

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

DECISION

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

by

**CAMPBELL THOMAS, 52 McLelland Drive,
Kilmarnock**

Appellant

against

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

First Respondents

and

**NEIL F McPHERSON, 87B John Finnie Street,
Kilmarnock**

Second Respondent

1. An Appeal dated 4 August 2020 was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42ZA(10) of the Solicitors (Scotland) Act 1980 by Campbell Thomas, 52 McLelland Drive, Kilmarnock (hereinafter referred to as "the Appellant") against the Determination made by the Council of the Law Society, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the First Respondents") on 25 June 2020 not to uphold a complaint of unsatisfactory professional conduct against Neil F McPherson, 87B John Finnie Street, Kilmarnock (hereinafter referred to as "the Second Respondent").

2. In accordance with the Rules of the Tribunal, the appeal was formally intimated to the First Respondents and the Second Respondent. Answers were lodged for the First Respondents.

3. Having considered the appeal and Answers, the Tribunal set the matter down for a virtual procedural hearing on 11 November 2020 and notice thereof was duly served on the parties.
4. At the virtual procedural hearing on 11 November 2020, the Appellant was present and represented himself. The First Respondents were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Second Respondent was present and represented himself. The Tribunal granted the Second Respondent's motion to receive his Answers after the deadline for lodging. All parties were content for a hearing to be fixed. After hearing submissions on the suitability of the case for a virtual hearing, the Tribunal set the matter down for a hearing in person on dates to be fixed.
5. The matter was subsequently set down for a hearing in person on 25 February 2021. However, due to coronavirus restrictions, the matter was adjourned by the Tribunal *ex proprio motu* on 21 January 2021. Another hearing in person was set down for 27 May 2021 and notice thereof was duly served upon the parties.
6. At the hearing in person on 27 May 2021, the Appellant was present in person and represented for a short period via video conference by John Toner but went on to represent himself at the hearing. The First Respondents were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Second Respondent was present and represented by Fred Mackintosh, Q.C. On the unopposed motion of Mr Stewart, the Tribunal received revised Answers for the First Respondents. On the unopposed motion of Mr Mackintosh, the Tribunal received a Second Inventory of Productions for the Second Respondent. The parties made submissions.
7. The Tribunal pronounced an Interlocutor in the following terms:-

Perth, 27 May 2021. The Tribunal in respect of the Appeal under Section 42ZA(10) of the Solicitors (Scotland) Act 1980 by Campbell Thomas 52 McLelland Drive, Kilmarnock ("the Appellant") against the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh ("the First Respondents") dated 25 June 2020 not to uphold a complaint of unsatisfactory professional conduct made against Neil F McPherson, 87B John Finnie Street, Kilmarnock ("the Second Respondent"); Confirm the Determination of the First Respondents in respect of the complaint; Find

the Appellant liable in the expenses of the First Respondents, the Second Respondent and of the Tribunal, including expenses of the Clerk, chargeable on a time and line basis as the same maybe 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; Refuse the Second Respondent's motion to certify the cause as suitable for junior counsel; and Direct that publicity will be given to this decision and that this publicity should include the name of the Appellant and the Second Respondent.

(signed)

Kenneth Paterson

Vice Chair

8. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Appellant, the First Respondents and the Second Respondent by recorded delivery service on *20 JULY 2021*.

IN THE NAME OF THE TRIBUNAL



Kenneth Paterson
Vice Chair

NOTE

The Appeal related to the Appellant's complaint accepted by the Scottish Legal Complaints Commission ("the SLCC") and passed to the Law Society for investigation. That complaint was in two parts and was as follows:-

"(1) Mr McPherson acted in a threatening manner towards me on 21 September 2016 outside Kilmarnock Sheriff Court in that he said in a loud and menacing voice "you better be careful Campbell, you better be very careful".

(3) Mr McPherson arranged for the exit of his client from a non-public facing door at Kilmarnock Sheriff Court on 11 January 2018, and inappropriately stated to members of the press that "He wouldn't have done it for anyone else but Campbell Thomas." Which I took as a personal attack against me."

The Professional Conduct Sub Committee of the First Respondents ("the PCSC") made no finding of unsatisfactory professional conduct. 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."

Unsatisfactory professional conduct lies on a spectrum between inadequate professional services and professional misconduct. The Appellant appealed against the PCSC's decision under Section 42ZA(10) of the Solicitors (Scotland) Act 1980 in accordance with the Tribunal's Procedure Rules 2008.

At the virtual procedural hearing on 11 November 2021, following submissions on the suitability of the case for a remote hearing, the Tribunal decided that a hearing in person ought to be fixed. Parties had indicated that witness evidence might be led, that witnesses might have to be referred to documents, and there was a possibility that their accounts might be challenged. The Chair asked the Appellant to explain the purpose of calling witnesses. He indicated they would speak to the incidents in question. The Chair explained that the Tribunal's role in an appeal case was to determine whether the First Respondents' Professional Conduct Sub Committee had made the correct decision regarding unsatisfactory professional conduct. The framework the Tribunal uses is

that set out in Hood, Petitioner [2017] CSIH 21. She explained that it was not the Tribunal's role to rehear the original complaint.

The matter was eventually set down for a hearing in person on 27 May 2021 after an earlier hearing was adjourned at the Tribunal's instance due to the COVID-19 restrictions in place at that time. Prior to the hearing in person, the Appellant informed the Tribunal that he would be represented by John Toner, National Organiser of the National Union of Journalists. At the Appellant's request, arrangements were made for Mr Toner to attend by video conference. The Tribunal granted permission for a witness for the First Respondents to give evidence remotely. It was noted that she was likely to be speaking to the documents lodged during the complaints process and her evidence would be of a formal nature. The Appellant also requested that his witnesses attend the hearing by video conference. This was opposed by the First Respondents. The Tribunal had regard to the remarks made by parties and the Chair at the virtual procedural hearing. If witnesses were to be led, it would not be appropriate to hear them by video conference since it was claimed by parties that credibility and reliability was going to be an important factor. The Tribunal therefore refused permission for the Appellant's witnesses to give evidence remotely.

At the hearing in person on 27 May 2021, the Tribunal had before it the Appeal and attached documents, Answers and revised Answers for the First Respondents, Answers for the Second Respondent, two Inventories of Productions for the Appellant, two Inventories of Productions for the First Respondents, two Inventories of Productions for the Second Respondent, and Lists of Witnesses from all parties. On the morning of the hearing, the Fiscal also provided a List of Authorities for the First Respondents.

On the morning of 27 May 2021 technical difficulties were experienced with the video conference platform and Mr Toner indicated that he could not hear the Chair. Various attempts were made to improve the communication. However, eventually the Chair proposed that the hearing was adjourned to another occasion to allow Mr Toner to participate in person. Mr Toner was in favour of that course of action but the Appellant and Mr Mackintosh indicated they were opposed to any adjournment. The Tribunal adjourned briefly to allow the Appellant to consider his position. On reconvening, the Chair indicated to the Appellant that given the communication problems, he could either seek an adjournment for his representative to attend in person or he could elect to represent himself. The Appellant indicated he wished to represent himself. He noted that his witness might not be able to attend on another occasion. The Tribunal decided to proceed with the hearing.

Mr Mackintosh invited the Tribunal to clarify the procedure for the appeal hearing. He moved the Tribunal to proceed as it had done in previous cases by way of review of the Sub Committee's decision and application of the principles contained in the case of Hood, Petitioner [2017] CSIH 21. If it did so, there would be no requirement to hear evidence. At the virtual procedural hearing, the Tribunal had reminded parties that it was not open to it to reconsider the complaint and that it wished to see all the documents available to the PCSC. Mr Mackintosh submitted that it was possible and appropriate for the Tribunal to come to a view on the papers. The appeal makes various criticisms that the PCSC gave improper weight to one factor or another. As the Appellant's criticisms related to weight, the Tribunal should apply the test in Hood to the PCSC's determination without hearing evidence. The Tribunal could make enquiry with the parties and apply the Hood test. The only other issue in the Appeal related to whether the Second Respondent had been charged by police. The PCSC's decision was wrong in this respect. The Second Respondent was charged and he informed the First Respondents of this during the investigation. Mr Mackintosh noted that the Appellant did not challenge this finding in the report.

Mr Stewart indicated that the procedure at the hearing was a matter for the Tribunal but in his view there was merit in proceeding on the basis of the papers alone. To hear the witnesses might sidetrack the Tribunal into issues of credibility and reliability when the PCSC did not have that information. It is the PCSC decision which must be judged in the appeal.

The Appellant urged the Tribunal to hear the evidence of his witness and concentrate on her evidence. The Tribunal adjourned the proceedings to consider this issue.

The Tribunal noted that according to Rule 40, subject to the provisions of the 1980 Act and the 1990 Act and of the Tribunal's rules, the procedure for dealing with a case, including the procedure at any hearing, shall be such as the Tribunal may determine. Since the Hood judgement, the Tribunal has consistently applied the test set out in that case to its own appeal cases. This was drawn to parties' attention at the virtual procedural hearing. Even before Hood, consistent with the approach of other appellate bodies, the Tribunal's usual approach in appeal cases was not to hear the matter afresh but to consider the reasonableness of the PCSC's decision. That approach was not criticised in Hood. It is rare for the Tribunal to hear evidence in an appeal case. It did "rehear" a complaint on the joint motion of parties in the Section 42A(7) Appeal by Messrs MacRoberts Solicitors and Richard Barrie. However, in that case it specifically noted that the decision was not to be treated as a precedent for future appeals.

Having regard to the statements contained in the documents lodged at Production 3 of the First Inventory of Productions for the First Respondents and Production 6 of the Second Inventory of Productions for the Appellant, the Tribunal was of the view that it was unnecessary to hear witness evidence about the incident in question which had already been the subject of the Sub Committee's determination. The hearing would therefore proceed as a review of the Sub Committee's decision following the principles in Hood. Parties made submissions.

SUBMISSIONS FOR THE APPELLANT

The Appellant said he wished to draw the Tribunal's attention to the decision of the PCSC and the issues raised in his appeal. With respect to issue 1 and referring to paragraph 1 of his grounds of appeal, the Appellant said it was not the words themselves which were at issue. Rather it was the delivery of those words which made the statement threatening.

The Appellant had left court to "feed the meter". He was accosted by the Second Respondent who said, "*You'd better be careful Campbell, you'd better be very careful.*" This caused an eyewitness to be sufficiently frightened to lock her car and close her windows. She told the Appellant she did not speak English and did not want to get involved. Her statement makes it clear that the tone and delivery of the words was frightening enough for her to want to disengage. However, she was friendly and understanding when she realised the Appellant was the victim. The Appellant noted the disparity regarding dates in her statement. He could not explain it. However, he submitted there was no doubt that the incident had taken place.

The Appellant submitted that a journalist trying to do a job should not be threatened. The incident took place outside where the Second Respondent thought there were no witnesses. The police initially tried not to accept the Appellant's complaint and he had to remind them of their obligations.

The Appellant said he found the incident frightening. He did not know what the words meant. If it was some kind of warning about something the Appellant was going to write, he would expect the Second Respondent to have referenced that. If the Second Respondent had wished to convey some kind of message, he could have used any mechanism. However, he chose to approach him in the street.

Two independent witnesses spoke to aspects of the incident. There are discrepancies in the photographer's statements. He was not present to explain them. However, the Appellant submitted that this witness did not recognise the person involved as the Second Respondent but would now be able to identify him as the person he now knows to be the Second Respondent.

The Appellant said a police officer considered him to be a "serial complainer". However, he should not have been pre-judged in this way. The discussion regarding whether the Second Respondent was charged or not muddies the waters. The Tribunal should focus on what was before the PCSC.

With reference to paragraph 2 of his appeal, the Appellant noted that the PCSC appeared to have erroneously linked the police constable's statement to the incident outside court on 21 September 2016. However, it clearly refers to a second complaint which was time barred. It refers to other issues the Appellant was concerned about. He considered the Second Respondent to be engaged in a course of conduct. The Appellant noted the reference to "freezing out" which suggested a previously friendly relationship. However, the opposite was true. The police constable knew about the incident outside court. The omission created an inaccurate picture. The Appellant suggested the police constable could have been biased against the Appellant because he considered him to be a "serial complainer".

With reference to paragraph 3 of his appeal, the Appellant noted that he continued to correspond with the Second Respondent. Two emails and a telephone call were made to the Second Respondent's office. The Appellant said he had no choice but to do that. He had to contact the Second Respondent as he had a right of reply. This is an obligation on journalists. The Appellant chose a low profile approach rather than attending at the Second Respondent's office in person. The Appellant said he did not know why the PCSC considered this relevant.

The Appellant said the determination of the PCSC was an incredible and very ominous decision given he was a journalist trying to a job.

The Appellant said it was crucial the Tribunal revisited issue 3. A solicitor must do his best for his clients. That might involve avoiding photographs. However, the Second Respondent's comments to the Appellant's colleagues were malicious. The Tribunal should consider whether the Appellant's colleague fabricated his account. The Second Respondent had a motive for being abusive and spiteful. The Second Respondent's comments described in issue 1 and issue 3 were reprehensible for a solicitor.

The Appellant encouraged the Tribunal to carefully examine the evidence of the police sergeant who had provided a precognition to the Second Respondent. The Appellant said he was shocked by the conclusion that the police sergeant considered a conspiracy had taken place. The Appellant said he had attempted to keep things simple. The process has been intimidating. He was bamboozled by some of the things which had happened at the Tribunal hearing. However, he was trying to be honest. A layperson might consider it a conspiracy that a police officer was paid for a precognition.

In course of questions by the Tribunal, the Appellant said he did not send the police constable's statement to the Law Society. It was clarified that the Appellant's submission was that the police constable's statement referred to a separate incident(s) to the one which was the subject of the complaint at issue 1.

SUBMISSIONS FOR THE FIRST RESPONDENTS

Mr Stewart began by noting that a solicitor must pay an administrative fee to Police Scotland for a precognition in a civil matter.

Mr Stewart referred the Tribunal the cases on his List of Authorities. The Tribunal offered the Appellant an adjournment to consider the case law but he indicated this was not required. With reference to Cowan, Petitioner [2014] CSIH 11, the Fiscal noted that at paragraph 19 the court said the Tribunal should focus on the subject matter of the complaint and not on extraneous or peripheral matters which were not the subject of complaint. The Tribunal should exercise a careful, vigorous and focussed consideration and analysis of the evidence the relevant law (paragraphs 19 and 20). With regard to Hood, Petitioner, Mr Stewart quoted from paragraph 17 which narrated the three tests for appellate interference. The Tribunal must give weight to the PCSC as an expert body. The PCSC has a wider range of experience and lay involvement than the Tribunal. The Fiscal referred to South Bucks District Council v The Secretary of State for Transport Local Government and the Regions [2004] All ER (D) 09, in support of the proposition that reasons need only refer to the material issues in dispute. The reasons should be sufficient to allow parties to understand the decision.

The Fiscal described the complaints investigation process, whereby a report is created which is a precis of information submitted by the complainer and the solicitor. Information is cross copied to the parties. The First Respondents accept that they received the Second Respondent's letter of 5

June 2019 (Production 1 of the Second Inventory of Productions for the First Respondents). Despite the terms of this letter, information about the Second Respondent being charged was not included in the report or the PCSC's decision. This is a factual error. However, as is correct, the report concentrates on the events relating to issue 1. There is much claim and counter claim regarding extraneous issues. The question of charge was disregarded and this was appropriate. Whether or not the Second Respondent was charged, does not strike at what happened on 21 September 2016. Whether the police thought the incident was threatening was peripheral.

The initial report considered the police constable's statement but says that direct witness evidence overrides this. The report was sent to the parties. The Appellant submitted additional emails containing witness statements. These were considered and included in the supplementary report. The First Inventory of Productions for the First Respondents contains the documents which were before the PCSC. Other documents lodged involved "mud-slinging", complaints and counter complaints. The PCSC had before it the report, the supplementary report and the emails. It was reasonable for the PCSC to consider the reports and parties' comments. The PCSC deals with 12 to 14 cases in an afternoon. It employs a reporter to assist it. This process is reviewed by the SLCC. The report is there to assist the PCSC but the decision is made by the PCSC which has delegated powers of the Council.

The Fiscal encouraged the Tribunal to look at the decision as a whole. He said it was not the case that if an error is made, the whole decision is vitiated. It is only if the decision is unreasonable that the Tribunal should interfere.

The PCSC approached the case correctly. It made a finding regarding the words said and then considered if they amounted to unsatisfactory professional conduct or professional misconduct. This was the correct test. They took into account the email statements. The police constable's statement was contained in an email. The Appellant passed this on to the SLCC. It was reasonable for the Law Society to accept this as relevant to the conduct complaint referred to it, particularly when the same PF reference number applied.

The PCSC did not "rubber stamp" the conclusion of the reporter. It weighed each piece of evidence. It interpreted the words in light of its own professional experience and came to a different conclusion. There is no weight of evidence contraindicative of the decision reached.

The Appellant was able to meet all his professional obligations. There was no requirement to meet the Second Respondent in person. The comments made outside court to the Appellant's colleagues were not offensive. At most, they demonstrate friction between the Appellant and the Second Respondent. They do not reach the test for unsatisfactory professional conduct. The Fiscal noted that the Appellant saw the report and did not advise of any errors although he had an opportunity to do so. The Fiscal submitted that the Appellant was seeking a rehearing by saying he forgot to say something during the investigation.

SUBMISSIONS FOR THE SECOND RESPONDENT

Mr Mackintosh said he broadly adopted the Fiscal's submissions. The failure to mention the charge was an omission. It did not appear in the report. The Appellant did not correct it. According to the PCSC determination, there was no evidence before it regarding charge but there was evidence in the file because the Second Respondent had been candid about that. It would be wrong to criticise the PCSC when the Appellant could have drawn that to their attention.

Mr Mackintosh drew the Tribunal's attention to what the PCSC found had actually happened regarding issue 1. This was a single incident, not repeated, and not part of a course of conduct, as in other cases where the Tribunal has found a conduct issue established (Law Society-v-Docherty and Section 42ZA Appeal by Matthew Berlow). The words themselves were not offensive or threatening. Even if the Tribunal accepts the eyewitness evidence, the words were at best an intemperate, spontaneous outburst demonstrating a loss of control, but falling short of the test for unsatisfactory professional conduct. At the time, members of the public did not know the Second Respondent was a lawyer. The participants were known to each other, and their relationship was not good.

With regard to issue 3, Mr Mackintosh adopted Mr Stewart's submissions on the way the decision was made. It cannot be the case that the Second Respondent is responsible for ensuring a client is photographed. There is no finding in fact about what was said.

With regard to sanction, Mr Mackintosh noted the long passage of time since these events in September 2016 and January 2018 and the length of time it took the Appellant to complain.

In answer to a question from the Tribunal, Mr Mackintosh said there was no suggestion the Second Respondent was seen leaving the court or that he was known to be a lawyer but he could not say it

was irrelevant that this incident took place outside court. In answer to another question, Mr Mackintosh said that the Second Respondent cannot remember what he said in the course of the incident at issue 3 but the gist of it was what that there was no point waiting for something that was not going to happen.

DECISION

There were two grounds of complaint which were relevant to this appeal. The first head of complaint was that the Second Respondent had acted in a threatening manner towards the Appellant by saying in a loud and menacing voice, "*you better be careful Campbell, you better be very careful.*" In his appeal and submissions, the Appellant indicated that it was the tone and delivery of the words which made them threatening. The second head of complaint was that the Second Respondent arranged for the exit of his client from a non-public facing door of the Court and inappropriately stated to members of the press that "*He wouldn't have done it for anyone else but Campbell Thomas*". The Appellant considered this to be a personal attack.

The First Respondents investigated these heads of complaint. In the course of that investigation, two reports were produced.

The first report was dated 3 April 2020. It referred to a statement from a police constable which was contained in an email to the Appellant from a representative of the Crown Office and Procurator Fiscal Service. That statement refers to the Appellant speaking to the police constable on 15 March 2017 and reporting how the Second Respondent was behaving towards him "for example when they passed each other in the court building." The police constable noted the complaint to be one of indirect actions of "freezing out" and unkind indirect words. He noted that the Appellant was anxious, and at one point, tearful. The report sets out the facts found by the reporter, the definition of professional misconduct and unsatisfactory professional conduct and the sanctions available to the PCSC. The reporter concluded that solicitors have a duty to treat members of the public with courtesy and respect and must refrain from bringing the profession into disrepute. With reference to the first head of complaint, the reporter was of the view that there was insufficient evidence to make any finding in fact regarding the statement alleged to have been made. The reporter places reliance on the police constable's statement, noting that the Appellant did not describe abusive or threatening behaviour when he spoke to the police constable at least six months after the event. The reporter noted that the Appellant continued to correspond with the Second Respondent. With reference to the second head of complaint, the reporter was of the view that the

Second Respondent had no control over how an accused person in custody would exit the court. Due to a lack of evidence, the reporter concluded he/she was unable to make any findings in fact in relation to what the Second Respondent may have said to the press. The Reporter therefore recommended that the PCSC took no further action in relation to any part of the complaint.

The second report was dated 17 June 2020. It was noted that following the issue of the first report, the Appellant had provided within an email copies of statements made by witnesses and email correspondence with the court. The reporter confirmed with the witnesses that the statements were made by them. On the basis of the further evidence, the reporter revised the findings in fact to include that the Second Respondent had said the words in question, that the statement was considered by a third party to be loud and threatening, and the statement caused the complainer to suffer fear and alarm. He recommended proceedings for professional misconduct in relation to the first head of complaint.

The PCSC met on 25 June 2020 and produced a decision which was intimated to the Appellant on 16 July 2020. The PCSC determination notes that it had the report and supplementary report before it and three emails from the Appellant dated 5 May 2020, 26 May 2020 and 2 June 2020. It said that it noted the background to the complaint as detailed in the information before it. In relation to the first head of complaint, the PCSC agreed with the reporter that it was capable of proof beyond reasonable doubt that the Second Respondent had said the words in question, that the statement had been considered by a third party to be loud and threatening and that the Appellant had suffered fear and alarm. However, the PCSC disagreed that the behaviour could be categorised as professional misconduct or unsatisfactory professional conduct. This was on the basis of the actual words spoken. The PCSC considered that the words in themselves were not threatening. It incorrectly noted that there was no evidence that the Second Respondent had been charged by police. It considered the statement of the police constable to be relevant, in particular that the police officer had not recorded the Appellant as describing abusive or threatening behaviour. It also noted that despite the alleged statement and effects, the Appellant had continued to correspond with the Second Respondent. It was not satisfied that the issue involved professional misconduct or unsatisfactory professional misconduct. In relation to the second head of complaint, the PCSC considered that Second Respondent would not have control over his client's exit from the court but that if he had made such a suggestion, this could be seen as consistent with acting in his client's best interests. The PCSC said it could not rely upon one statement to provide any demeanour or motive behind the alleged statement. It therefore determined to take no action in respect of either head of complaint.

The Appellant claimed in his grounds of appeal and in his submissions that the PCSC had erred in disregarding the view of the Reporter about the content and delivery of the statement. Evidence from two independent witnesses should not have been dismissed. Too much emphasis was placed on the words spoken and not what lay behind them. The Appellant noted that the Second Respondent had in fact been charged by police. The Appellant criticised the PCSC's reliance on the police constable's statement when it did not relate to the incident in question on 21 September 2016. The Appellant challenged the PCSC's reliance on the Appellant continuing to correspond with the Second Respondent despite the statement and its effects. The Appellant said he was under a professional obligation to contact the Second Respondent as he was due to publish a news report referring to a police investigation into the Second Respondent. The Appellant accepted that the Second Respondent did not control how his client exited court. However, he said that this Appellant's comments to the press were made in a crowing, malicious and unprofessional way. He noted that the Second Respondent had a strong motive for abusive and spiteful behaviour as the Appellant had reported him to the police and he was under investigation in relation to that matter. However, the PCSC failed to take that into account.

The Tribunal considered the principles in Hood, Petitioner [2017] CSIH 21. In that case it was said that the Court should be slow to interfere with the PCSC'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 PCSC 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 PCSC could properly reach. The Tribunal also bore in mind what a competent and reputable solicitor would have done in the circumstances. The finding or refusal to find unsatisfactory professional conduct follows on from that evaluative question. The Tribunal noted that the PCSC is comprised of six legal and six lay members. Its views on professional conduct matter should be afforded respect.

The Tribunal analysed the PCSC's determination carefully against the framework in Hood. It noted the Appellant's criticisms of the decision. It identified some factual inaccuracies but considered that these did not affect the central issue to be determined, namely whether the PCSC had erred in its decision-making in terms of the tests in Hood, and ultimately whether the Second Respondent was guilty of unsatisfactory professional conduct.

The first factual error in the PCSC determination related to whether the Second Respondent was charged by police. The PCSC noted that there was no evidence that the Second Respondent had been charged or that there was an ongoing investigation into the incident. The Second Respondent had made it clear in the course of the investigation that he had been charged by police and a report submitted to the Procurator Fiscal (Letter of 5 September 2019 with Annex A from the Second Respondent to the First Respondents contained at Production 1 in the Second Inventory of Productions for the First Respondents). This letter does not appear to have been made available to the PCSC. It does not appear in the list of documents they considered. However, the Tribunal considered that this error was not material and did not affect the overall decision of the Sub Committee. Whether or not the Respondent had been charged was not determinative when it came to unsatisfactory professional conduct. The test for criminal conduct and unsatisfactory professional conduct are different. Solicitors can be charged in relation to matters that do not amount to unsatisfactory professional conduct. Unsatisfactory professional conduct can be established where there is no criminal conduct. While the Tribunal noted this incorrect information, there is no suggestion the PCSC used its assumption that there had been no charge as any kind of determining factor, rather than applying as it should, the test for unsatisfactory professional conduct to the Second Respondent's behaviour. In the Tribunal's view, nothing turns on this inaccuracy.

The second factual error related to the police constable's statement. The Tribunal considered that the statement referred to incidents which were separate to the behaviour described at head of complaint one. The police constable's statement was taken six months after the incident in question and referred to behaviour in the court building when parties passed each other. It made no reference to the incident at head of complaint one. The PCSC note that they considered the statement to be relevant. They said it was of note that the police officer had not recorded the Appellant as having described behaviour which was considered as abusive or threatening. The Tribunal considered that this was not a relevant consideration when assessing the conduct on 21 September 2021. However, despite this, the PCSC proceeded on the basis that the statement was made by the Second Respondent in the fashion described by the Appellant and the other eyewitness. Therefore, any inference they drew from the police constable's statement was limited.

The Appellant also argued that the PCSC had taken into account an irrelevant consideration. The PCSC noted that despite the alleged statement and its effects, the Appellant had continued to correspond with the Second Respondent. The Tribunal accepted that the Appellant considered he was under a professional duty to communicate with the Second Respondent in circumstances where

he was pursuing a news story about the Second Respondent. However, it is also correct to note that despite the Appellant's feelings about the events of 21 September 2016, he had continued working on the story. He had not felt constrained to drop his investigation into the Second Respondent or pass the story on to another journalist. He had continued to work at Kilmarnock Sheriff Court. These were not irrelevant factors as they gave context to the events of 21 September 2021. A journalist has a right to pursue a story while meeting his own professional obligations but must be robust enough to accept criticism, challenge, or a warning that proceeding with a story might have legal consequences.

Keeping those issues in mind, the question to be determined by the PCSC was whether the Second Respondent was guilty of unsatisfactory professional conduct. The conduct must be analysed against the definition of unsatisfactory professional conduct contained in section 46 of the Legal Professional and Legal Aid (Scotland) Act 2007, namely whether or not the Second Respondent's conduct was of the standard which could reasonably be expected of a competent and reputable solicitor.

The Tribunal considered head of complaint one. The Tribunal kept at the forefront of its mind how a competent and reputable solicitor would have acted in the circumstances. These particular circumstances included an already strained and difficult relationship between the Appellant and the Second Respondent. The parties were well known to each other. The background included a news story which the Appellant intended to write about the Second Respondent. The Second Respondent was not acting in a professional capacity at the time although the incident did take place outside a court building. The whole incident was very short and limited to one sentence.

The Tribunal considered the PCSC was correct to proceed on the basis that the Second Respondent had said "*You'd better be careful Campbell, you'd better be very careful.*" The Appellant said that these words were delivered in a loud and menacing fashion. The eyewitness described the Second Respondent speaking in a loud voice and sounding menacing, nasty, threatening and mean. The PCSC considered that the words themselves were not threatening. The Tribunal analysed the actual words, the context in which they were said, and the eyewitnesses' assessment of the incident. It considered that although views on this incident might vary, and it would have been open to the Tribunal to come to a different decision had matter come before it at first instance, the PCSC's analysis was not unreasonable. On their ordinary meaning, the words were cautionary, and in the context of this case, likely to relate to the ongoing investigation by the Appellant. This might have been assertively put by the Second Respondent given the history of the relationship. Although the

Appellant and the eyewitness interpreted this as a threat, the Tribunal did not think this was an inevitable conclusion when the context was known. The background was unavailable to the eyewitness. She initially did not want to get involved in this incident but was persuaded by the Appellant to give a statement to the police.

In making its assessment the Tribunal kept in mind the observation in Wingate & Evans v Solicitors Regulation Authority [2018] EWCA Civ 366 that the duty to act with integrity does not require solicitors to be “paragons of virtue”. Unsatisfactory professional conduct is a departure from the standards of competent and reputable solicitors. The Tribunal considered that in this case, the PCSC’s assessment of the words said and their delivery was reasonable. The conduct was not sufficient to impinge upon the Second Respondent’s reputation in the circumstances. Neither would it damage the reputation of the profession.

The Tribunal considered the second head of complaint and again kept in mind how a competent and reputable solicitor would have acted in the circumstances. The PCSC was not prepared to rely on the statement of the press photographer. However, even if it had taken his statement at face value, the Tribunal considered that the words said did not bear the interpretation the Appellant ascribed to them. There is no indication of malice. The words at worst were a poor joke. They were unlikely to affect the Appellant’s reputation. It is a counsel of perfection to say that solicitors must interact perfectly with others at all times. The PCSC decision could therefore not be challenged under the grounds in Hood.

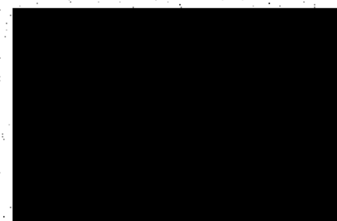
Therefore, considering the case as a whole, and applying the grounds for potential interference in the decision of an expert body, the Tribunal decided to uphold the determination of the First Respondents and refuse the appeal. The Tribunal invited submissions on publicity and expenses.

The Appellant said he would rather not be identified due to the background to this case. Mr Mackintosh noted the Tribunal’s usual practice was to name both parties. If the Second Respondent was to be named, then the Appellant should also be identified. Mr Stewart noted that the Tribunal has previously decided that successful solicitors must be named even if they would not have been identified but for the appeal.

The Appellant invited the Tribunal to exercise its discretion regarding expenses. He noted that the case was brought due to the Second Respondent’s actions. He surmised that the decision must have been a “close-run thing” due to the lengthy deliberations. He was of limited means. He asked the

Tribunal not to award expenses against him or alternatively to limit or share those expenses. Mr Mackintosh sought expenses against the Appellant. He criticised the pleading in the appeal and the Appellant's approach to Hood. It was the Appellant's choice to bring the appeal. Expenses should follow success. He moved for sanction for junior counsel as he had been asked to step in for junior counsel in this case. He suggested the issue was simple but the appeal was unfocused. Complications arose due to the way the case had been pleaded. The Appellant noted it was his right to appeal and it had been unfortunate he had lost his representation. He did not contribute to this incident. Mr Stewart moved for expenses against the Appellant. It was his appeal. If no expenses were awarded against the Appellant then all solicitors will pay for him to exercise his right of appeal.

Following a break for deliberations, the Tribunal directed that publicity would be given to the decision and that publicity would name all the parties to the appeal, in accordance with paragraphs 14, 14A and 23 of Schedule 4 to the Solicitors (Scotland) Act 1980 and as recently discussed in the Section 42ZA Appeal case by Andrew Duthie. The Tribunal found the Appellant liable in the expenses of both Respondents and of the Tribunal on the usual basis. It refused sanction for Counsel, considering that the issue was not so complex or difficult or of such importance that counsel was required. The Second Respondent's expenses will therefore be assessed at a solicitor's rate in the terms set out in the Tribunal's interlocutor.



Kenneth Paterson

Vice Chair