

**THE SOLICITORS (SCOTLAND) ACT 1980
THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL
The Scottish Solicitors' Discipline Tribunal Procedure Rules 2008**

DECISION

**in Appeal under Section 42ZA(10)
of the Solicitors (Scotland) Act
1980**

by

**JAMES CRUICKSHANK, The
Digger, Suite 223, Claymore
House, 149 Kilmarnock Road,
Glasgow**

Appellant

against

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

First Respondent

and

**KEITH D McFARLANE, Solicitor,
Gillespie Macandrew LLP, 5
Atholl Crescent, 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 James Cruickshank, The Digger, Suite 223, Claymore House, 149 Kilmarnock Road, Glasgow (hereinafter referred to as "the Appellant") against the Decision by the Council of the Law Society (hereinafter referred to as "the First Respondent") dated 26 April 2012, not to uphold a complaint of unsatisfactory professional conduct in respect of Head of Complaint 1, 2 and 3 against Keith D McFarlane,

Solicitor, Gillespie Macandrew LLP, 5 Atholl Crescent, Edinburgh (hereinafter referred to as “the Second Respondent”).

2. The complaint by the Appellant which was investigated by the First Respondent as set out in the Decision appealed against was –

“I James Cruikshank, wish to complain about Mr Keith McFarlane, of Gillespie Macandrew, who currently represent Mr A in defamation against me. The main points of my complaint include:

1. *Mr McFarlane is acting in a conflict of interest situation, by representing Mr A in his defamation action against me despite having represented me as a defender in a defamation action raised by a different Pursuer between 2007 and 2009.*

2. *Mr McFarlane has caused a further conflict of interest situation by instructing Mr C despite Mr C having represented me as a defender in a defamation action raised by a different Pursuer between 2007 and 2009. Gillespie Macandrew have instructed Mr C. Mr C was my legal counsel. Mr C was aware of the budget I had for the case. He was aware of the money that the magazines make. He was aware of the number of shops we had, and had a good idea of where the shops were situated. This information was passed on, and letters were written to shops threatening them with legal action.*

3. *Mr MacFarlane said, in a letter dated 2 March 2011, that the SLCC would not investigate any of my complaints about him or Gillespie Macandrew.”*

3. In accordance with the Rules of the Tribunal, the Appeal was formally intimated to the First Respondent and the Second Respondent. Answers were lodged on behalf of the First Respondent and the Second Respondent.

4. Having considered the Appeal with the Answers, the Tribunal resolved to set the matter down for a procedural hearing on 10 September 2012 and notice thereof was duly served on all the parties.

5. The procedural hearing took place on 10 September 2012. The Appellant was present and represented himself. Mr Herd accompanied the Appellant. The First Respondent was represented by Sean Lynch, Solicitor, Kilmarnock. The Second Respondent was represented by Gordon Innes, Solicitor, Edinburgh. At that the hearing the Chairman referred to the Appellant's Form of Appeal and stated that the Answers received from both Respondents indicated a difficulty by them in understanding the grounds of appeal. The Chairman suggested that the Appeal as presently framed was not relevant or specific and did not adequately reflect what was being appealed against. The Chairman indicated that the Appellant would require to amend the Appeal to make it more relevant and specific and to give the other parties fair notice of the points being raised. The Tribunal allowed the Appellant a further 21 days to amend his Appeal and a Diet of Debate was fixed for 28 November 2012. The Appellant stated that he required documentation which he had not received. The Chairman explained that if the Appellant required documentation and the parties who had the documents refused to give them to him, he could ask the Tribunal for an Order to recover the documents and that the Tribunal could issue such Order in terms of its Rules. The Chairman explained that the Appellant must specify what documents he needed and why he required them.

6. A Debate in relation to the relevancy and specification of the Appeal took place on 28 November 2012. The Appellant was present and represented himself. Mr Herd accompanied the Appellant. The First Respondent was represented by Sean Lynch, Solicitor, Kilmarnock. The Second Respondent was represented by Gordon Innes, Solicitor, Edinburgh.

7. Having heard submissions from the Appellant and the First and Second Respondents, the Tribunal found the Appeal to be so irrelevant and lacking in specification as to be manifestly ill-founded and dismissed the Appeal and accordingly confirmed the Determination of the Council of the Law Society of Scotland dated 26 April 2012.

8. The Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 28 November 2012. The Tribunal having considered the Appeal by James Cruickshank, The Digger, Suite 223, Claymore House, 149 Kilmarnock Road, Glasgow (hereinafter referred to as “the Appellant”) against a Decision by the Council of the Law Society (hereinafter referred to as “the First Respondent) dated 26 April 2012, not to uphold a complaint of unsatisfactory professional conduct in respect of Heads of Complaint 1, 2 and 3 against Keith D McFarlane, Solicitor, Gillespie Macandrew LLP, 5 Atholl Crescent, Edinburgh (hereinafter referred to as “Second Respondent”); Find the Appeal irrelevant and lacking in specification and Refuse the Appeal and Confirm the Determination of the Council of the Law Society of Scotland dated 26 April 2012; Find the Appellant liable in the expenses of the Law Society and the Tribunal including the expenses of the Clerk as the same may be taxed by the Auditor of the Sheriff Court at Edinburgh on a party and party 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 shall be given to this decision such publicity to include the name of the Appellant.

(signed)

Alistair Cockburn

Chairman

9. 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 both Respondents and the Appellant by recorded delivery service on

IN THE NAME OF THE TRIBUNAL

Chairman

NOTE

The Appellant lodged an Appeal with the Scottish Solicitors' Discipline Tribunal against a Determination of the Council of the Law Society of Scotland dated 26 April 2012 in relation to a Complaint made by him. The Determination was that no action should be taken in relation to all three Heads of Complaint.

A procedural hearing took place on 10 September 2012. An issue arose regarding the recording of the hearing. The Appellant had wished to make his own recording of the hearing. The Chairman of that Tribunal had advised that the Tribunal had a shorthand writer who took verbatim notes of the proceedings and that recording of the hearing was not allowed in terms of Rule 46 of the Tribunal's Rules. The Appellant had indicated that he did not agree with the Tribunal's ruling however he accepted the position and the recording equipment was not used.

At the procedural hearing the Chairman referred to the Appellant's Form of Appeal and stated that the Answers received from both Respondents indicated a difficulty by them in understanding the grounds of appeal. The Chairman suggested that the appeal, as presently framed, was not relevant or specific and did not adequately reflect what was being appealed against. The Chairman explained that an Appellant would normally be expected to set out his reasons why the decision of the First Respondent on each of the grounds of appeal should be overturned. The Chairman indicated that it was important that pleadings gave fair notice to the other parties of the points which have to be answered. The Appellant was given a further 21 days in which to amend his grounds of appeal. A Debate in relation to the relevancy and specification of the Appeal was fixed for 28 November 2012.

An amended Note of Appeal by the Appellant was lodged with the Tribunal on 15 November 2012 and copied to the First and Second Respondents. A Note of Argument for the Second Respondent was received in response to the amended appeal documentation.

An Inventory of Productions was lodged by the Appellant.

At the commencement of the Debate the Chairman asked the Appellant to confirm that he was not intending to record the hearing. The Appellant indicated that he would like to record the hearing and did not see any reason why it could not be recorded. In response, the Chairman indicated that the Tribunal's Rules provide that a single record of the proceedings is made by the Tribunal to ensure that there are no issues in relation to different versions. The Appellant indicated that he still wished to record the proceedings. The Chairman indicated to the Appellant that he did not have the Tribunal's permission to make a recording.

The Appellant asked the Chairman what his authority was for that ruling. The Chairman advised that the Tribunal had issued a ruling based on the Tribunal's Rules.

The Appellant stated that there was authority in the House of Lords for the recording of proceedings.

The Chairman advised that this authority was irrelevant and asked the Appellant to confirm that he would not be recording the proceedings. The Appellant confirmed that he would not record the proceedings and that also applied to his colleague, Mr Herd who was accompanying him. Mr Innes asked for the recording equipment to be removed from the Tribunal hearing. The Chairman advised that this was not necessary as the Appellant had given an assurance which also extended to his colleague.

Mr Lynch lodged a copy of the Decision in the case of The Council of the Law Society of Scotland-v-The Scottish Legal Complaints Commission [2010] CSIH 79.

Mr Lynch made a motion that in the particular circumstances of this Appeal the Appellant should lead the submissions in the Debate. Mr Lynch submitted that there should be an opportunity given to the Appellant to outline what he says makes him entitled to the remedy he seeks and Mr Innes concurred in that motion. The Chairman explained to the Appellant that this was not the usual procedure and asked him if he wanted to lead or hear the criticisms of his pleadings first. The Appellant elected to address the Tribunal first.

The Chairman advised the Appellant that this was his appeal and that the Tribunal and the Respondents needed to understand what the appeal is about and what the detail of that appeal is. The Chairman advised that the Tribunal had received two documents, firstly the appeal documentation dated 30 May 2012 and secondly, an adjusted statement of appeal received on 15 November 2012. In response to a question from the Chairman, the Appellant confirmed that the first of these documents was no longer relevant and the appeal was now based on the second document only.

The Chairman explained that the decision of the Law Society which is being appealed against was in relation to a complaint made by the Appellant regarding the Second Respondent. The Chairman advised that the most the Tribunal could do is to disagree with the Law Society in relation to the determination of the complaint of unsatisfactory professional conduct against the Second Respondent. The Chairman explained that the Tribunal could not find someone else at fault. The Chairman asked the Appellant if he understood that the Law Society's decision which is being appealed against relates only to the conduct of the Second Respondent.

The Appellant replied that the decision of the Law Society also comments on the behaviour of other persons. The Chairman then explained that all complaints regarding solicitors require to be made to the Scottish Legal Complaints Commission (hereinafter referred to as "SLCC"). That body then decides whether the complaint amounts to professional misconduct and should be prosecuted before the Tribunal or alternatively the complaint relates to an allegation of unsatisfactory professional conduct by a solicitor and if so, it refers the complaint to the Law Society for investigation and a determination to be made by them. The Chairman made it clear that the decision being appealed against relates only to the conduct of the Second Respondent.

In response, the Appellant referred to the case of Sharp-v-The Council of the Law Society of Scotland [1984] SC 129 and stated that in terms of that decision the whole circumstances should be considered.

The Chairman advised that in terms of the statutory framework the only issue in this Appeal was whether the Law Society's decision regarding the complaint about the

conduct of the Second Respondent was correct or not. The Chairman advised that if the Appellant was saying that the SLCC had misunderstood his complaint then the Appellant has another avenue of complaint. The Chairman advised that if the Appellant wanted to complain about Gillespie Macandrew, he could only complain to the SLCC about that firm in relation to the conduct of solicitors employed by them. The Chairman advised that the Tribunal is constrained by the legislation.

In response, the Appellant stated that he had brought this issue up some time ago. The Chairman replied that if that was the case then the Appellant had had time to consider his position regarding this. The Chairman asked the Appellant to consider his position regarding this Appeal as the expenses can only increase, they cannot go down.

The Chairman explained to the Appellant how the Debate would proceed. He advised that Mr Innes and Mr Lynch had submitted that the Appellant's grounds of appeal lack any substance in relation to both relevancy and specification. They submit that even if the Appellant could prove everything which he alleges, the law does not allow him a remedy in terms of this appeal procedure. The Chairman indicated that it would be helpful for the Appellant to note the points made by both Respondents in order that he could answer them and advised that after hearing from all parties the Tribunal would make a decision as to whether a proof should then be fixed in relation to the Appeal.

SUBMISSIONS FOR THE APPELLANT

The Appellant stated that there are two Court of Session defamation cases where the pursuers are represented by Gillespie Macandrew, Bannatyne Kirkwood and France and Mr C, Advocate. In these actions the legal team are pursuing defamation actions on behalf of a man called Mr A regarding articles published in The Digger. The Appellant advised that the team involved in pursuing this action against his company are the same team that previously represented him and he stated that this was a prima facie case of conflict of interest.

The Chairman advised that there are two types of conflict of interest. Firstly, acting for two parties at the same time and secondly, successive conflict and stated that what

the Appellant is suggesting is a successive conflict. The Chairman asked the Appellant if he was able to identify the information which the Second Respondent was privy to which has resulted in the Appellant's business being disadvantaged in these proceedings.

In response, the Appellant stated that there was a file which Gillespie Macandrew had kept containing confidential financial information regarding his company which Gillespie Macandrew had access to when previously acting for his company.

The Appellant stated that he could now see an error in his complaint as the Second Respondent did not represent him before; it was a Mr D from the same firm. The Appellant stated that neither Gillespie Macandrew nor Mr C who had both acted for him in the past made any attempt to contact him to tell him that they no longer represented him. He stated that the Law Society's decision stated that the relationship was over in 2009 and that was not correct.

The Chairman asked the Appellant when he last gave Gillespie Macandrew or Mr C any instructions to implement.

The Appellant replied that he could not say when he last spoke to them about this.

The Chairman advised that a client might still regard a particular solicitor as his solicitor but there would be no ongoing solicitor/client relationship after the instructions ended.

The Appellant advised that the case in the Court of Session is still open. He stated that he had been advised by the Court of Session that the file is still open but it is in limbo. He stated that he could go and get the process folder and that the papers will show that Gillespie Macandrew are still his lawyers.

In relation to the action in which the Appellant was represented by Gillespie Macandrew and Mr C, the Chairman asked who in Gillespie Macandrew was representing the Appellant.

The Appellant stated that Mr D of Gillespie Macandrew was his contact.

The Chairman asked whether Mr D was an assistant or a partner and whether the Appellant had instructed Gillespie Macandrew direct or via solicitors in Glasgow.

In response, the Appellant stated that he could not precisely remember if he had instructed Glasgow solicitors first but he thought that Gillespie Macandrew were instructed direct.

In response to a question from the Chairman as to whether he paid Gillespie Macandrew, the Appellant stated he was not sure if he did pay another solicitor.

The Chairman asked if Bannatyne Kirkwood and France were involved. The Appellant responded that this was a good example of the Law Society's investigation not being correct and stated that Bannatyne Kirkwood and France were never his solicitors. The Appellant confirmed that the action he referred to as being still open in the Court of Session was a defamation action against him raised by Mr B.

The Chairman asked when the Appellant had last contacted Mr D to ask him to do something. The Appellant replied that he thought he had contacted him to see what was happening regarding the number of bills which he was receiving.

The Chairman then asked the Appellant when he had last asked Mr D to carry out some task.

The Appellant replied that he had contacted Mr D to go over an apology which he was going to print in the paper.

The Chairman asked if terms of settlement had been agreed. The Appellant replied that there was no confirmation that terms of settlement had been agreed but that he went on and published the apology anyway.

The Chairman asked if there were other proceedings instituted.

The Appellant responded that there were and that the Second Respondent was acting for the pursuer in those proceedings. The Appellant explained that Ms E who was at that time a solicitor at Maclay Murray and Spens was acting on his behalf in these proceedings and that she wrote to Mr F from Bannatyne Kirkwood and France and advised that there appeared to be a conflict.

The Chairman asked what role Bannatyne Kirkwood and France had in these matters.

The Appellant replied that Bannatyne Kirkwood and France were instructed by Mr A to sue The Digger over an alleged defamation. The Appellant explained that the Second Respondent was a solicitor within Gillespie Macandrew who was instructed by Bannatyne Kirkwood and France in that action as Edinburgh agents. The Appellant stated that Ms E raised this issue in 2010 and that a complaint was made to the SLCC but there were some problems with that body understanding what the complaint was about.

The Chairman asked if there was a list of issues agreed with the SLCC in relation to that complaint. The Appellant advised that the problem with that was that he did not know at that stage that he could not make a complaint about a law firm and he stated that it could be said that his complaint was dead in the water at that stage.

The Chairman stated it appeared to him that the issue in this case was whether the Second Respondent had utilized information about his business which was to the Appellant's prejudice. The Chairman indicated it would be helpful if the Appellant could indicate what facts there are from which a Tribunal could conclude that the Second Respondent had placed himself in a conflict of interest situation.

The Appellant advised that the law firm and the advocate pursuing him in an action against him were the same legal team as had represented him in a previous case and that they had information which meant they could financially cripple him before he got his day in court. The Appellant stated that the legal team knew how long both sides could drag matters out in court. The Appellant stated the team knew this information as they had the file. The Appellant stated that by instructing Mr D rather than the Second Respondent, this was a case of sharp practice by the pursuers.

The Chairman advised that in terms of Mr C, the Tribunal could not deal with a complaint about him because the Tribunal is not the body which disciplines advocates. In relation to the financial information the Chairman asked what information was passed to the Appellant's legal team on a confidential basis which would not have been available to the public through the normal channels. In addition, the Chairman also asked the Appellant to identify in what way he has been prejudiced by this information being available to the legal team.

In response, the Appellant asked if he had to be able to prove it and the Chairman replied that this was not necessary at this stage. However the Chairman stated that the Appellant could not just say the information was in the file, he would have to say what was in the file that was confidential.

The Appellant stated that he did not know what information the team had that they could not get in the public domain. The Appellant asked why Bannatyne Kirkwood and France would instruct Gillespie Macandrew otherwise.

The Chairman stated that there could be two reasons for that, firstly, that Mr A asked Bannatyne Kirkwood and France to instruct Gillespie Macandrew or secondly, Bannatyne Kirkwood and France would instruct Gillespie Macandrew because they are their usual Edinburgh agents.

The Appellant stated that it was obviously not a good idea if Bannatyne Kirkwood and France regularly instructed Gillespie Macandrew because if they had not had done so then there would not have been any complaint by him.

The Chairman reiterated that the Appellant needed to tell the Tribunal what was in the file and how it was used to his prejudice.

The Appellant stated that he would like to tell the Tribunal what was in the file but the file was never given back to him.

The Chairman stated that if there was confidential information in the file, that information must have been communicated by the Appellant to Gillespie Macandrew and therefore the Appellant must know what he told them.

The Appellant stated that Gillespie Macandrew knew how much money he had and they knew him and how he would react to the court proceedings. He stated that they knew the sales circulation and the shops The Digger was distributed to. The Appellant asked the Chairman to tell him what information he wanted and he would tell the Tribunal if he had it.

The Chairman stated that he needed to know how the information could be used to the Appellant's disadvantage and what facts the Appellant was going to be able to prove to show that the information was used against him.

The Appellant advised that the circulation figures were contained in one of the summonses. He stated that Gillespie Macandrew knew what the circulation list was and that they wrote to the shops threatening legal action in the hope of stopping them selling the magazine. He stated that in his mind that is harassment.

The Chairman stated that the Appellant needs to allege that the Second Respondent is implicated in this in some way or accept that Mr D should have been the person who the complaint was made against.

The Appellant stated that the Tribunal should just tell him if he had a case or not.

In response, the Chairman stated that he could not give a decision half way through the submissions. The Chairman stated that the Tribunal was the body who can determine whether the Second Respondent was culpable. However, the Chairman stated that if what was said by the Appellant in document 9 of his Inventory of Productions was correct i.e.

“There are three subjects in this complaint and not one of them regard [sic] Mr McFarlane.”

then it appeared as if the Second Respondent was not to blame.

The Chairman then asked if the Appellant wished ten minutes to consider whether he wished to proceed with the Appeal.

In response, the Appellant asked why the SLCC did not throw out the complaint.

The Chairman advised that there were only very limited grounds on which a complaint can be rejected by the SLCC and if these grounds do not apply then the complaint needs to be sent to the Law Society for investigation.

In response to a question from one of the Tribunal members regarding what would be in the public domain, the Appellant responded that there were no public documents available at the time regarding his financial affairs as he was trading as a sole trader. The Appellant stated that the information was very privileged and private and that he was the only person who knew the information.

The Tribunal then adjourned for ten minutes to allow the Appellant to consider his position.

Following the adjournment, the Appellant advised that as he was aware that lawyers charge for the whole day, he intended to proceed with the Appeal.

The Chairman advised the Appellant that that is not the case and that the expenses of the Tribunal will relate only to the time taken to hear the case.

The Chairman asked the Appellant again whether he wanted to proceed with this Appeal as he had stated that he had no complaint against the Second Respondent. The Appellant stated that he would like to hear what the Respondents have to say.

Mr Cruickshank referred the Tribunal to his pleadings which were contained in his second Appeal document. He referred to the final paragraph of the first page of that document where it states -

“McFarlane and Mr G [sic] admit to discussing the case back in 2010. Mr G [sic] confirms he was previously instructed but no longer. Lawsoc made no effort of prove this or produce any evidence to support this fact”

The Appellant stated that this is evidence of a conflict of interest.

The Chairman stated that there is very little authority regarding successive conflicts and no Scottish authorities.

The Appellant stated that there was an issue regarding Gillespie Macandrew’s failure to follow a code of conduct.

The Chairman advised that this was not a matter for this Tribunal. He stated that Gillespie Macandrew may have their own in-house code of conduct but there is no general code relating to successive conflict of interest which applies to solicitors.

The Appellant stated that Gillespie Macandrew were discussing the case as far back as 2010 and stated that he would be interested in seeing any code of conduct they were following. The Appellant referred to paragraph 6.10 of the Solicitor Reporter’s report where it states –

“The solicitor also wrote to Mr H of Biggart Baillie on 2 March 2011, being the letter referred to more particularly in terms of Issue 3. This letter deals with procedural matters regarding the ongoing case and concludes with the solicitor statement:

“It is my understanding that the Scottish Legal Complaints Commission have taken the view that the [the complainer’s] comments raised in his letter of complaint are not worthy of any investigations.””

The Appellant stated that this paragraph shows that the Law Society failed to handle the complaint properly. The Appellant stated that this is relevant to Head of Complaint 3; he submitted that as stated in his pleadings in the second paragraph on the second page -

“10. Lawsoc failed to handle complaint properly that Mr I told McFarlane the complaint was not worthy of any investigation by the SLCC. The SLCC denied discussing complaint with Mr I.”

The Chairman read from the Law Society’s decision in relation to issue 3,

“...the terms of the letter reflected the solicitors understanding and did not represent a categorical statement of fact. It did not appear to the Sub Committee that there was anything in the letter which was intended to be misleading or to indicate collusion between the solicitor and the Commission. Equally it did not appear to the Sub Committee there was anything in the correspondence from the complainer which added to the evidence available to it. Indeed it appeared to the Sub Committee that much of the complainers concerns appeared to be based on his belief in the existence of some form of conspiracy for which he had produced no evidence whatsoever. It did not appear to the Sub Committee that there was any merit in this particular issue and accordingly the Sub Committee determined to take no action in respect of this complaint.”

The Appellant stated that he wanted to know what Mr I knew, and wondered if he had information about the complaint that he as the complainer was not aware of. The Appellant stated this was a breach of confidential information by Mr I.

The Chairman stated that in his view it could not be wrong for a Client Relations Partner to discuss a complaint which the SLCC are investigating with the solicitor concerned

The Appellant stated that he had been told to go ahead with the complaint.

In response to a question by the Chairman as to who told the Appellant to go ahead with the complaint the Appellant replied that the SLCC did and he stated that the SLCC are associated with the Tribunal and if it was not for them, he would not be involved in this Appeal.

In response the Chairman explained the separation between the SLCC, the Law Society and the Tribunal as outlined previously.

The Appellant then referred the Tribunal to paragraph B3 of the Solicitor Reporter's report which states:

“The solicitor set out that he had never been instructed to act on the complainer's behalf. The solicitor stated that he is acting as the Edinburgh agent for Mr A, as instructed by BKF. He advises that, upon receiving instructions to act, a check was carried out to establish if the firm had current instructions to act on the complainer's behalf. Although a colleague had previously represented the complainer, the firm did not have current instructions and was not acting on the complainer's behalf.

The solicitor advised that BKF instructed the advocate, Mr C direct. The solicitor further stated that BKF contacted Mr C directly to pass further information to him. The solicitor stated that Mr C is regularly instructed by BKF in defamation actions.”

The Chairman asked the Appellant if he was still instructing Gillespie Macandrew at that time and if so, what were the instructions and to what did they relate.

In response, the Appellant stated that in layman's terms he had instructed a firm to do work for him and that work took two years. He advised that the firm never wrote to him sending a final bill and saying that the relationship had ended. The Appellant stated the firm never said if you want to keep us on you need to pay a retainer.

The Chairman stated that he had tried to explain to the Appellant that the client/agent relationship only exists when the firm has current instructions. The Chairman asked whether the firm had current instructions from the Appellant.

In response, the Appellant stated that the firm did and now they are acting for someone else against him. He asked if the Tribunal thought this was fair.

In response, the Chairman explained that this is the usual position as if different solicitors were required to be instructed on each occasion, large companies would soon run out of firms able to act for them. The Chairman stated that the point the Tribunal would have to consider is whether because of the passage of time and failure to give instructions that the Second Respondent should have been doing something on the Appellant's behalf. The Chairman advised that it would have been perfectly correct for a client to write and ask the solicitor what he was doing regarding a particular instruction. The Chairman stated that he noted however that the Appellant was unable to state to the Tribunal the last date on which he gave instructions to Gillespie Macandrew.

Mr Lynch stated that the schedule from the Sub Committee's decision stated that the work done by Gillespie Macandrew for the Appellant was carried out between 2007 and 2009.

The Appellant acknowledged that this was said in the summary of his complaint but stated that does not change the point that there could be a successive conflict.

The Chairman stated that there is a process where conflict by a firm can be challenged in Court but explained that it would be necessary to narrate a particular act which caused prejudice.

The Appellant stated that this issue was discussed before the last Tribunal.

The Chairman replied that at the procedural hearing the previous Tribunal had ordered a Debate and then fixed a hearing for that and explained that the Tribunal was in the process of hearing that Debate. The Chairman then asked the Appellant what more he wished to tell the Tribunal regarding paragraph 10 of the Solicitor Reporter's report.

The Appellant then stated in his view the way the hearing was going meant his arguments were pigeon-holed.

The Chairman explained to the Appellant that if he wanted to argue that there was a successive conflict the allegation has to be that a solicitor acting on his behalf received confidential information and subsequently the same firm, albeit a different solicitor, acted against him and in doing so they accessed that information from the first solicitor and used it to his prejudice. The Chairman advised that all the Tribunal can do in deciding this Appeal is to say that the Law Society was wrong to say that the Second Respondent was not guilty of unsatisfactory professional conduct.

The Chairman then explained the options available to the Tribunal in determining this Appeal. He advised that in terms of Section 53ZB(2) of the Solicitors (Scotland) Act 1980 there are three options open to the Tribunal in dealing with an appeal under Section 42ZA(10). Firstly the Tribunal may quash the determination being appealed against and make a determination upholding the complaint. Secondly, where the Tribunal takes the first option and quashes the determination it can also direct that the solicitor should pay compensation to the complainer of up to £5000 in relation to loss, inconvenience or distress resulting from the solicitor's conduct. The third option is that the Tribunal may confirm the determination.

The Appellant then stated that another option would be to consider the predicament he was in.

The Chairman responded that it was not the function of the Tribunal to do that.

The Appellant then enquired whether the Tribunal was taking a blinkered view of this matter and asked the Chairman what the views of the other members were.

The Chairman then asked each member of the Tribunal to state what their view was.

Each member of the Tribunal stated that they had sympathy with the Appellant's position but that in dealing with this Appeal they could only look at the decision of the Law Society in relation to the Second Respondent's conduct which was the subject of the Appeal.

The Appellant then stated that it was a very white, middle class Tribunal.

In response the Chairman stated that the Appellant had conducted himself properly up to now and asked him to continue doing so.

The Appellant responded that he thought that he was forced into this position by the SLCC and that he was being shown the exit door by the Tribunal and he intended to take it.

The Chairman asked the Appellant whether he was saying that he wished to withdraw his Appeal. In response the Appellant stated that what he meant was that he no longer recognised the authority of the panel. He stated that he was leaving.

The Chairman then invited Mr Lynch to commence his submissions.

The Appellant then left the hearing room at 12:30pm repeating that he did not recognise the authority of the panel. He left behind his ipad. His ipad was then removed from the hearing room.

SUBMISSIONS ON BEHALF OF THE FIRST RESPONDENTS

Mr Lynch advised that he had not responded to the amended grounds of appeal lodged by the Appellant but stated that the Note of Argument for the First Respondent which he had lodged in response to the first grounds of appeal was equally relevant to both documents. Mr Lynch apologised for the fact that his Note of Argument had been submitted in draft format. He stated that he had lodged a copy of the Council of the Law Society of Scotland-v-The Scottish Legal Complaints Commission [2010] CSIH 79. He stated that the relevant legislation is set out in paragraphs 5 and 10 of that decision. Mr Lynch referred the Tribunal to paragraph 34 of the decision which deals with the SLCC's duties.

Mr Lynch advised that he wished to adopt the submissions made in the Note of Argument on behalf of the Second Respondent which post dates the lodging of the Appellant's second Appeal document. Mr Lynch submitted that fundamentally the Appeal must fail as the Appellant was unable to draw to the Tribunal's attention any

act of the Second Respondent which could amount to unsatisfactory professional conduct.

Mr Lynch stated that the Appellant is saying that the Second Respondent who was previously his solicitor may have had confidential information about his company but submitted that the Appellant was unable to say what information was used to his detriment. Mr Lynch stated that in the absence of any guidelines about successive conflicts solicitors needed to be guided by their common sense and experience in accepting instructions in circumstances like these. Mr Lynch urged the Tribunal to refuse the appeal and made a motion for expenses to be awarded on the usual terms.

SUBMISSIONS ON BEHALF OF THE SECOND RESPONDENTS

Mr Innes stated that he wished to clarify one or two matters. Firstly he explained that Mr D is employed by Gillespie Macandrew as an associate and has always been employed by them in that capacity. He stated that Mr McFarlane is a consultant to the firm and has always been associated with the firm in that capacity.

Mr Innes stated that the matters raised by the Appellant in relation to the status of the alleged ongoing action in the Court of Session had not previously been raised but that he was able to confirm that there is a Joint Minute lodged in the Process and that the action is finished. Mr Innes explained that at the time the case was concluded the Appellant was advised of the steps required to bring matters to a conclusion. The Appellant was advised that he needed to pay the legal expenses. Mr Innes confirmed that the Appellant paid the expenses through Gillespie Macandrew but then emailed to say that he wanted nothing further to do with the firm thereafter. Mr Innes asked the Tribunal to adopt what is stated in the Decision of the Law Society in relation to the period when the firm acted for the Appellant i.e. between 2007 and 2009.

Mr Innes stated that he wished to adopt the submissions made in the Note of Argument for the First Respondents. He stated that he agreed with Mr Lynch that a decision has to be taken at the time instructions are given as to whether there is a potential conflict of interest and that the particular circumstances of each case must be considered by the solicitor who is instructed. He stated that his firm regularly acts for

banks and if they are called upon to sue another bank that they have previously acted for they need to consider if they are privy to confidential information which could potentially be used in the action. He stated that there is a process which should be followed in each case.

DECISION

The Tribunal noted that whilst the Appellant had wished to make a complaint against the firm of Gillespie Macandrew and the advocate who had previously represented him, this Appeal only concerned the conduct of the Second Respondent. The Appeal was against the Decision of the Law Society in relation to three heads of complaint. All three heads of complaint concerned the alleged behaviour of the Second Respondent. In his pleadings and his oral submissions the Appellant stated that he had no complaint about the behaviour of the Second Respondent.

The Tribunal noted that the second appeal document submitted by the Appellant was intended to replace the first one. The Tribunal had regard to the written and oral submissions made by all the parties. In relation to the Note of Argument for the First Respondent which was adopted by Mr Innes on behalf of the Second Respondent the Tribunal agreed that as stated by Mr Lynch even if the Appellant were to succeed in establishing every single averment of fact in his note of appeal there would be nothing before the Tribunal which would entitle it to make a finding of unsatisfactory professional conduct against the Second Respondent. There was no material raised within the grounds of appeal which would entitle the Appellant to lead evidence before the Tribunal. The Tribunal noted that the grounds of appeal contained matters which were outwith the matters which were remitted by the SLCC to the First Respondent for investigation. The Tribunal agreed as submitted on behalf of the Second Respondent that it had no locus to deal with the issues raised by the Appellant. Accordingly the Tribunal found the Appeal to be so irrelevant and lacking in specification as to be manifestly ill-founded and dismissed the Appeal and confirmed the Determination of the Law Society.

In the course of considering this Appeal the Tribunal had regard to the issue of successive conflicts and noted that there are no Scottish authorities or guidance available from the Law Society in relation to this issue.

In relation to the issue of calculation of the expenses of this Appeal Mr Lynch made a motion that expenses should be awarded on a party and party basis as was awarded by the Tribunal in the Appeal by Dr Ashworth (16 May 2012) as the Appellant was not legally represented. That motion was not opposed and was granted by the Tribunal. The Tribunal made the usual order in relation to publicity.

Chairman