

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

INTERLOCUTOR

in Complaint to the Scottish Solicitors' Discipline
Tribunal

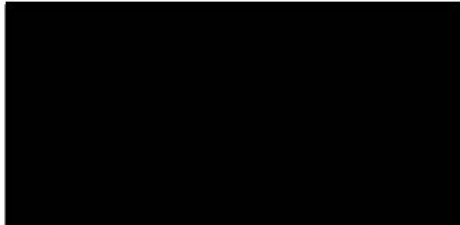
by

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

and

**BENJAMIN NEPHI HANN, Hann & Co. Solicitors, 83
Princes Street, Edinburgh (hereinafter referred to as "the
Respondent")**

By Video Conference, 1 November 2021. The Tribunal, having considered the Respondent's motion to adjourn the hearing fixed for 1 and 2 December 2021, and the Respondent's application for production of a document; Refuses the motion to adjourn the hearing; Directs the Complainers under Rule 40(2) of the Scottish Solicitors' Discipline Tribunal Rules 2008 to disclose to the Respondent within seven days the report produced during its investigation into the Respondent's conduct; Allows the Respondent seven days thereafter to lodge the report if so advised; Reserves all questions of expenses to the conclusion of the case; and Continues the case to the hearing fixed for 1 and 2 December 2021.



**Ben Kemp
Vice Chair**

NOTE

A Complaint dated 23 October 2020 was lodged with the Tribunal. The case called for virtual procedural hearings on 14 January 2021 and 23 March 2021, a virtual preliminary hearing on 25 May 2021, and virtual procedural hearings on 29 June 2021 and 23 July 2021. The matter was set down for a virtual procedural hearing on 1 November 2021 with a hearing in person fixed for 1 and 2 December 2021.

On 26 October 2021, the Respondent sent an email to the Tribunal Office which was copied to the Fiscal for the Complainers. He indicated that he wished to recover a report produced by the Complainers during the investigation into his conduct. This report had previously been disclosed to the Respondent by Egress email but he had not downloaded it and it was no longer available to him through Egress. The Complainers were refusing to provide him with another copy of the report. He asked how he could formally request it through the Tribunal. The Fiscal responded by email on the same date suggesting that the Tribunal considered the Respondent's email as a request for the Law Society to produce a document under Rule 13 of the Scottish Solicitors' Discipline Tribunal Rules 2008 ("the Tribunal's Rules"). The matter could then be argued at the virtual procedural hearing on 1 November 2021. He indicated that the Complainers were opposed to the Respondent's application. The Chair indicated to parties that the Tribunal would deal with the request at the virtual procedural hearing on 1 November 2021 and sought written submissions in advance of the virtual procedural hearing. No written submissions were received from the Respondent.

On 29 October 2021, the Fiscal provided an email to the Tribunal Office with outline submissions. He noted that Rule 13 required production of documents which were recoverable in Scottish court proceedings. He said there had to be relevant pleadings to support the request. The document requested is not before the Tribunal and does not form part of the Complaint. The reasons the Respondent has given for requiring the report do not relate to the Complaint. The reporter's views are not relevant when considering the present Complaint before the Tribunal. It is incumbent upon parties to bring before the Tribunal only relevant matters. The report is not the best evidence. The emails the Respondent refers to are in his possession. The Fiscal noted that the Council will sometimes release copies of documents previously given to a party but in this instance provision of the report would not assist to narrow the issues and would obfuscate the real issue before the Tribunal.

At the virtual procedural hearing on 1 November 2021 the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented himself. The

Tribunal had before it the Complaint, Answers, Joint Minute, Interlocutor and Note of 25 May 2021, one Inventory of Productions for the Complainers and two Inventories of Productions for the Respondent. The virtual procedural hearing had been fixed to ascertain parties' readiness for the hearing. On the last occasion, the Respondent had indicated he intended to obtain a medical report and instruct a representative. The Tribunal also wished to be addressed on whether the hearing or any part of it should be held in private.

The Fiscal confirmed the Complainers did not intend to lead any oral evidence at the hearing. He submitted that the hearing should be held in public. Parts of it should only be held in private to the extent that it was strictly necessary. At present, there is no medical report to support a hearing in private on grounds relating to the Respondent's health.

The Respondent advised that he had arranged to obtain a medical report from Dr. James Harrison. However, it was not available yet. He moved the Tribunal to adjourn the hearing to allow him to obtain the report and get a representative.

The Respondent made an application to recover the report produced during the Reporter's investigation into the Respondent's conduct. He said it was necessary to defend himself against the allegation of professional misconduct. It would also be relevant when considering the expenses of the action. He said he wanted to be able to show why the Complainers had brought the action. He said there were false allegations contained within the report. This was why he had given far more information than was required in the Answers. He needed to be able to refer to the report. Although he had pleaded guilty to a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, he felt he was still having to defend himself against an allegation of stalking under section 39 of the Criminal Justice and Licensing (Scotland) Act 2010. He had previously read the report but had not downloaded it from Egress. He could no longer access it.

Regarding the question of holding the hearing in private, the Respondent acknowledged that the documents he had lodged contained a lot of personal information which he did not necessarily want in the public domain, including matters relating to his health. However, he acknowledged the conviction is already a matter of public record.

The Fiscal opposed the application to produce the document. He referred to the written bullet points he had submitted. He reminded the Tribunal that it was the master of professional misconduct. The report

was “neither here nor there”. The Professional Conduct Sub Committee (PCSC) decision is the basis of the Fiscal’s instruction, not the reporter’s report. Some of the issues which the Respondent wishes to raise can be dealt with by primary evidence which the Respondent can lodge. Other issues are not contained in the report and/or are not referred to in the pleadings. The Answers are already very extensive and the hearing is likely to take considerable time. The Respondent needs to be restricted to his averments. It was his responsibility to download the report.

The Respondent noted that the PCSC decision was based on the report. He said his pleadings dealt with this matter. The Complainers had falsely accused him of stalking. This issue was most relevant to the question of expenses.

DECISION

The Tribunal had careful regard to the papers before it. Applications for recovery of documents are generally dealt with under Rule 13 of the Tribunal’s Rules. The Respondent had not made the application under any particular Rule, although the Fiscal had invited the Tribunal to deal with it as an application under Rule 13.

Rule 13 provides that the Tribunal may, on the application of either the principal Complainer or the Respondent, or on its own initiative, make an order requiring the Respondent, the principal Complainer and any Secondary Complainer 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. The 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. Rule 13 applications are generally utilised for documents which have never been disclosed to the Respondent, or documents which cannot be legitimately accessed in any other way.

The Tribunal was satisfied that the report was adequately identified in the Respondent’s email of 26 October 2021 and that it was in the Complainers’ custody and control. It was their report produced by their reporter. They had previously supplied it to the Respondent. In most cases, it would not be necessary for the proper consideration of a Complaint for an investigative report to be produced to the Tribunal. In some cases, it might even be prejudicial.

“(1) 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.

(2) The Tribunal may issue directions to the parties or to any of them as to how the case is to be dealt with.”

While Rule 13 would usually be the appropriate mechanism for dealing with production of documents which had not been previously disclosed, the Tribunal considered that it would be appropriate and sufficient in the unusual circumstances of this application to issue a direction under Rule 40. The direction was not to produce a document of new, but rather to provide a copy of a document which had already been disclosed. It was appropriate in the interests of ensuring the efficient and fair conduct of these proceedings that the Respondent is permitted access to a document already disclosed to him and which, but presumably for administrative oversight, he would still have access to. There can be no prejudice arising to either party in granting this request, and a risk of potential unfairness to the Respondent if it is not so granted.

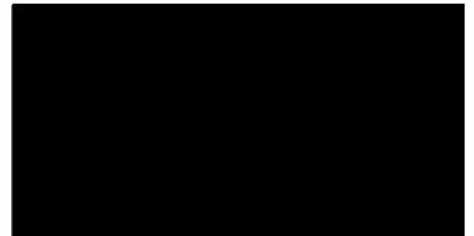
Therefore, the Tribunal made a direction under Rule 40(2) that the Complainers provide a further copy of the report to the Respondent within seven days of the virtual procedural hearing. The Respondent will have seven days thereafter to lodge the report if so advised.

The Tribunal informed the parties of the decision and asked the Fiscal to address it on the Respondent's motion to adjourn the hearing. The Fiscal indicated that the Complainers were in the Tribunal's hands regarding the motion to adjourn. The Tribunal refused the motion. It had to secure the expeditious progress of the case while at the same time ensuring fairness to the Respondent. The Respondent had already been given a significant period to obtain a report and get representation. There was a lack of clarity about the date of the appointment with the medical practitioner, the date the report will be available, and its relevance to these proceedings. The Complaint is over a year old. The Tribunal encouraged the Respondent to give priority to obtaining legal representation and to obtain the report without delay. Once he has done those things it will be for him or his representative to make any application as to further procedure.

Given the limited information currently before the Tribunal, the presumption is that the hearing in person will proceed in public. However, parties can address the Tribunal at the hearing or raise the issue before that if it becomes necessary in the light of further information. The Tribunal is mindful of the privacy of third parties in this case.

POSTSCRIPT

Following the Tribunal's direction under Rule 40(2), which was delivered orally to parties on 1 November 2021, the Respondent indicated by email to the Tribunal office that he had in fact now been able to download the report in question, as previously produced to him by the Complainers. He lodged it with the Tribunal on 3 November 2021 as Production 26 in the Third Inventory of Productions for the Respondent. The Tribunal's direction on this matter is therefore redundant and in practical terms, there is no need for the Complainers to disclose another copy of the report to the Respondent. However, the Tribunal has produced this Interlocutor and Note to record the arguments and decisions made at the virtual procedural hearing and to record its reasons for those decisions for parties' information.



Ben Kemp
Vice Chair