

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

INTERLOCUTOR

in Complaint to the Scottish Solicitors' Discipline
Tribunal


in causa

THE COUNCIL OF THE LAW SOCIETY OF
SCOTLAND, Atria One, 144 Morrison Street,
Edinburgh

against

GORDON DANGERFIELD, Archer Coyle Solicitors,
513 Clarkston Road, Muirend, Glasgow

Edinburgh, 16 December 2019. The Tribunal, on the opposed motion of the Complainers, receives the affidavit of Sheriff Douglas A. Brown dated 6 December 2019; continues the Complaint to the hearing fixed for 22 and 23 January 2020; and reserves all questions of expenses until the conclusion of the case.



Colin Bell
Vice Chair

NOTE

On 16 December 2019, the case called for a procedural hearing. The Complainers were represented by their Fiscal, Breck Stewart, Solicitor-Advocate, Edinburgh. The Respondent was present and represented by Elizabeth Coyle, Solicitor, Glasgow.

Ms Coyle indicated that Senior Counsel was instructed but was not available to attend the procedural hearing. The Fiscal indicated that he had a number of matters to discuss with Counsel for the Respondent and would do so over the coming weeks.

The Fiscal moved the Tribunal to receive two affidavits. The affidavit of Sheriff Douglas A. Brown was produced. The Fiscal indicated that an affidavit of Sheriff Thomas S. Millar had not yet been signed and therefore was not produced. He moved the Tribunal to receive the affidavits under reservation of all questions as to the competency and relevancy of any statement contained therein. He wished the affidavits to be treated as evidence given on behalf of the Complainers.

The Fiscal noted the Tribunal's usual practice to receive affidavits in respect of uncontroversial evidence only. However, he submitted that the correct approach was for the Tribunal to admit all affidavits. The only reference to affidavits in the Scottish Solicitors Discipline Tribunal Procedure Rules 2008 was that contained in Rule 14(5) which only has application in the absence of a Respondent. Rule 14(1) refers to the rights of persons to be present at a hearing "and to lead their evidence". He submitted that the width of that Rule meant that the Tribunal was obliged to apply Section 2 of the Civil Evidence (Scotland) Act 1988. That section provides that hearsay is admissible, and a statement made by a person otherwise than in the course of the proof shall be admissible as evidence of any matter contained in the statement of which direct oral evidence by that person would be admissible. In his submission, the Sheriffs' oral evidence would be admissible so their affidavits must be permitted. Section 9(c) of the Civil Evidence (Scotland) Act 1988 defines "civil proceedings" as "any proceedings before a Tribunal or enquiry, except insofar as, in relation to the conduct of proceedings before the Tribunal or enquiry, specific provision has been made as regards to the rules of evidence which are to apply." The Fiscal submitted that there was no Tribunal rule which made specific provision regarding rules of evidence other than Rule 14 with regard to affidavits. Therefore, the 1988 Act applied, and the affidavit must be received. In support of this argument, the Fiscal referred the Tribunal to Macphail's "Sheriff Court Practice", 3rd Edition, paragraph 15.43; Davidson's "Evidence", paragraphs 12.109 to 12.111; Glaser v Glaser 1997 SLT 456; McVinnie v McVinnie 1995 SLT (Sh Ct) 81; and Ebrahim v Ebrahim 1989 SLT 808. He noted that the Sheriff Court had made a rule regarding affidavit evidence and was therefore in a different

position to the Tribunal where the 1988 Act must apply. In his submission, in the absence of a rule regulating the use of affidavits, the situation is prescribed by the 1988 Act.

The Fiscal further submitted that even if the Tribunal did have a discretion, it was appropriate to exercise that discretion in favour of the Complainers. In civil actions or appeals where factual evidence is in dispute, evidence is provided in the Sheriff's note. In criminal cases, the Sheriff's opinion, assessment of the evidence, views and submissions made by parties are contained in the written note or stated case. The Fiscal suggested that it was "excessive" to ask two Sheriffs from Hamilton Sheriff Court to attend a Tribunal hearing. It would cause the court great difficulty if their presence was required.

The Tribunal queried whether Rule 40 of the 2008 Rules could be considered a rule of evidence for the purposes of Section 9(c) of the 1988 Act. The Fiscal submitted that Rule 40 conferred a general discretion regarding Tribunal procedure but did not obviate Section 9(c) of the 1988 Act as it was not a rule of evidence. He reiterated that the Tribunal had no discretion in the matter except to admit the affidavit under reservation of competency and relevancy.

Ms Coyle noted that a copy of Sheriff Brown's affidavit was only provided to the Respondent on the morning of 16 December 2019 even although it had been signed on 6 December 2019. She highlighted that the Tribunal's own notice says that documents should be provided 14 days in advance of the procedural hearing. She submitted that based on principles of best evidence, the interests of justice and natural justice, the affidavits ought not to be received. The Respondent should have the opportunity to cross-examine these witnesses. She took issue with the cases referred to by the Fiscal and submitted that Tribunal proceedings are *sui generis*. The fact the Tribunal uses the criminal standard of proof suggests that civil evidence rules are inappropriate. The cases are 25 years old and relate to extraordinary circumstances. The convenience of Hamilton Sheriff Court was not in her submission sufficient reason to allow the Sheriffs to give evidence by way of affidavit. Both witnesses had been cited by both parties.

The Fiscal countered that the parties have 14 days before the hearing to produce documents. He wished to raise the issue at the procedural hearing to obtain a ruling from the Tribunal regarding the admissibility of affidavit evidence. Even if his motion was granted, this would not preclude the Respondent calling these witnesses. The Fiscal said the 1988 Act allows affidavits thereby changing the interpretation of the best evidence rule.

The Tribunal gave careful consideration to the parties' submissions. The Civil Evidence (Scotland) Act 1988 applies to Tribunal proceedings. Notwithstanding that, the terms of Tribunal Rule 40 gives the

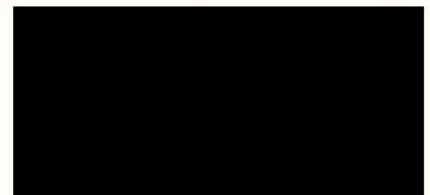
Tribunal discretion regarding whether or not to receive affidavits. This is not inconsistent with interpretation of the 1988 Act.

Having decided that it had a discretion in this matter, the Tribunal exercised that discretion by admitting Sheriff Brown's affidavit. This does not preclude either party from leading oral evidence from Sheriff Brown at the hearing and therefore no unfairness or prejudice to the Respondent arises. The burden of proof regarding misconduct will remain upon the Complainers at all times. It is a matter for the Complainers whether they wish to rely upon the affidavit which is received subject to all questions of competency and relevancy being reserved. In the absence of the witness, the evidence will be untested by cross-examination and may therefore be of limited weight.

The Tribunal could not receive the affidavit of Sheriff Millar which was not before it. If the Fiscal wishes any further affidavit to be received, he should make the appropriate motion in due course.

In answer to Ms Coyle's question, the Tribunal clarified that the Respondent was not precluded from calling Sheriff Brown as a witness for the Respondent.

Parties indicated that there were no other procedural matters to raise with the Tribunal. Ms Coyle invited the Tribunal to continue the case to the hearing already fixed. The Fiscal sought a further procedural hearing. This was opposed by Ms Coyle on grounds of time, trouble and expense. In her view, another procedural hearing was totally unnecessary. After due consideration, the Tribunal refused the Fiscal's motion and continued the case to the hearing already fixed for 22 and 23 January 2020.



Colin Bell
Vice Chair