

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

INTERLOCUTOR

in Section 42ZA Appeal

by

PETER STEWART, 30 Stewart Crescent, Thrumster  
(hereinafter referred to as "the Appellant")


against

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

and

GARY WEBSTER, Solicitor, Ledingham Chalmers  
LLP, Kintail House, Beechwood Business Park,  
Inverness (hereinafter referred to as "the Second  
Respondent")

By Video Conference, 28 April 2021. The Tribunal, having considered the First Respondent's preliminary plea that the appeal should be dismissed on the basis that it discloses no *prima facie* basis for any appeal, and is irrelevant *et separatim* lacking in specification; Uphold the First Respondent's preliminary plea; Dismiss the Appeal; Find the Appellant liable in the expenses of the First Respondent 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 Three 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, the First Respondent and the Second Respondent.

  
**Kenneth Paterson**  
**Vice Chair**

**NOTE**

The Appellant was formerly a client of the Second Respondent's firm. A dispute arose between the Appellant and the firm regarding fees. In due course, the firm obtained an inhibition over the Appellant's property. Later, the firm came to represent clients who wished to buy the Appellant's property. The Appellant complained to the Scottish Legal Complaints Commission (SLCC) about the actions of the Second Respondent. The complaint which was accepted by the SLCC and passed to the Law Society for investigation as a conduct complaint was as follows:

*"I, Mr Peter Stewart, wish to complain about Mr Gary Webster of Macleod & MacCallum Limited and/or Macleod and MacCallum Limited who acted for the purchaser between, 12 February 2019 and 8 March 2019 in the sale of my property "Stonecroft", in that:*

*3. Mr Gary Webster and/or Macleod & MacCallum Limited acted in a potential conflict of interest situation between 12 February 2019 and 8 March 2019 in that, during this period they acted for a prospective purchaser despite knowing that the firm had an inhibition in place over me."*

The Law Society's Reporter recommended no action. A complete report was provided to the Sub Committee but only a redacted copy was given to the Appellant and later lodged with the Tribunal. The redactions related to the contents of the prospective purchasers' file which was held by the firm.

The Sub Committee made no finding of unsatisfactory professional conduct against the Second Respondent. 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. The Reporter and the Sub Committee were both of the view that no solicitor client relationship was established until 8 March 2019 and therefore the Second Respondent did not act for the prospective purchasers between the dates specified in the complaint. There was therefore insufficient factual basis to support the complaint as no conflict arose. The Appellant appealed timeously against the Sub Committee's decision under section 42ZA(10) of the Solicitors (Scotland) Act 1980 in accordance with the Tribunal's Procedure Rules 2008.

The Tribunal operates a system of written pleadings in appeals cases whereby the Appellant lodges grounds of appeal and the Respondents have an opportunity to lodge Answers to that Appeal. In this case, only the First Respondent lodged Answers. The Second Respondent did not enter proceedings. The First Respondent's Answers contained a preliminary plea which was in the following terms:

*"The Appellant's grounds of appeal disclosing no prima facie basis for any Appeal, and being irrelevant et separatim lacking in specification, the Appeal should be dismissed."*

A virtual procedural hearing was set down for 20 January 2021. This was adjourned on the Appellant's motion to allow him to obtain legal representation and prepare his case. A virtual procedural hearing was set down for 23 February 2021.

At the virtual procedural hearing on 23 February 2021, the Appellant was present and represented himself. The First Respondent was represented by its Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Second Respondent attended as an observer. The Fiscal moved the Tribunal to fix a virtual preliminary hearing to deal with the preliminary plea. In support of the plea, he produced a note which had been intimated to the Appellant and lodged with the Tribunal Office on 22 February 2021. The Appellant indicated he wished to instruct a legal representative. The Tribunal set a virtual preliminary hearing for 22 April 2021. This was adjourned on the Appellant's motion to 28 April 2021.

At the virtual preliminary hearing on 28 April 2021, the Appellant was present and represented himself. The First Respondent was represented by its Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Second Respondent attended as an observer. The First Respondent having no objection, the Tribunal received additional documents lodged by the Appellant after the last day set down for lodging documents. The Tribunal noted that the Appellant had sought and been granted at various stages of this appeal more time to obtain legal representation. He indicated that he had been unable to secure representation for the preliminary hearing and therefore appeared on his own behalf. At the preliminary hearing, the Appellant did not seek another adjournment to make further attempts to get representation or to amend his pleadings to meet the criticisms made in the First Respondent's note which was lodged and intimated on 22 February 2021. The Tribunal therefore proceeded with the preliminary hearing.

At the virtual preliminary hearing, the Tribunal had before it:

1. The Appeal dated 16 October 2020 which was accompanied by –
  - (a) A letter dated 28 October 2020 from the Clerk to the Sub Committee to the Appellant,
  - (b) The Sub Committee Determination dated 24 September 2020,
  - (c) Emails dated 13 February 2019 between the Appellant and his solicitor,
  - (d) Emails dated 27 February 2019 to 7 March 2019 between the Second Respondent and the Appellant's solicitor,
  - (e) Emails between the Appellant, his solicitor and another director of Macleod & McCallum, one of which was dated 14 October 2019,
  - (f) A draft Discharge,
  - (g) A letter dated 27 July 2020 from Inksters to the Appellant,
  - (h) An undated letter from the Appellant to the SLCC.
2. Documents submitted by the Appellant on 24 November 2020 which comprised of –
  - (a) A letter dated 20 July 2020 from the Law Society to the Appellant,
  - (b) The Law Society report dated 20 July 2020 (which contained redactions),
  - (c) A letter dated 7 September 2020 from the Law Society to the Appellant,
  - (d) The Law Society supplementary report dated 7 September 2020.
3. Answers for the First Respondent.
4. A note prepared for the First Respondent in support of its preliminary plea.
5. Documents submitted by the Appellant on 26 April 2021. Documents 1-6 had been previously lodged by parties. Document 7 was an invoice from MacLeod & McCallum dated 1 May 2015. Document 8 was an agreement relating to a wind farm. Document 9 was a timeline.
6. A note prepared by the Appellant in support of his appeal.
7. A List of Authorities for the First Respondent.
8. The Tribunal's decision of 20 August 2020 in the Law Society of Scotland-v-Mark Thorley lodged by the Appellant.

The Tribunal considered whether it could proceed with the preliminary hearing with access only to the redacted report, when the Sub Committee had been provided with an unredacted copy. The First Respondent's Fiscal indicated that the redactions were made to protect the duty of confidentiality owed by the Second Respondent to the prospective purchasers. However, as a result of that decision, the Sub Committee had more information than was made available to the Appellant and the Tribunal. The

Appellant had not taken steps to challenge the Law Society's decision on the redacted report or applied to the Tribunal or the Court for an order for production of an unredacted report. The Tribunal noted that it must read the Appellant's grounds of appeal at this stage at their highest. It was content therefore to proceed to deal with the preliminary plea with reference being made to the redacted report. However, this issue may have had to be further explored and resolved had the matter proceeded to a full hearing.

## **SUBMISSIONS FOR THE FIRST RESPONDENT**

The Fiscal submitted that the appeal should not proceed to a full hearing as it was not sufficiently relevant and specific to give the First Respondent fair notice of the grounds of appeal. He noted his oral submissions would not follow the structure of his written note.

### **Party Litigants**

In the Fiscal's submission, all parties must adhere to the basic rules of pleadings. They must be relevant and specific. This is an issue of fair notice and natural justice. The Tribunal ought not to give the Appellant in the present case significant leeway because he represented himself. Reference was made to Aslam-v-Royal Bank of Scotland [2018] CSIH 47 and Barton-v-Wright Hassall LLP [2018] 1WLR 119.

### **Fair Notice**

With reference to Morrison's Associated Company Limited-v-James Rome and Sons Limited 1964 SC 160, the Fiscal said it was a fundamental rule of pleading that a party is not entitled to establish a case against his opponent of which the other has not received fair notice upon record. As is noted in that case, these are not mere technical rules, since their disregard would tend to create injustice.

### **Specification**

The object of the appeal must be the full statement of facts and grounds of appeal. The Fiscal referred to paragraphs 9.27 and 9.29 in MacPhail's "Sheriff Court Practice". He noted the Tribunal's approach in appeals cases which is to consider them against the framework set out in Hood, Petitioner 2017 SCLR 799 at paragraph 17. The Tribunal can only examine the single conduct issue which was before the Sub Committee. As a result, it cannot look at the actions of MacLeod & McCallum. It can only have regard to the conduct of the Second Respondent occurring between 12 February 2019 and 8 March

2019. It can only scrutinise any conflict of interest arising due to the presence of the inhibition. In general, the Fiscal said the appeal failed to link the Appellant's dissatisfaction with the decision to the grounds for appellate review in Hood. He went on to discuss in more detail each paragraph of the appeal.

With reference to paragraph 1, the Fiscal noted the appeal claimed that the Sub Committee ignored all evidence and then says it did not pay sufficient attention to the email evidence. The paragraph is also insufficiently specific. The Appellant refers to "evidence" and "emails" but does not specify what these are. The Appellant should set out what evidence was wrongly considered and what finding in fact should be altered or substituted.

The Fiscal said paragraph 2 of the appeal revealed a misunderstanding of the rules of the Reporter and the Sub Committee as the report contained only recommendations and it is the Sub Committee that made the decision. The appeal does not refer to specific paragraphs of the decision which support the Appellant's claim that the Sub Committee failed to consider the issues itself. Paragraph 2 contains no reference to the Sub Committee failing to properly consider the allegation of conflict of interest.

Paragraph 3 asserts that the Second Respondent acted for the prospective purchasers "by his own admission" and refers to a copy document attached. However, there is no specification or notice of the document he is relying upon or any explanation of how the evidence supports his position.

Paragraph 4 refers to the inhibition as "questionable". This was not part of the complaint. Criticism of the firm is not a matter for the Tribunal. The Appellant failed to identify and describe the nature of the conflict. Even if a conflict or potential conflict existed, he does not explain why the Second Respondent is guilty of unsatisfactory professional conduct. Reasons explaining how the Second Respondent's conduct fell short are necessary.

Paragraph 5 notes that a copy of a document is attached but does not specify what this is. The whole paragraph refers to the actions of the firm which are not a matter for this Tribunal. No facts or evidence are set out to support the assertion that the Second Respondent or the firm misled the court.

Paragraph 6 refers to correspondence between the Second Respondent and the Appellant's solicitor. However, no explanation is given as to why the Appellant's solicitor's understanding of the situation

is relevant to the conduct of the solicitor. The issue is not properly specified. The appeal fails to demonstrate how the Law Society failed to consider the email or give it weight.

Paragraph 7 makes reference to a letter but no date is specified. Over 40 pages of documents were submitted with the appeal. The First Respondent should not have to guess to which one it refers.

Paragraph 8 is directed at the firm. The Tribunal cannot consider its actions. Specific averments against the Second Respondent are required for the appeal to progress. The Appellant says the Second Respondent dispensed with the normal practice of a solicitor but does not say how he departed from those standards.

### **Relevancy**

The Fiscal referred to paragraph 9.32 of MacPhail's "Sheriff Court Practice". He noted that for the First Respondent to succeed on this ground, the appeal must be so unfounded that the Appellant cannot win even if everything in the appeal is proved.

The Fiscal said the appeal could be said to raise six issues and he described these as follows: "rubber stamping" of the report; failure to consider all evidence; alleged improper inhibition; the Second Respondent acting for purchasers; conflict of interest; the Firm forcing the Appellant to do something.

With regard to "rubber stamping the report", the Fiscal noted that the Sub Committee is entitled to agree with the Reporter. The appeal does not say why they cannot agree. It does not say the Reporter's recommendations were wrong in law. His criticisms do not fall within the grounds in Hood Petitioner. The Appellant should have made reference to particular paragraphs in the decision to demonstrate it did not consider the complaint before it. Given the length and content of the Sub Committee's decision, the Fiscal submitted it was clear that it did consider the issues and did not simply agree with the Reporter.

In relation to a failure to consider all the evidence, the Fiscal said the decision explains why it took the view the Second Respondent was not acting for the purchasers. It summarises both parties' positions and draws its own conclusions. The appeal does not say that decision was unreasonable or based on a fundamental error. Without specific criticism of the decision, the case cannot proceed. The appeal does not say what ought to have been considered.

According to the Fiscal, the question regarding the propriety of the inhibition is wholly irrelevant. It was not before the Sub Committee. The question is whether the Second Respondent acted in a conflict of interest situation. The Tribunal must focus on the complaint made not potential grievances which were not expressed (Law Society of Scotland v Scottish Legal Complaints commission 2010 SCLR 781).

The Fiscal said that the Appellant did not set out how the solicitor client relationship was formed or how such relationships are constituted. Without making averments on this, the Appellant cannot criticise the Sub Committee.

Even if there was a solicitor client relationship, the Appellant must make sufficient averments regarding the alleged conflict of interest. He does not set out what the conflict was. He does not say who was disadvantaged. He does not declare the private information known to the Second Respondent which was not known to the prospective purchasers. The decree and inhibition were matters of public record. If there is a potential conflict of interest between the firm and its client, then their interests aligned. The purchasers wanted to buy the property and the firm wanted money.

The Sub Committee and the Tribunal cannot consider whether the Appellant was “forced” to do something. This was not part of the original complaint. Even if the Tribunal links the actions of MacLeod and MacCallum to the Second Respondent, a contract could not be forced on the Appellant.

### **SUBMISSIONS FOR THE APPELLANT**

The Appellant made submissions which were based on his written note submitted in advance of the preliminary hearing and which the Tribunal members had read in advance of the preliminary hearing. He noted the Law Society report had been heavily redacted and this had made it “nigh impossible” to respond to the Sub Committee decision.

In relation to paragraph 1 of his appeal, the Appellant disputed the Sub Committee’s finding that the purchasers were not clients. He described the rules and guidance on conflict of interest and said it was clear there was a conflict in this case.



Regarding paragraph 2, the Appellant said the Sub Committee did not consider any of the further evidence submitted to it. The Appellant referred the Tribunal in particular to the letter dated 27 July 2020 from Inksters to the Appellant.

In relation to paragraph 3, the Appellant drew the Tribunal's attention to emails and correspondence from his solicitor which refers to their understanding that the Second Respondent was instructed by the purchasers and were therefore clients. He said this supported his claim that there was a solicitor client relationship on 12 February 2019 "well before the conflict over the inhibition was settled".

Regarding paragraph 4, the Appellant said his characterisation of the inhibition was relevant because it was his position he was never responsible for the debt. He referred the Tribunal to the firm's invoice which noted the fees were to be payable by ABC Wind Limited per Stronach. He also referred the Tribunal to his agreement with the wind farm which he said demonstrated that the developer was liable for all legal costs. He noted that a lawyer must refrain from acting for a new client if there is a risk of a breach of confidence entrusted to the lawyer by any former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client. He said that the fact that the Second Respondent's firm held an inhibition against him and were also in a client relationship with the purchasers, created a clear conflict of interest between the firm (of which the Second Respondent was a director) and the Appellant.

In relation to paragraph 5, the Appellant referred the Tribunal to the draft Discharge prepared by the firm. He said its terms were improper and the Tribunal had previously held this to be misconduct in The Law Society of Scotland-v-Mark Thorley.

In relation to paragraph 6, the Appellant said he intended to call witnesses to speak to the documents produced. He said the evidence proved there was a solicitor client relationship in existence between the firm and the purchasers during the period specified in the complaint.

In relation to paragraph 7, the Appellant asked the Tribunal to consider the evidence he had produced and which was dismissed by the Sub Committee. In conclusion, the Appellant moved the Tribunal to set a full hearing.

In answer to questions from the Tribunal, the Fiscal indicated it was the First Respondent's position that no issue of conflict of interest had crystallised although there is always an obligation to consider former and prospective client conflicts. The Fiscal agreed that the Appellant was challenging a key finding of the Sub Committee regarding the solicitor client relationship. However, the problem with the appeal was the lack of specification regarding why he said the Sub Committee decision was wrong.

The Tribunal referred to the impact of the redactions to the report, in particular on the ability of the Appellant to be specific about the solicitor client relationship. The Fiscal submitted that the Law Society must act within the law. It must protect clients confidentiality owed by the Second Respondent to the purchasers. This might put the Appellant "on the back foot" however, he had not taken any steps to gain access to the redacted material, such as by asking the purchasers to waive their confidentiality or by taking a judicial review of the Law Society's decision.

## **DECISION**

The Tribunal's usual approach to appeals has been to follow the guidance in Hood, Petitioner 2017 SCLR 799. 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 is what a competent and reputable solicitor ought to have done in the circumstances. The finding or refusal to find unsatisfactory professional conduct follows on from that evaluative question. Therefore, a section 42ZA(10) appeal must address how the solicitor concerned is said to be guilty of unsatisfactory professional conduct.

The Tribunal gave careful consideration to the written submissions and documents produced by both parties. It took into account everything said by the parties at the preliminary hearing. It bore in mind some general principles when considering the preliminary plea as described in the following paragraphs.

The Tribunal noted that at a preliminary hearing it should read the pleadings as if they are completely true and interpreted broadly in favour of the pleader. The Appeal could only be dismissed if, reading the averments as if they were true, the claim was bound to fail even if the Appellant proved all the facts stated by him.

Party litigants must comply with procedural rules (Aslam-v-Royal Bank of Scotland [2018] CSIH 47 and Barton-v-Wright Hassan LLP [2018] 1 WLR 1119). However, the system of pleadings which is designed to ensure fairness to all parties, puts a significant burden on party litigants who are unfamiliar with the process. The Tribunal therefore analysed the appeal carefully to see whether anything in it on a fair construction ought to be permitted to proceed to the next stage.

Careful regard was paid to the terms of the complaint made to the SLCC. The focus must be on the nature of the grievance expressed by the complainer, rather than on the nature of potential grievances which have never been expressed (Law Society of Scotland-v-Scottish Legal Complaints Commission 2010 SCLR 781). The Appellant had complained that the Second Respondent had acted in a conflict of interest situation by acting for the prospective purchasers during a specified period at the same time as an inhibition remained undischarged against the Appellant, who was the seller. The Appellant raised other issues in his submissions at the preliminary hearing which were not part of the original Complaint to the SLCC. He questioned the propriety of the terms of the firm's draft discharge. In this regard, the Appellant drew the Tribunal's attention to its decision in Law Society-v-Mark Thorley. The Tribunal decided it could have no regard to this complaint which was not reflected in the complaint the Appellant made to the SLCC and could not therefore be part of this appeal. Similarly, the Tribunal could not consider complaints that the Second Respondent had misled the court, that the inhibition should never have been obtained against the Appellant, or that the Second Respondent's firm had attempted to force contractual terms on the Appellant.

Bearing these general points in mind, the Tribunal went on to analyse the Appeal. The Appellant's main point was that a solicitor client relationship existed between the Second Respondent and the prospective purchasers between 12 February 2019 and 8 March 2019. He lodged documents in support of this proposition. The Tribunal were of the view that some of these were capable of supporting his position. For example, it noted that the email of 13 February 2019 from the Appellant's solicitor to the Appellant that,

*“This is just to let you know the solicitors for the [prospective purchasers] (Macleod and MacCallum) have been touch to say that they are instructed...” (Emphasis added).*

Additionally in the email of 7 March 2019 from the Second Respondent to the Appellant’s solicitor it was stated that,

*“As I’m acting for the buyer I’ve asked a colleague of mine in our Court Department to take on the inhibition side of things. I have an offer ready to go and am just trying to get final instructions to submit this.” (Emphasis added).*

The redacted report made it difficult to explore this issue in any more detail (and for the Appellant to be more relevant and specific in his pleadings). The Reporter and Sub Committee were of the view (having seen the Reporter’s summary of the information in the prospective purchasers’ file) that there was no solicitor client relationship. The Tribunal would have considered this an appropriate matter for proof given the emails above, had the preliminary plea been unsuccessful.

The Sub Committee’s decision was narrowly focussed. It decided that there was no solicitor client relationship and therefore there could be no conflict of interest. It was the Fiscal’s position that no issues of conflict of interest crystallised although he said there is an obligation to consider prospective and former client conflicts. The Fiscal submitted that even if a solicitor client relationship existed, there was no conflict because the interests of both parties aligned. The Tribunal could foresee circumstances in which a conflict might arise and that the parties’ interests might not necessarily align. This might have been an issue to consider at a hearing, had the preliminary plea been unsuccessful.

However, despite these initial points identified by the Tribunal in favour of the Appellant, there were fundamental problems with the appeal with regard to relevance and specification. Although there were averments that a solicitor client relationship existed between the Second Respondent and the prospective purchasers during the period set out in the complaint, there were no pleadings linking the alleged solicitor client relationship to a conflict of interest. There were no pleadings linking any conflict of interest to unsatisfactory professional conduct on the part of the Second Respondent. The Appellant failed to show how the Sub Committee had failed in their decision making in terms of the criteria set out in Hood, Petitioner.

In relation to the alleged conflict of interest, there was no explanation of how the conflict was created or the parties involved in it. The Appellant described the conflict as being between the firm and the Appellant. He said that a conflict existed because confidential information about him or his affairs could be shared with the prospective purchasers giving them undue advantage. There was no specification of the confidential information which he said created or could create a conflict. There were no pleadings to show how the Second Respondent was in a different position to any other solicitor engaged by the prospective clients who would have discovered the inhibition in the course of the usual searches.

No link was made in the appeal between the alleged conflict of interest and the Second Respondent's alleged unsatisfactory professional conduct. This is the ultimate question the Tribunal requires to address in a section 42ZA(10) appeal but the pleadings were not sufficiently relevant or specific to allow the Tribunal to come to a different decision than the Sub Committee. The appeal hints at issues, but these are not sufficiently clearly expressed to allow it to proceed. The Tribunal and the First Respondent cannot guess the grounds of appeal. It is not the function of the Tribunal to build the Appellant's case. This is a disciplinary tribunal and its focus must remain on the Sub Committee's decision making and whether ultimately the solicitor concerned is guilty of unsatisfactory professional conduct.

Therefore, on the basis that the Appeal disclosed no *prima facie* basis, and was irrelevant *et separatim* lacking in specification, the Tribunal upheld the First Respondent's preliminary plea. It dismissed the Appeal.

The Tribunal invited submissions on publicity and expenses. The First Respondent moved for expenses and made no motion regarding publicity. The Appellant indicated that he wished to know why his case had failed before addressing the Tribunal on expenses. The Chair explained that a written decision containing reasons would be provided in due course and that it was the Tribunal's practice to award expenses at the conclusion of the hearing. There were no reasons to depart from the Tribunal's usual practice of awarding expenses according to success. It therefore found the Appellant liable in the expenses of the First Respondent and the Tribunal. It directed that the decision should be given publicity. In accordance with paragraph 14A of Schedule 4 to the Solicitors (Scotland) Act 1980, no

parties need be named other than the Appellant and the Second Respondent as identification of others would be likely to damage their interests.



**Kenneth Paterson**  
**Vice Chair**