expressed an opinion that it was of considerable importance that a substitution should be allowed.
19. A similar situation arises here in that a member of the Tribunal after the hearing of evidence has now retired. To discontinue the process or to reconvene a different Tribunal in its entirety would be impracticable and not in accordance with the principals of the proper administration of the process.
20. The court in approving of the substitution had regard to the proper purpose the power of substitution was being exercised for and the necessity that proper procedures should be followed. The parties should be told in advance what the situation is and what is contemplated and why it is considered to be in the

interests of justice to make a substitution so that both parties may make if they so are minded appropriate representations about the exercise of the power.

21. This is the scenario which is envisaged here. Each party to the process before the Discipline Tribunal are being afforded the right to make representations regarding the substitution of a lay member.

22. The approach to be adopted by the Discipline Tribunal in this case is influenced by ensuring that the interests of justice are applied. In my submission having regard to the length of these proceedings, the expense incurred to date, the decision of the Inner House, the limited purpose for which the hearing is being commenced, the language of the 1980 Act in relation to constitution and the Rules of the Discipline Tribunal, it is an entirely appropriate course suggested by the Discipline Tribunal that it be reconvened with the appointment of an additional lay member in lieu of the retired member.

SUBMISSIONS FOR THE SECOND RESPONDENT IN RESPECT OF COMPETENCY

Mr Dunlop asked the Tribunal to reject the Appellant's submissions. The Inner House of the Court of Session had remitted the matter to the Tribunal to deal with expenses. He submitted that it would be extraordinary if the Tribunal was unable to do what was directed by the Court of Session. Mr Dunlop stated that the Appellant's submissions were that the appeal to the Court of Session was not competent at the time it was made but this argument was rejected by the court and the court's decision was binding on the Tribunal. The Interlocutor of the Court of Session dated 19 March 2013 ruled that the appeal was competent. The Inner House had also allowed the Second Respondent's appeal and remitted the matter of expenses to the Tribunal. Mr Dunlop stated that the Court of Session was aware that one of the members of the First Tribunal was no longer a member of the Tribunal when the remit was made. Mr Dunlop submitted that there was nothing in the 1980 Act, the Tribunal Rules or the common law to state that this Tribunal could not now deal with the issue of expenses and publicity. Mr Dunlop referred the Tribunal to Section 54 of the 1980 Act and to Schedule 4 where it is stated that "*the validity of proceedings before the Tribunal is not affected by a vacancy in membership of the Tribunal nor by any defect in the*

appointment of a member". Mr Dunlop pointed out that Tribunal members' tenure was a period of 5 years and accordingly it could be anticipated that a situation such as this might arise. Mr Dunlop submitted that the Tribunal today was properly constituted as there were two legal members and two lay members present. Paragraph 19 of Schedule 4 allowed the Tribunal to award expenses as it saw fit and paragraph 23 applied this to Section 42ZA appeals.

Mr Dunlop referred the Tribunal to Rule 54(1) of the Tribunal Rules where it is stated that the functions conferred by the rules upon the Tribunal may be exercised on behalf of the Tribunal, in relation to a particular case or part of a case by any particular Tribunal constituted in accordance with the Act. Rule 54(3) states that the particular Tribunal constituted to deal with any part of the case is not required to deal with all the proceedings relating to that case and, accordingly, different particular Tribunals may be constituted to deal with different parts of the case. In respect of Rule 54(4) Mr Dunlop submitted that the First Tribunal had completed the decision part of the case as evidenced by the fact that the Court of Session held that an appeal at that stage was competent. This Tribunal was now being asked to determine another aspect of the case in light of the Court of Session's decision.

Mr Dunlop submitted that it was also competent in terms of common law. In the Inner House the substantive hearing in respect of the matter had been dealt with by a bench which was differently constituted than the one that dealt with the issue of expenses. Mr Dunlop also referred the Tribunal to the case of MacLean of Ardgour v-MacLean, 1941 SC 613 where it was held that a successor could be involved in determining expenses.

The Appellant made further submissions in response to Mr Dunlop's submissions. He pointed out that this case was unique in that no appeal had ever been taken in the past where the Tribunal had not completed its consideration of expenses and publicity. He submitted that it was not appropriate in accordance with natural justice to continue with consideration of expenses and publicity at this stage. The Appellant submitted that Mr Dunlop had not addressed the difficulties in connection with the loss of the right of appeal. Mr Dunlop stated that he was going to invite the Tribunal to pronounce an Interlocutor refusing the appeal and making an order on expenses and publicity. It was pointed out by the Tribunal that paragraph 15 of Schedule 4

indicates that every decision of the Tribunal certified by the Clerk should be sent to parties intimating the right of appeal. However in this case there were difficulties given the precise terms of Section 54A(3). Mr Dunlop stated that even if there was no statutory right of appeal Judicial Review would be available and pointed out that the decision on competency could not be governed by whether or not there was a right of appeal.

DECISION IN RESPECT OF COMPETENCY

The Tribunal considered all the detailed submissions very carefully. In this case the First Tribunal had considered the evidence and submissions and had issued their decision in respect of the substantive issues under appeal. It would have been different if the First Tribunal had lost a member in the middle of the evidence or before it had made its decision on the substantive issues. In this case the fact that the Court of Session accepted an appeal at the stage in the proceedings before the Tribunal had completed its decision making in respect of expenses and publicity must suggest that the Tribunal had completed that part of the proceedings and accordingly in terms of Rule 54(3) it is now perfectly competent for this particular Tribunal to deal with another part of the case which relates to expenses and publicity. The Tribunal also note that the Court of Session was aware of the fact that one of the members of the First Tribunal was no longer a member of the Tribunal when matters were remitted back to the Tribunal to deal with expenses.

The Tribunal consider that it would have been preferable if the issue of expenses and publicity had been dealt with at the same time as the decision was made on the substantive issues in relation to the appeal. The First Tribunal however had reached a decision on the substance of the appeal and had issued, what were intended to be, interim findings. The First Tribunal proposed to reconvene to consider the matter of expenses and publicity and submissions had been invited in respect of these matters from all the parties. Before this could happen the interim findings were appealed by the Second Respondent to the Court of Session, who quashed the Tribunal's decision in respect of Head of Complaint 1A and remitted the matter of expenses back to the Tribunal. In these unusual circumstances and given the terms of Section 54A(3) it appears that there is no statutory right of appeal with regard to expenses and publicity.

The Appellant made mention of the European Convention on Human Rights but made no substantive submissions on this.

As the Court of Session has overturned the Tribunal's decision it would not be appropriate for this Tribunal to issue an Interlocutor refusing the appeal.

Although it would have been preferable if the matter had been remitted back to the Tribunal prior to the lay member's appointment expiring (as pointed out in the Clerk's letter), the Tribunal do not consider that it is incompetent at this stage for a differently constituted Tribunal to deal with the issues. It is clearly preferable that the differently constituted Tribunal comprises the original three members plus a new member. The Tribunal accordingly repelled the Appellant's submissions in respect of competency.

In connection with the right of appeal issue, if this Tribunal was not competent to deal with matters then it would not be competent to issue any decision which might generate an appeal to the Court of Session and accordingly any issue with this decision on competency would have to be taken by way of Judicial Review in any event.

SUBMISSIONS WITH REGARD TO EXPENSES AND PUBLICITY

Mr Dunlop made a Motion for expenses of the Second Respondent. Mr Dunlop stated that the standard rule on expenses was that expenses would follow success. He referred to the case of MacLean of Ardgour-v-MacLean 1941 SC, where the court allowed a case to be put out for hearing in order to enable an Interlocutor to be adjusted and for the purpose of disposing of the outstanding question of expenses despite the fact that the present Lord Justice Clerk had succeeded to the office of the previous Lord Justice Clerk who had presided at the trial. Mr Dunlop pointed out that the Appellant had originally made seven complaints to the Law Society about Mr Cowan. The Law Society rejected all these complaints. The Appellant then appealed Head of Complaints 1A, 1B and 6 to the Tribunal but abandoned Head of Complaint 6 during the course of the proceedings. The Tribunal dismissed Head of Complaint 1B but upheld Head of Complaint 1A but this had been quashed by the Court of Session. Accordingly, Mr Cowan had been acquitted of all the complaints. Mr Dunlop submitted that it was the Appellant who had caused the litigation to be answered and

who had insisted on the complaints in which he had been wholly unsuccessful. Mr Dunlop referred the Tribunal to letters from the Appellant dated 9 June and 1 December 2009 where the Appellant threatened Mr Cowan with years of legal ramifications. The complaints were made in a piecemeal way. Mr Dunlop further pointed out that although the Appellant had apologised in the Court of Session with regard to writing those letters, in another letter of 19 November 2013 the Appellant had threatened to raise proceedings to reduce the Inner House Decree. Mr Dunlop submitted that the Appellant was hell bent on pursuing the matter. Mr Dunlop pointed out that at the start of the proceedings before the First Tribunal he asked the Tribunal to dismiss the appeal as irrelevant but the First Tribunal indicated that they could not make a ruling on this until facts had been found. Mr Dunlop pointed out that the First Tribunal in its reasoned decision made no criticism of his own personal conduct. Mr Dunlop submitted that he did not pursue illegitimate lines of enquiry before the First Tribunal. He submitted that as Mr Cowan had been wholly successful there should be an award of expenses made in his favour.

Mr Dunlop then went on to ask the Tribunal to certify the cause as suitable for the employment of Senior Counsel. He pointed out that a finding of unsatisfactory professional conduct was a very serious matter and concerned criticisms of Mr Cowan in relation to his conduct in court. Mr Cowan's reputation was extremely important to him. Mr Dunlop also pointed out that the Appellant was known as John Hardey but was also known as Adrian Russo and asked that any Interlocutor awarding expenses refer to the Appellant by way of both names.

In connection with publicity, Mr Dunlop stated that the decision of the Inner House was already on the Court of Session website and suggested that the Tribunal made an order dismissing the appeals and making an order for expenses and publicity.

SUBMISSIONS BY THE LAW SOCIETY IN RESPECT OF PUBLICITY AND EXPENSES.

Mr Reid stated that he associated himself with Mr Dunlop's comments. He asked the Tribunal to find the Appellant liable in the Law Society expenses. He pointed out that the decision of the Law Society had eventually been upheld in full. The Law Society did not contribute to delay in the process and did not introduce any irrelevant

material. The entire process had been instigated by the Appellant. Mr Reid also stated that he agreed with Mr Dunlop's submissions in respect of publicity.

SUBMISSIONS FOR THE APPELLANT IN RESPECT OF PUBLICITY AND EXPENSES

Mr Hardey referred to his written submissions, Note of Submissions found at Appendix C, which are referred to for their whole terms which are held as incorporated herein *brevitatis causa*.

The Appellant added to his written submissions and advised the Tribunal that the letters written in 2009 should not have been written but that they were set against a background of reciprocal animosity between himself and Mr Cowan. The Appellant pointed out that the Tribunal found that Mr Cowan had let his animosity overflow into his professional life and Mr Hardey quoted from the First Tribunal's decision. He pointed out that this finding was made by the First Tribunal after having seen the parties give evidence under oath. The Appellant submitted that Mr Cowan was not a total victim in the whole process. The Appellant emphasised that the Law Society had made procedural errors in its determination and it was accordingly necessary for the Appellant to appeal to the Tribunal. The Appellant also submitted that he was not the one responsible for four days of evidence. If matters had proceeded by way of submissions they could have been concluded in one day. He referred the Tribunal to Smith and Barton case reference 75/489, where a solicitor who was found guilty of professional misconduct was nonetheless found liable in the expenses due to the fact that it was his own conduct which brought him before the Tribunal. The Appellant submitted that in this case, due to the errors made by the Law Society, he was entitled to bring the appeal. The Appellant also pointed out the fact that Mr Reid despite two letters written to him by the Appellant, was not prepared to make any concession with regard to Ms C's evidence. The Appellant submitted that the matter turned into a character trial of him before the First Tribunal which had rejected any claim that the appeal had been brought by him out of malice.

Mr Dunlop pointed out that the letters written by the Appellant recently showed that he was still intent on taking matters further. Mr Dunlop stated that in connection with the procedural errors by the Law Society, this does not establish that the complaint

was justified. He pointed out that there was no power for the Tribunal to remit the matter to the Law Society and submitted that the Appellant's complaints were not well made. The Inner House had ruled that Mr Cowan's conduct was not such as to warrant any sanction. The Appellant indicated that he had no submissions to make with regard to publicity.

DECISION IN RESPECT OF EXPENSES AND PUBLICITY

The Tribunal after having considered all the submissions made decided that there was no rational in this case for departing from the usual course of awarding expenses following success. Although the First Tribunal had upheld Head of Complaint 1A, this had been overturned by the Court of Session. This meant that Mr Cowan was one hundred percent successful in defending the appeal. The Appellant had brought the appeal to the Tribunal. The First Tribunal required to find facts in order to determine the matter. The Court of Session did not indicate that it was not competent for the First Tribunal to proceed in this way and even if the Tribunal had been in error in doing so was not the fault of either Mr Reid or Mr Dunlop.

In connection with the procedural errors made by the Law Society in their determination. In respect of Head of Complaint 1B, it made no difference to the outcome. In respect of Head of Complaint 1A although the First Tribunal may have found procedural errors, it would be unsafe to rely on the First Tribunal's quashed decision in this regard.

In connection with the case in Smith and Barton referred to by the Appellant, in that case the Tribunal awarded expenses against the Respondent because it considered that it was the Respondent's own conduct that resulted in him ending up before the Tribunal. However in this case, following the Court of Session decision, Mr Cowan has been found not to be at fault in respect of any of the Heads of Complaint. This situation is accordingly distinguishable. The Tribunal accordingly found the Appellant liable in the whole expenses of the Law Society and Mr Cowan in relation to this case before the Tribunal including the expenses of today's hearing. The Tribunal made no finding against the Appellant in relation to the Tribunal's expenses including the Tribunal's expenses in connection with today's proceedings, given the whole circumstances of the case.

In connection with whether or not the case should be sanctioned for the employment of Senior Counsel, the Tribunal considered that the subject matter of the appeal was not particularly complex. The Tribunal also noted that the case concerned unsatisfactory professional conduct and there was accordingly no risk of the Tribunal imposing a sentence that would result in a restriction on Mr Cowan's practising certificate or prevent him operating as a solicitor. Whilst the Tribunal appreciate that the matter will have been very important to Mr Cowan, it was not a difficult case from a legal point of view and accordingly the Tribunal did not consider it appropriate to certify the case as appropriate for the employment of Senior Counsel.

In connection with publicity, in terms of Schedule 4 of the 1980 Act there is an obligation on the Tribunal to give publicity to its decision. It is however very unusual to be in a situation where a decision is being made in respect of publicity of a decision which has been overturned since it was made. In the circumstances the Tribunal ordered that publicity would be given to this decision and the decision of the First Tribunal which would include the names of the parties but would also include reference to the Court of Session decision. This will ensure that anyone looking at the decision of the First Tribunal will be aware that it had been overturned by the Court of Session.

Malcolm McPherson
Vice Chairman

APPENDICES INDEX

APPENDIX A - Note of Submissions on Competency by Mr Hardey

APPENDIX B - Synopsis on Submissions on Competency by Mr Hardey

APPENDIX C - Note of Submissions by Mr Hardey