

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

INTERLOCUTOR

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

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, 11 June 2021. The Tribunal, having considered the parties' written and oral submissions; Makes no award of compensation; Finds no expenses due to or by any party in relation to all expenses incurred up to and including the preliminary hearing which was the subject of the Tribunal's Interlocutor of 24 June 2020, and thereafter Finds each Respondent liable in respect of one-half of the expenses of the Appellant and of the Tribunal including the expenses of the Clerk chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for General Business with a unit rate of £14.00; Certifies the cause as appropriate for the employment of Senior Counsel; and Directs that publicity will be given to the decisions of the Tribunal of 24 June 2020, 30 September 2020, 8 February 2021, and this decision of 11 June 2021, and that this publicity should include the names of the parties to the appeal.


Ben Kemp
Vice Chair

NOTE

On 8 February 2021, the Tribunal upheld the appeal, quashed the determination of the First Respondents and made a determination upholding a complaint against the Second Respondent. The hearing was continued to 11 June 2021. In advance of that date and in accordance with the timetable set down by the Tribunal, parties lodged written submissions on compensation, expenses and publicity. At the continued hearing, the Tribunal had before it the documents previously lodged and listed in the decision of 8 February 2021. In addition, it had written submissions from all three parties and a List of Authorities prepared for the First Respondents. The parties made oral submissions in the course of which they adopted their written submissions.

SUBMISSIONS FOR THE APPELLANT

Mr Smith confirmed that the Appellant did not seek compensation through these Tribunal proceedings.

Mr Smith noted what he perceived to be the Second Respondent's continuing lack of insight and the consequent risk that the conduct might reoccur.

Mr Smith noted that this matter had already been given publicity in various related Court of Session decisions. Anonymisation would be artificial since "jigsaw" identification could be made. The principle of open justice meant that the decision should be published "warts and all". The background to the complaint was a commercial transaction, rather than a family or other sensitive matter.

With regard to expenses, Mr Smith noted the principle was substantive success. The question was not whether the Appellant had been successful in every single part of his argument. The Tribunal ought to take an overall view. Broadly speaking, the Appellant had been successful. The Second Respondent ought to be liable in expenses. He committed the offence. Proceedings were primarily caused by him. Mr Smith moved for sanction for Senior Counsel noting the importance of the matter to the Appellant, and the substantial loss and significant settlement achieved. The agent and client, client paying scale should be applied.

SUBMISSIONS FOR THE FIRST RESPONDENT

Ms Motion asked the Tribunal to make an award of no expense due to or by any party. She drew the Tribunal's attention to Competition and Markets Authority v Flynn Pharma Limited and Others [2020] EWCA Civ 617. She invited the Tribunal to consider the role of the regulator in cases such as this.

Ms Motion accepted that the Appellant had been successful to a substantial extent. However, he had also been unsuccessful at earlier stages. The debate on the "constructive knowledge" issue had considerable implications for the profession and regulatory law in general. This matter had to be clarified. The principal part of the preliminary hearing related to that argument (and the Respondent had been unsuccessful on this point). She suggested that any expenses awarded should be on the agent and client, client paying scale. There was no dispute regarding sanction for Senior Counsel.

The Chair asked to what extent Ms Motion said the Tribunal was bound by the Flynn Pharma case when awards of expenses were discretionary and the Tribunal's practice has been to award expenses against the Law Society where appropriate in the past. Ms Motion noted the Flynn Pharma case is generally accepted across regulatory bodies as authoritative, as is Baxendale-Walker v The Law Society [2007] EWCA Civ 233. Following that approach, expenses should only be found against the Law Society where its approach was unreasonable. By contrast, in this case, the Law Society had been responsible and proper in its approach. Its argument did not find favour with the Tribunal but was not so far away that an award of expenses was appropriate.

SUBMISSIONS FOR THE SECOND RESPONDENT

Mr Dunlop noted the Tribunal's powers are contained within Section 53ZB(2) of the Solicitors (Scotland) Act 1980. No question of penalty arose.

With regard to expenses, Mr Dunlop noted that the Appellant had not enjoyed complete or substantial success. The Appellant's "constructive knowledge" argument was rejected and expenses were expressly reserved at that stage. The Appellant had continued inappropriately to argue for professional misconduct. Mr Dunlop rejected Mr Smith's criticisms of the Answers. He noted it was settled that this Tribunal applies the agent and client, client paying

scale. He moved the Tribunal to make no award of expenses. If this was not appropriate, he suggested it would be usual for the Law Society to bear the burden. In his view, the Baxendale-Walker and Flynn Pharma cases were persuasive only and did not bind the Tribunal. He had no opposition to sanction for Senior Counsel.

DECISION


The Tribunal gave careful consideration to the parties' oral and written submissions.

No award of compensation was sought. There was no information before the Tribunal to consider the issue. Therefore, the Tribunal made no award of compensation.

With regard to expenses, the Tribunal had regard to the Baxendale-Walker and Flynn Pharma cases but noted these were persuasive only. The Tribunal's usual approach was in general to award expenses according to success. It had however to consider each case on its particular circumstances and merits. Expenses are not awarded as an additional penalty but arise as a consequence of the cost of proceedings.

The Tribunal considered success was evenly split up to and including the debate on 24 June 2020. The Appellant was successful in having the Respondents' motion to dismiss repelled. However, he was unsuccessful with regard to a substantial part of the argument he put forward that day, particularly with regard to the constructive knowledge issue. It was not until after the preliminary hearing that the issues were clarified. The Tribunal therefore considered that it was appropriate to make no award of expenses up to and including that date and that each party should therefore bear their own expenses to that stage. Thereafter, expenses should follow success and these should therefore be awarded to the Appellant. Expenses should be awarded on the usual scale this Tribunal generally utilises, namely the agent and client, client paying scale. Given the complexity of the issues involved, the complicated background to the complaint, and the importance of the matter to parties, the Tribunal certified the cause as appropriate for Senior Counsel. The Tribunal considered whether to make the Respondents jointly and severally liable for expenses but decided that each Respondent should be liable for one half of the Appellant's expenses and the Tribunal's expenses from the date of the preliminary hearing. This was fair having regard to the respective responsibility of parties.

The Tribunal ordered that publicity should be given to the decision. This included the decisions of 24 June 2020, 30 September 2020, 8 February 2021, and this present decision of 11 June 2021. The Tribunal had regard to the principle of open justice and the Tribunal's obligations under Paragraphs 14 and 14A as read with Paragraph 23 of Schedule 4 of the Solicitors (Scotland) Act 1980. The parties and the Second Respondent's partner ought to be named. Given the nature of the background circumstances to the complaint and the extensive publicity this matter has already been given, there was no requirement to anonymise any third parties already named in the Tribunal's decisions in this case and already intimated to parties.



Ben Kemp
Vice Chair