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

INTERLOCUTOR

in Section 42ZA Appeal

by

ROBERT KIDD, 12 Mykinon, Germasogeia, Limassol 4045, Cyprus (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

SCOTT ALLAN, Solicitor, c/o Shepherd and Wedderburn LLP, Commercial House, 2 Rubislaw Terrace, Aberdeen (hereinafter referred to as "the Second Respondent")

By Video Conference, 24 June 2020. The Tribunal having considered the First and Second Respondents' motions to dismiss the Appeal; Refuses said motions; Continues the case to a procedural hearing to be afterwards fixed; and Reserves all questions of publicity and expenses meantime.

[redacted]

Ben Kemp
Acting Vice Chair

NOTE

An appeal dated 13 February 2020 was lodged with the Tribunal. Answers were lodged by both Respondents. Before a hearing was fixed in this case, all scheduled Tribunal hearings were cancelled due to government advice on the coronavirus pandemic. Parties indicated that it would be helpful to have a video conference discussion with a Chair or Vice Chair of the Tribunal to discuss the appropriate way forward. A virtual meeting therefore took place on 17 April 2020 with Mr Kemp, Acting Vice Chair of the Tribunal, the Tribunal Clerk, and the parties' representatives. At that meeting, the Respondents sought a preliminary hearing to take place by video conference. This was not opposed by the Appellant. A timetable was set for adjustment of the Appeal and Answers and the lodging of Notes of Argument and Lists of Authorities. The preliminary hearing took place on 8 June 2020. Parties made submissions at that preliminary hearing. No evidence was led. There was insufficient time for the Tribunal to complete its deliberations. Therefore, the Tribunal continued its deliberations on 24 June 2020.

At the preliminary hearing on 8 June 2020, the Tribunal had before it the original Appeal with covering letter of 13 February 2020 and the various documents which were enclosed with that letter. It also had Answers for both Respondents, the adjusted Appeal, adjusted Answers for both Respondents, Notes of Argument from all parties, and Lists of Authorities from all parties. Various productions were also made available to the Tribunal. The bundle of documents for the Appellant comprised his original complaint to the Scottish Legal Complaints Commission (SLCC); the SLCC's summary of complaint, eligibility decision, and eligibility report; and the Law Society's report and determination. The List of Documents for the First Respondent contained an email of 30 July 2018 from the Appellant's representative to the SLCC, the SLCC's summary of complaint, a copy letter of 28 January 2019 from the SLCC to the First Respondent, and the SLCC's eligibility decision report. The Second Respondent productions included a letter from the Appellant dated 17 August 2018 and the Law Society's supplementary report of 16 December 2018.

At the preliminary hearing on 8 June 2020, the Appellant was represented by Andrew Smith, QC. The First Respondent was represented by Elaine Motion, Solicitor Advocate, Edinburgh. The Second Respondent was represented by Roddy Dunlop, QC.

MOTION

Following an initial discussion with the parties regarding the purpose of the preliminary hearing, it was established that the Respondents' motion was for the Tribunal to dismiss the Appeal on the basis that it disclosed no valid ground of appeal in terms of the tests set out in Hood v Law Society of Scotland [2017] CSIH 21. The Appellant's position was that an appeal hearing should proceed. Parties were agreed that if the appeal was not dismissed at this stage, an evidential hearing would be required, with a procedural or case management hearing in the first instance.

The preliminary issues in this appeal were encapsulated in two questions posed in slightly different formulations in the Notes of Argument produced by the Appellant and the Second Respondent. The Tribunal was asked to consider the following questions:

1. Did the First Respondent's Professional Conduct Sub Committee err in law by limiting their consideration of the Second Respondent's conduct to his actual knowledge and failing to consider "constructive knowledge"?
2. Did the First Respondent's Professional Conduct Sub Committee err in that it was plainly wrong of them to find that the Second Respondent had no actual knowledge of Kenneth Gordon's actions?

The Respondents' submission was that both questions fell necessarily to be answered in the negative. That being the case, the appeal, they submitted, should be dismissed, without the necessity of a hearing. Parties agreed that Mr Smith for the Appellant would speak first, followed by the representatives for the Respondents.

SUBMISSIONS FOR THE APPELLANT

Mr Smith made submissions based on his Note of Argument and referred to the productions lodged by the Appellant. It was the Appellant's argument that the First Respondent was in error of fact and law. The error of fact related to a misapprehension of what was referred to the First Respondent by the Scottish Legal Complaints Commission (SLCC). The error of law related to the First Respondent's restriction of the complaint to actual knowledge. The Respondents sought to dismiss the case but the Appellant's view was that the appeal ought not

to be dismissed at this preliminary stage and instead the Tribunal should fix a case management hearing to determine further procedure.

According to Mr Smith, the background facts were not in dispute. It was accepted that Paull and Williamsons breached its fiduciary duties to Robert Kidd by Kenneth Gordon's actions and that Kenneth Gordon had sought to conceal his involvement. The question which remained was the extent of the Second Respondent's knowledge. Did he have actual or constructive knowledge, and what, if so, was the professional obligation which arose as a result? Ought he to have known and inquired as to what Kenneth Gordon was doing?

Mr Smith described the statutory complaints process contained in sections 2, 6, 46 and 47 of the Legal Profession and Legal Aid (Scotland) Act 2007. He referred to the definition of "complaint" in section 46 which "includes any expression of dissatisfaction". He said it was that which must go to the First Respondent under section 6. Mr Smith said that the SLCC cannot act beyond its statutory powers and has no power to restrict the First Respondent's investigation.

Mr Smith referred to the Appellant's original Complaint at paragraph 1.5 contained on the paper apart (page 430 of the bundle of documents prepared for the preliminary hearing). He said it was a perfectly legitimate function of the SLCC to distil the complaint and "get the conversation going".

Mr Smith drew the Tribunal's attention to the SLCC's eligibility decision (page 436 of the bundle) at paragraphs 1.4.3 and 2.18 - 2.23 which refers to the SLCC being of the view that the First Respondent was required to investigate what the Second Respondent knew about Kenneth Gordon's involvement and on that basis whether he knew or ought to have known that such involvement was inappropriate.

Mr Smith referred to the First Respondent's report of 19 September 2019 (page 454 of the bundle) and the emails described therein. The reporter was of the view that as there was no evidence of actual knowledge, the matter could not be taken any further. However, in Mr Smith's submission, the First Respondent is obliged to investigate matters of public importance and this called for investigation.

Mr Smith referred the Tribunal to Law Society of Scotland v Scottish Legal Complaints Commission 2011 SC 94 at paragraphs 41 and 45 which explores the scope of the word "complaint". He said a flexible approach should be taken but the starting point was the original complaint to the SLCC. The SLCC should not narrow down a complaint. Kerr Stirling v Scottish Legal Complaints Commission [2012] CSIH 98 at paragraph 21 and McSparran McCormick v Scottish Legal Complaints Commission 2016 SC 413 at paragraphs 14 and 23 showed that reference must be made to the original complaint. Mr Smith said that the SLCC must filter out complaints only to the extent of the statutory provisions. The First Respondent is obliged to investigate the complaint. However, the questions raised are to be adjudicated by the First Respondent, not the SLCC. Mr Smith also referred to Frank Houlgate Investment Company Limited v Biggart Baillie LLP 2013 SLT 993 at paragraph 42 and the reference to a solicitor's "wishful unthinking". He said that parallels could be drawn with the Second Respondent's actions. Undoubtedly, he should have known about the situation and investigated.

In answer to questions from the Tribunal, Mr Smith said the First Respondent must take a realistic view of what the Appellant was complaining about. They could not bolt on something completely different but they must investigate within the four corners of the original complaint. Mr Smith confirmed that the Appellant's case was built on actual knowledge as well as constructive knowledge.

SUBMISSIONS FOR THE FIRST RESPONDENT

Ms Motion adopted the submissions that were to be made for the Second Respondent, as set out in the Second Respondent's Note of Argument. She asked the Tribunal to refuse the appeal at this stage and uphold the determination of the First Respondent in terms of Section 53ZB of the Solicitors (Scotland) Act 1980.

Ms Motion referred to the judgement in Law Society of Scotland v Scottish Legal Complaints Commission 2011 SC 94. She said this case was about the ability of the SLCC to send totally unmeritorious complaints through the system. This case described the process which has been adopted in order for the relevant bodies to meet their statutory obligations. In her submission, paragraphs 33-36 of that case show clearly that the First Respondent has a narrow remit. The SLCC has a wider role and that is how they get to the summary of complaint that goes to the First Respondent. With reference to paragraphs 44-46 of that case, Ms Motion said that the

SLCC and by implication, the First Respondent, cannot go outwith the four corners of the complaint. The First Respondent argued that the scope of the four corners of the complaint has to be the summary of complaint. This gives certainty to all. Using the summary of complaint is the only way to deal with a case in terms of natural justice and fair notice. She noted that the complaint was agreed by the complainer. If the First Respondent had considered additional issues, it would have been acting ultra vires.

In support of her argument regarding fair notice and pleading specifically, Ms Motion referred to Strouthos v London Underground Ltd [2004] EWCA Civ 402, Law Society v JA Murray (SSDT 6 January 1975) and Chauhan v General Medical Council [2010] EWHC 2093 (Admin). Ms Motion also referred to Law Society of Scotland v Donaldson (SSDT 10 May 2018). In that case, the Tribunal adopted the approach taken in Hood v Law Society of Scotland [2017] CSIH 21. She said that putting all of it together, the answer was simple: the First Respondent can only proceed on the facts in the summary of complaint.

With reference to her Note of Argument, Ms Motion noted that there is no evidence of direct or actual knowledge. This leaves the Appellant relying on "constructive knowledge". However, professional conduct relates to personal behaviour. A solicitor is responsible for his/her own actings. She referred the Tribunal to section 46 of the 2007 Act, the reporter's report and the sub committee decision.

Ms Motion noted that the report cannot be subject to criticism. The Tribunal must assess the Sub Committee's decision making. However, there is nothing to justify Tribunal interference. The Sub Committee has lay and legal representation. It made a reasoned decision. She said that the Houlgate decision was not comparable to professional conduct proceedings. In that case, the solicitor involved came before the Tribunal in relation to his professional conduct.

In answer to questions from the panel, Ms Motion reiterated that the starting point for the First Respondent must be the summary of complaint. The legislation refers to "the complaint remitted to it". That must be the summary of complaint. If something goes awry in the summary of complaint narrowing the scope of referral, the remedy is an appeal to the Court of Session. Alternatively, the First Respondent could suggest to the complainer that he/she ought to make another complaint to the SLCC. The existence of the SLCC as a gatekeeper protects the public interest. Its role is to flesh out or distil the complaint into a form of words which the complainer accepts. This particular appellant is an astute professional person who agreed the

scope of complaint. If wilful blindness on the part of the Second Respondent was an issue, this could have been put in the summary of complaint. Ms Motion confirmed that the First Respondent receives the SLCC file when a complaint is remitted to it and that includes the complainer's original complaint, in the form it was received from the complainer.

SUBMISSIONS FOR THE SECOND RESPONDENT

Mr Dunlop's motion was for the Tribunal to refuse the appeal as it disclosed no proper basis. He said that the test for appellate interference was not met. Mr Dunlop submitted that at most, the Appellant disagreed with the Sub Committee's analysis regarding actual knowledge. This was not enough. The Sub Committee considered all the evidence and correspondence. It did not get anywhere close to showing guilty knowledge on the part of the Second Respondent. In his submission, there was nothing to be gained from looking at the question of actual knowledge. The gravamen or meat of the appeal was in relation to constructive knowledge.

Mr Dunlop referred to the concept of fair notice. In his submission, the SLCC undertakes the inquiry or investigation and the summary of complaint is the "charge". Mr Dunlop said that the Second Respondent was charged with actual knowledge and the Sub Committee had to decide if that met the test for unsatisfactory professional conduct. The Tribunal is concerned with whether the Second Respondent is guilty of unsatisfactory professional conduct. Matters are well past the charging stage. The Sub Committee can only investigate and convict on the basis of what is libelled. In support of this he referred the Tribunal to Strouthos v London Underground Ltd [2004] EWCA Civ 402 at paragraphs 12 and 41, Chauhan v General Medical Council [2010] EWHC 2093 (Admin) at paragraph 6 and Law Society of Scotland v Donaldson (SSDT 10 May 2018). In his submission it would be wholly unfair to go through a process with a charge that said, "You knew X" and for the Tribunal to accept he did not know X but had he done more digging and "followed the breadcrumbs" he might have been obliged to do something. There is a material difference regarding fair notice.

Mr Dunlop invited the Tribunal to consider the statutory structure contained in Sections 2 and 6 of the Legal Profession and Legal Aid (Scotland) Act 2007. He said reference to "the complaint" in Section 42ZA of the Solicitors (Scotland) Act 1980 is the complaint remitted to the First Respondent by the SLCC under section 6(2)(a) of the 2007 Act. The SLCC determines if a complaint is a conduct complaint. The First Respondent is to investigate what is remitted.

According to Mr Dunlop, the Note of Argument by the Appellant was utterly wrong. It contravened the requirements of fair notice and betrayed statutory functions and responsibilities. If the Tribunal could do what the Appellant suggested, then a complaint rejected as frivolous, vexatious or totally without merit by the SLCC could be revisited by the First Respondent. However, if he was wrong about that, he invited the Tribunal to consider if there was any material difference between the original complaint and the summary of complaint. According to Mr Dunlop, there are two things core to both; actual awareness and a failure to inform. There was no illegitimate trimming by the SLCC. If the Tribunal is prepared to drill behind it, the complaints are the same. The only reference to "ought to have known" is in the eligibility decision but this must be understood in its context. He asked the Tribunal to refer to paragraphs 2.20 and 2.22 of the eligibility decision. In his submission, the constructive knowledge relates not to whether the Second Respondent ought to have known what Kenneth Gordon was doing, but rather if the Second Respondent knew what Kenneth Gordon was doing, whether he ought he to have known it was inappropriate. Constructive knowledge of Kenneth Gordon's actions is not the subject of complaint. Actual and constructive knowledge do not shade into one another. There is a vast difference between "You knew X" and "You ought to have known X". The latter was not charged or answered.

In answer to questions by the Tribunal, Mr Dunlop said that the charge crystallises at the point when the SLCC cedes control and remits the case to the First Respondent. At that time, the decision is appealable. If something else arose during the investigation, it would have to be referred to the SLCC as a separate complaint.

DECISION

The Tribunal gave careful consideration to the documents produced by the parties, the authorities, the Notes of Argument and the oral submissions. It proceeded on the basis of the two questions outlined by the Respondents. In short, the Tribunal was asked to consider whether the First Respondent had erred by failing to consider "constructive knowledge" on the part of the Second Respondent and whether the First Respondent had erred by finding that the Second Respondent had no actual knowledge of his partner's actions. Only if the Tribunal concluded that both questions fell to be answered in the negative should the appeal be dismissed at this stage.

All parties made submissions at the preliminary hearing on the "charge" and the status of the summary of complaint. While solicitors must have fair notice of the charge against them, the Tribunal was not persuaded that the First Respondent is as narrowly constrained by the referral from the SLCC as was suggested by the Respondents. The gravamen of the complaint ought to be examined, with reference to the original complaint if required. "Complaint" includes any expression of dissatisfaction and this must encompass the original complaint to the SLCC. It was apparent from the authorities that the Court of Session has in other cases had regard to the original complaint as well as the summary of complaint (Kerr Stirling v Scottish Legal Complaints Commission [2012] CSIH 98 and McSparran McCormick v Scottish Legal Complaints Commission 2016 SC 413). This was not to suggest that the First Respondent could embark on a frolic of its own, to investigate another matter entirely, but it was reasonably entitled to inquire into the gravamen of the matter referred by the SLCC. It was not required to be unduly technical or constrained in its interpretation of the document produced by the SLCC to summarise the matter referred for investigation by the First Respondent. The Tribunal therefore decided that it was appropriate to have regard at least to the Appellant's original complaint in considering the Respondents' motions.

In relation to the first question, the Tribunal nonetheless found that there was no basis to conclude that the Sub Committee was wrong to exclude consideration of constructive knowledge. Constructive knowledge was not part of the original complaint. The original complaint at paragraph 1.5 is as follows:

"Scott Allan was the lead partner for me and for ITS. He was aware of Ken Gordon's improper activity on behalf of Lime Rock at least to a substantial extent but did not alert me."

This is an allegation of actual knowledge.

Issue 3 at paragraph 1.4 of the summary of complaint is as follows:

"Mr Allan failed to act in my best interests between approximately November 2008 and November 2009 as, despite being aware that a practitioner within Mr Allan's firm was providing advice to another party to the transaction, LRP, he did not inform me."

This is an allegation of actual knowledge.

Insofar as constructive knowledge was referred to by the SLCC in the eligibility decision, properly construed this related to the Second Respondent's knowledge of his professional responsibilities, had he been aware of Mr Gordon's actions. Paragraph of 2.22 of the Eligibility Decision Report is as follows:

"Accordingly, the SLCC considers an investigation of this issue of complaint is required, which may seek to establish precisely what Mr Allan knew about Mr E's involvement in the transaction and, on that basis, whether or not he knew, or ought to have known, ***that such involvement was inappropriate.*** *"* (Emphasis added.)

This gives context to the slightly more ambiguous section at paragraph 2.20 of the Eligibility Decision report which notes,

"If Mr Allan was aware, or ought to have been aware, that Mr E's involvement with LRP in relation to the relevant transaction was inappropriate and had the potential to compromise Mr Kidd's interests, but failed to take appropriate steps in such circumstances, the SLCC considers this could amount to a breach of this Rule."

The only reference to constructive knowledge, the Tribunal concluded, related to the question whether the Second Respondent ought to have known, given his (actual) knowledge of the facts, that professional obligations were being breached. That a solicitor may be 'deemed' to be aware of their professional obligations- assumed constructive, if not actual, knowledge- is, the Tribunal considers, uncontroversial. However, the nature and extent of the Respondent's professional obligations in this case must turn firstly on the extent of his actual knowledge of the facts of Mr Gordon's involvement. In relation to the complaint before the SLCC, it was never suggested, the Tribunal has concluded, that the Respondent might fall to be criticised professionally as a result of his constructive (as opposed to actual) knowledge of those facts.

The Tribunal has considered whether the First Respondent should nonetheless itself have considered the possibility of constructive, as opposed to actual, knowledge of Mr Gordon's involvement, avoiding being too technical or narrow in its consideration of the matter referred. The Tribunal has concluded however that the question of whether the Second Respondent is guilty of unsatisfactory professional conduct can only be determined by reference in the first instance to the Respondent's actual knowledge of the relevant facts; namely, his actual knowledge of Mr Gordon's involvement. This knowledge cannot properly be 'deemed' or 'constructive'. The Second Respondent was either aware of Mr Gordon's involvement, to the extent at least necessary to put him perhaps under a duty of inquiry, or disclosure, or he was not. Issues arising from 'wilful blindness' or a failure to investigate a matter of which a solicitor has been put on notice, can in some cases constitute professional misconduct or unsatisfactory professional conduct. A duty of inquiry can arise following on from actual knowledge of some facts, even if these are incomplete. However, these issues and possible duties must arise in the first instance from an element of actual knowledge. The relevant question is whether, given

what the Second Respondent actually knew, he was under a duty to investigate, or a duty of disclosure, or some other relevant professional obligation. In this case the Sub Committee was correct to limit its investigation firstly to what the Second Respondent actually knew, but not just because this was, properly construed, the basis of the original complaint, the summary of complaint and the eligibility decision. Whether or not the Sub Committee would have been entitled to examine the question of constructive knowledge in this sense (and this Tribunal has concluded that the Appellant is right to suggest that it should not be unduly narrow in examining the gravamen of the matter referred), the fact is that an assessment of the Second Respondent's conduct in this case, could only, necessarily, take as its starting point his actual knowledge of the relevant facts at the time in question. Therefore, for these reasons, the Tribunal answered the first question in the negative, in favour of the Respondents.

The second question cannot however, the Tribunal has concluded, be answered at this preliminary stage. The Tribunal did not consider that it was in a position at this time to determine safely that the appeal could not succeed in relation to point two; that the First Respondent's Sub Committee erred in its findings in relation to, and arising from, the Second Respondent's actual knowledge of Mr Gordon's involvement. It would be necessary to have before it at a full hearing all the evidence pertinent to the Second Respondent's actual knowledge which was considered by the Sub Committee in order to assess whether it had erred in its decision making while applying the principles described in Hood v Law Society of Scotland [2017] CSIH 21. The Tribunal considered that the emails referred to in the report relied upon by the Sub Committee raised some questions about the extent of the Second Respondent's knowledge of Mr Gordon's actings. However, the emails themselves were not produced for the preliminary hearing. The Tribunal also noted that it had not seen other papers which were before the Sub Committee, namely the correspondence representatives had submitted to the Sub Committee and the witness statements of the Second Respondent dated 26.03.19 and 25.11.19. It would be important to take account of these when analysing the Sub Committee's decision in terms of the principles described in Hood v Law Society of Scotland [2017] CSIH 21. The Tribunal was therefore unable to assess whether the Sub Committee had erred in its decision making with regard to actual knowledge at this stage. It is appropriate for this case to proceed to a hearing so that the Sub Committee's analysis of the extent of the Second Respondent's actual knowledge can be examined.

In the first instance, the Tribunal will set this matter down for a procedural hearing the date of which will be afterwards fixed. Case management questions and further procedure can be

determined at that procedural hearing. The Tribunal reserved all questions of publicity and expenses meantime.

Ben Kemp
Acting Vice Chair