

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

DECISION

**in Appeal under Section 42ZA(9)
of the Solicitors (Scotland) Act
1980 as amended**

by

**ALAN STRAIN, formerly of 16/28
Lagoon Street, Sandgate,
Queensland, 4017, Australia and
now of 147 Baskerville Street,
Brighton, Queensland, 4017,
Australia**

Appellant

against

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

and

**DAVID HAMILTON KIDD, 11
Strathalmond Green, Edinburgh
Second Respondent**

1. An Appeal dated 23 December 2013 was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42ZA(9) of the Solicitors (Scotland) Act 1980 as amended by Alan Strain, then of 16/28 Lagoon Street, Sandgate, Queensland, 4017, Australia and now of 147 Baskerville Street, Brighton, Queensland, 4017, Australia (hereinafter referred to as "the Appellant") against the Determination made by the Council of the Law Society, 26 Drumsheugh Gardens, Edinburgh (hereinafter referred to as "the First Respondents") dated 14 November 2013 upholding a complaint of unsatisfactory conduct made by David Hamilton Kidd, 11 Strathalmond Green, Edinburgh (hereinafter referred to as "the Second Respondent") against the

Appellant and the Direction of the same date made by the First Respondents ordering the Appellant to pay a Fine of £1,000.

2. In accordance with the Rules of the Tribunal, the Appeal was formally intimated to the First and Second Respondents. Answers were lodged for the First Respondents. The Second Respondent did not lodge Answers and has not entered the process.
3. On 3 February 2014 the then solicitor for the Appellant intimated a motion to amend the grounds of appeal and a motion to sist the cause. Having considered the Appeal, Answers and the terms of the motions for the Appellant, the Tribunal set the case down for a procedural hearing on 12 June 2014. In advance of this hearing, the First Respondents lodged a motion asking the Tribunal to ordain the Appellant to find caution in the sum of £5,000 as a condition precedent to the Appeal proceeding further.
4. At the procedural hearing on 12 June 2014, the Appellant was absent but was represented by Counsel, James Hastie, instructed by Campbell Normand, Solicitor, Edinburgh. The First Respondents were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh.
5. The Tribunal heard submissions from both parties in relation to all three motions before it. The Tribunal concluded that in the interest of fairness to the Appellant, the case would be continued to a further procedural hearing on 19 August 2014, with the Appellant given 28 days to amend the grounds of appeal, to make them more focussed and include all matters sought to be relied upon by the Appellant. Thereafter the First Respondents would have 21 days to lodge Answers. The motions to sist and find caution were continued to that date.
6. Amended grounds of Appeal and Answers were lodged with the Tribunal office.
7. On 19 August 2014, the Appellant was absent but was represented by Counsel, James Hastie, instructed by Campbell Normand, Solicitor,

Edinburgh. The First Respondents were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh.

8. The Appellant asked that the amended Appeal be allowed to be received by the Tribunal, and thereafter renewed his motion to sist the cause. The First Respondents opposed the motion to sist and renewed their motion for caution. Additionally, the First Respondents sought an award of expenses for the two hearings that had taken place. Having heard submissions from both parties, the Tribunal allowed the amended Appeal and the Answers thereto to be received, refused both the motion to sist and the motion for caution and reserved the question of expenses to the end of proceedings. The Tribunal ordered that the case be set down for a full hearing of all grounds of appeal to be heard on a date to be afterwards fixed.
9. The Tribunal accordingly pronounced an Interlocutor in the following terms:-

Edinburgh 19 August 2014. The Tribunal in respect of the Appeal under Section 42ZA(9) of the Solicitors (Scotland) Act 1980 as amended by Alan Strain, 147 Baskerville Street, Brighton, Queensland, 4017, Australia (“the Appellant”) against the Council of the Law Society, 26 Drumsheugh Gardens, Edinburgh (“the First Respondents”) and David Hamilton Kidd, 11 Strathalmond Green, Edinburgh (“the Second Respondent”); having heard the Appellant and First Respondents (1) Allow the amended Appeal and Answers to be received; (2) Refuse the motion by the Appellant to sist the cause; (3) Refuse the motion by the First Respondents to ordain the Appellant to find caution; and (4) reserve the question of expenses to date until the end of proceedings.

(signed)

Dorothy Boyd
Vice Chairman

10. 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

Dorothy Boyd
Vice Chairman

NOTE

At the procedural hearing on 12 June 2014, the Tribunal had before it the original Appeal for the Appellant, Answers for the First Respondents, two motions for the Appellant and a motion for the First Respondents. All matters had been intimated to the Second Respondent, who at no stage had entered the process. The Tribunal heard detailed submissions from both parties before deciding to continue the case to a further hearing on 19 August 2014. At that stage in addition to the aforementioned documents the Tribunal had before it an Amended Appeal and Answers thereto. Further submissions were made by both parties before the Tribunal reached its decision.

PROCEDURAL HEARING – 12 JUNE 2014**SUBMISSIONS FOR THE APPELLANT TO AMEND AND SIST**

Mr Hastie indicated to the Tribunal that he would address the motion to amend first, as the motion to sist would only require to be considered if the motion to amend was granted.

The motion to amend related to a new ground of appeal based on a submission of bias. Rule 45(2) of the Tribunal Rules 2008 allows for the possibility of an amendment but does not provide a test for that. Accordingly, Mr Hastie submitted that the question of amendment was within the discretion of the Tribunal. The information on which to base this amended ground of appeal had only been received by the Appellant in an email of 10 January 2014, which was after the Appellant had lodged his Appeal. The Appellant had asked the Law Society for details of the members who had sat on the Sub Committee that had considered his case. These names were not included in the intimation of determination sent to the Appellant. The names of the members of the Sub Committee was the information forwarded to the Appellant on 10 January 2014. One of these names had stood out for the Appellant. This member's failure to disclose an interest leads to a question of bias, which is a clear ground of appeal. If the Appellant had known the makeup of the Committee prior to it considering his case, he would have objected to that particular individual being a member of the Committee.

Following receipt of this information, the Appellant had lodged a conduct complaint against Mr A, the name recognised by the Appellant. This complaint had gone to the Scottish Legal Complaints Commission, who in their determination identified two issues: (1) that Mr A had not declared an interest; and (2) that there were no minutes of the Sub Committee meeting which could help in determining any influence Mr A might have had on the eventual decision.

Mr Hastie submitted that an appearance of bias would be sufficient to result in the quashing of the Sub Committee decision. The proposed amendment was accordingly relevant and had been intimated as soon as the Appellant had the relevant information.

It was submitted that the motion to sist was being made to allow the conduct complaint against Mr A to be investigated prior to this Appeal being dealt with.

SUBMISSIONS IN RESPONSE BY FIRST RESPONDENTS

Mr Knight opposed the motion to amend. It was his submission that the proposed amendment was *prima facie* irrelevant. He said that the Appellant conceded in his motion that it was not known what influence Mr A had had on the eventual determination and so it was impossible to see how the Appellant could advance a ground of appeal that said the decision had been tainted by Mr A's involvement.

Mr Knight indicated that he had carried out some preliminary investigation that had indicated that Mr A had limited knowledge of Mr Strain. He submitted that the Professional Conduct Sub Committee schedule forwarded to the Appellant amounted to minutes. If a member declares an interest at the meeting then that would be noted in the schedule. Mr Knight had ascertained that there had been an informal discussion between Mr A and the convenor of the Sub Committee prior to the meeting regarding Mr A's limited knowledge of the Appellant.

Additionally, the Fiscal opposed the motion to sist. He submitted that even if the amendment was allowed, there would be no benefit to be gained by sisting the case as the conduct complaint against Mr A had been suspended by the Law Society, with the Scottish Legal Complaints Commission's approval, until the conclusion of this Appeal.

The Tribunal asked Mr Hastie to clarify exactly where the conflict of interest on the part of Mr A lay. In response, Mr Hastie indicated that there was a change in the relationship between Mr A and the Appellant after the Appellant had had to complain to Mr A about the standard of representation of a client that the Appellant had referred to Mr A. He suggested that the Sub Committee's decision was so different to the reporter's recommendation to the Sub Committee that the Appellant was concerned regarding the possible influence of Mr A.

It was further submitted that the schedule referred to by the Fiscal did not amount to minutes.

In response, Mr Knight suggested that the information being put forward by Mr Hastie was now new information but even so that did not change the Fiscal's primary position that the Appellant was unable to show that Mr A had had any influence on the Sub Committee decision.

MOTION FOR CAUTION

SUBMISSIONS BY THE FIRST RESPONDENTS

Mr Knight explained that his motion was based on two elements. Firstly, the current grounds of appeal were irrelevant and do not disclose a valid ground of appeal. There was no suggestion of an error of law or that the Committee had failed to take some fact into account or had given some fact too much weight. Nothing in the Appeal suggested that no reasonable Committee could have reached the decision that the Sub Committee had reached. The grounds were incoherent and unfocussed. Secondly, the Appellant now resided in Australia and the Society were faced with the enforcement of a potential award of expenses on the other side of the world. He referred to the case of Brown-v-The Council of the Law Society of Scotland and William Renfrew which he suggested was on all fours with this case.

SUBMISSIONS FOR THE APPELLANT

In response, Mr Hastie suggested that the test for a motion for caution was impecuniosity. No such suggestion had been made by the First Respondents here. He

submitted that there was a Treaty between the United Kingdom and Australia which allowed for the enforcement of court judgments. Although, he conceded a Tribunal might not be included in the definition of court for this purpose. He submitted that potentially this was the wrong motion, but even a motion to Sist a Mandatory was inappropriate as the Appellant owns heritable property in Scotland.

Additionally, he argued that the un-amended grounds of appeal disclosed two relevant matters; that the Sub Committee had preferred the evidence of one individual rather than others without giving reasons why and the Sub Committee had not taken into account information regarding the Appellant's state of knowledge at the time the tender was prepared.

It was further submitted that, if the Tribunal were to allow the amendment, then that would be a further relevant ground of appeal.

DECISION

The Tribunal considered the motion to amend first. Rule 45(2) of the 2008 Tribunal Rules clearly gave the Tribunal power to allow amendment of the grounds of appeal. The proposed amendment raised issues of apparent, if not actual, bias. There appeared to be inconsistencies in the paperwork before the Tribunal which the Tribunal felt should bear further examination. The information which founded this ground of appeal was not received by the Appellant until after the time limit for marking his appeal had expired.

In these circumstances, fairness dictated that the Appellant should be allowed to amend his Appeal to put forward this additional ground. It appeared to the Tribunal that what was said before it today was more detailed than what had been included in the original motion. Additionally, whilst the original grounds of appeal did appear to include relevant matters, these were not clearly stated. The Tribunal took the view that it was appropriate to allow the Appellant an opportunity to amend his grounds of appeal to make them clear, focussed and complete.

The motions to sist and find caution were very much linked to the grounds of appeal. It appeared appropriate that the fair course of action was to continue the case to a

further procedural hearing to allow the Appellant to amend his grounds of appeal and the First Respondents to answer these new grounds. At that stage, if the parties wished to renew their motions then the Tribunal would consider the motions to sist and find caution. Accordingly, the case was continued to a further procedural hearing on 19 August 2014.

PROCEDURAL HEARING – 19 AUGUST 2014

When the case called on the above date the Tribunal had all of the documents referred to above together with amended grounds of appeal and answers thereto.

MOTIONS TO AMEND AND SIST SUBMISSIONS FOR THE APPELLANT

Mr Hastie asked the Tribunal to allow the amended Appeal to be received.

Thereafter, he renewed his motion to sist the case pending the investigation of the conduct complaint against Mr A. He suggested that the previous decision by the Law Society to suspend the investigation pending the outcome of this Appeal was taken in the belief that the investigation could not be completed before the full hearing of the Appeal.

The Law Society, he submitted, was obliged to investigate the complaint, regardless of the Appeal. The complaint against Mr A clearly related to the issue of bias. The decision of this Tribunal would not affect the Law Society investigation, but the outcome of the Law Society investigation could affect the Tribunal.

He submitted that the Law Society were in a position to investigate the allegation of bias. Without minutes for the meeting, the Appellant could not do that.

Mr Hastie lodged with the Tribunal copies of the Scottish Legal Complaints Commission determination which he said clearly stated that no declaration of interest had been made by Mr A and yet at the last hearing Mr Knight had indicated that there had been a discussion between Mr A and the Chairman of the Committee before the meeting. Mr Hastie went on to say that the amended grounds of appeal made

reference to this suggested informal discussion but in his Answers Mr Knight appeared to have denied that. Mr Hastie submitted that the Appellant was not in a position to investigate this allegation as part of the appeal process.

In response to a question from the Chairman, Mr Hastie conceded that the agents for the Appellant could precognose the potential witnesses. He conceded that they had not considered this possibility as the members of the Sub Committee were not obliged to give a statement to the Appellant's agents.

Mr Hastie submitted that he had sufficient information to advance a claim of apparent bias. What was stated in the amended grounds of appeal was enough to argue that a reasonable person would consider that there had been apparent bias.

SUBMISSIONS FOR THE FIRST RESPONDENTS RE AMENDMENT AND SIST

Mr Knight opposed the motion to sist. He confirmed that the outstanding complaint against Mr A had been suspended pending the outcome of this Appeal. He submitted that the Appellant was trying to engage in a fishing exercise to bolster his Appeal.

It was further submitted that the ground of appeal relating to bias was still irrelevant. He said the onus of leading evidence to support the Appeal was upon the Appellant. He suggested that the Appellant's position regarding the allegation of bias was somewhat fluid, where the Appellant had started with a proposition that Mr A knew him and this proposition had grown into a whole host of allegations against Mr A.

In answer to a question from the Chairman, Mr Knight conceded that there was an apparent inconsistency in the paperwork before the Tribunal as to whether or not there had been a declaration by Mr A. Mr Knight said he was not in a position to state definitively whether or not Mr A had had a conversation with anyone prior to the Sub Committee meeting. He himself wanted to speak to Mr A with regard to this issue.

Mr Knight submitted that the Appellant still did not have a relevant or stateable ground of appeal regarding bias.

The Fiscal asked what the Appellant's motion would be if the motion to sist was refused.

In response, Mr Hastie suggested he could advance a case of apparent bias on the basis of what was in the amended Appeal. The only evidence required would come from Mr Strain himself. On the basis that the Fiscal's Answers simply said "*quoad ultra denied*" Mr Hastie could not see what evidence the First Respondents could lead.

It was Mr Hastie's position that if the motion to sist was refused he would ask the Tribunal to fix a full hearing to consider the grounds of appeal numbered 2 to 6 as they did not require evidence to be led. Only if they were refused would it be necessary to fix a hearing to hear evidence and consider ground 1.

The Fiscal submitted that it would not be appropriate to have two hearings and it was far more appropriate to have one hearing to consider all matters.

CAUTION

SUBMISSIONS FOR THE FIRST RESPONDENTS

Mr Knight renewed his motion for the Tribunal to order the Appellant to find caution. He conceded that he could no longer suggest that there were no *prima facie* grounds of appeal. He accepted that the Appeal as amended was now stateable.

He submitted that the First Respondents were faced with the prospect of enforcing an award of expenses in Australia. No proof had been produced that Mr Strain owns heritable property in Scotland. The Appellant had asked the Tribunal to have a split hearing in order to save him the cost of attending.

Mr Knight conceded that there was a difference between this case and the case of Brown that he had previously referred to in that the Appellant in that case had stated that he had no money at all.

SUBMISSIONS FOR THE APPELLANT RE CAUTION

Mr Hastie opposed the motion for caution. He emphasised to the Tribunal that no suggestion had been made that the Appellant was impecunious. He indicated that the Appellant is employed as a solicitor in Brisbane and it was Mr Hastie's information that the Appellant owns heritable property in Scotland.

The Fiscal for the First Respondents then moved the Tribunal to grant an award of expenses for the two hearings held to date against the Appellant on the basis that it was only now that the Appellant had stateable grounds of appeal.

That motion was opposed by Mr Hastie who suggested that expenses should be reserved to the end of the case. He submitted that the allegation of apparent bias arose after the marking of the Appeal and the Appellant could not have included that motion at an earlier stage.

DECISION

The Tribunal took the view that the allegation of apparent bias presented a relevant and stateable ground of appeal. The necessary information to include such a ground of appeal had not been available to the Appellant until after the original appeal had been lodged. Fairness dictated that the Appellant should be allowed to include this new ground of appeal. The other grounds in the amended grounds of appeal that had been lodged were substantially what had been included in the original appeal, only now they were clearly stated and focussed in their terms. The Tribunal concluded that it was appropriate in all of the circumstances to allow the amended grounds of appeal to be received and so also the amended Answers thereto.

With regard to the Appellant's second motion, it appeared he was asking the Tribunal to sist this Appeal to allow the Law Society to investigate a conduct complaint that was currently suspended pending the outcome of this Appeal. The Tribunal has no power to compel the Law Society to proceed with the other outstanding complaint. It was quite wrong to suggest that the Appellant could not investigate his allegations of bias. The Appellant's agents could easily have attempted to precognose the relevant witnesses.

In all of the circumstances, it did not appear appropriate to the Tribunal to sist the Appeal and so this motion was refused.

The motion for caution for the First Respondents was now based solely on the ground that the Appellant was resident in Australia and that the Law Society was faced with the prospect of enforcing any award of expenses there.

The Fiscal had suggested that his case was on all fours with the case of James Brown-v-The Council of the Law Society of Scotland and William Renfrew. Certainly that case was authority for the proposition that caution could be ordered in Tribunal proceedings. Thereafter, the Tribunal took the view that there was no similarity to this case at all. The Fiscal had not suggested that the Appellant was impecunious. He had conceded that the grounds of appeal were stateable.

Furthermore, the Fiscal had not suggested that an award of expenses would not be enforceable in Australia if need be.

Therefore, in all of the circumstances, the Tribunal concluded that an order for caution was not appropriate at this time.

Lastly, the Tribunal considered the Fiscal's motion for expenses. The main import of the amended grounds of appeal was to include the new ground of apparent bias. This ground could not have been included in the original grounds of appeal. The remaining grounds in the amended appeal were substantially what was in the original appeal, simply rephrased in a clearer and more focussed manner.

Having regard to all of the circumstances, the Tribunal concluded that it would be premature to consider the question of expenses at this stage and ordered that the question of expenses be reserved to the conclusion of the case.

Having dealt with the above matters, the Tribunal then considered what further procedure would be appropriate. It could see no logical reason for having a two stage hearing. It considered that such an approach could introduce unnecessary difficulties and ultimately lead to greater not less expense. The Tribunal took the view that the sensible course of action was to fix a full hearing to consider all issues together.

Accordingly the Appeal was continued to a full hearing to consider all grounds of appeal, on a date to be afterwards fixed.

Dorothy Boyd
Vice Chairman