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

I N T E R L O C U T O R

in Complaint to the Scottish Solicitors' Discipline Tribunal

by

THE COUNCIL OF THE LAW SOCIETY OF SCOTLAND, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the Complainers")

and

ALLAN RICHARD MORISON STEELE, WS, 22 Forres Avenue, Giffnock, Glasgow (hereinafter referred to as "the Respondent")

By Video Conference, 1 September 2021. The Tribunal having heard submissions in relation to the Complaint at the instance of the Council of the Law Society of Scotland against Allan Richard Morison Steele, WS, 22 Forres Avenue, Giffnock, Glasgow; Allows the adjusted Complaint to be received; Repels the preliminary pleas of the Respondent to the specification and relevancy of the Complaint; Continues the Complaint to a procedural hearing on 12 October 2021 at 10am, to proceed by video conference; and Reserves all questions of expenses to the conclusion of the case.

[redacted]

Colin Bell

Chair

NOTE

A Complaint dated 20 April 2021 was lodged with the Tribunal. This was served upon the Respondent. Answers were lodged by the Respondent, including preliminary pleas to the specification and relevancy of the Complaint. The Complaint was set down for a virtual procedural hearing on 10 June 2021. On joint motion, this virtual procedural hearing was adjourned administratively and a preliminary hearing was fixed for the Pleas in Law to be debated. The Tribunal allowed both parties four weeks to adjust the Complaint and Answers. Both parties were to lodge written notes of argument and Lists of Authorities in advance of the preliminary hearing. It was confirmed that the preliminary hearing was suitable to be dealt with by way of video conference.

At the virtual preliminary hearing on 1 September 2021, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Stuart Munro, Solicitor, Glasgow. The Tribunal had before it a Complaint marked "as adjusted 17 June 2021", Notes of Argument for both parties, a First Inventory of Productions for the Complainers, two Inventories of Productions for the Respondent, two Lists of Authorities for the Complainers, and one List of Authorities for the Respondent.

The Tribunal formally allowed the adjusted Complaint to be received. Mr Munro confirmed that he was not seeking to adjust the Answers. Mr Munro confirmed to the Tribunal that his submissions would be restricted to the pleas to the specification and relevance of the Complaint only. As the pleas were on behalf of the Respondent, both parties agreed that the Respondent's submissions should proceed first.

SUBMISSIONS FOR THE RESPONDENT

The Respondent had lodged a written Note of Argument in three sections:

1. Specification
2. Relevancy
3. Other issues.

Mr Munro confirmed that this hearing had been set down to deal with the Pleas in Law relating to specification and relevancy only. The written Note of Argument in relation to these two matters was as follows:-

"**1. Specification**

1.1 The respondent is entitled to know what conduct is founded upon by the complainer. Specifically, he is entitled to know what it is that is said to amount to professional misconduct.

1.2 At article 5.2, the complainer refers to the respondent's '*conduct as narrated in articles 3.2 through 3.9 which resulted in the conviction and his conviction for acting in a threatening and abusive manner*' as contravening the duties incumbent upon him. Focus in these articles is on the summary trial, the sentencing process, the respondent's attempts to appeal, and the sheriff's findings. But the complainer makes no direct averments about the underlying conduct. At no stage does the complainer make explicit averments as to the incident involving the respondent and his wife.

1.3 Furthermore, the complainer refers at article 4.2 to the duty to be trustworthy and honest, and not to behave in a way which is fraudulent or deceitful. The complainer avers that duty to have been contravened, but does not specify how.

1.4 In its adjusted complaint, the complainer specifies that it relies upon the findings of the sheriff in his reports. These reports however were prepared in the context of a sentence appeal; they do not contain findings of fact. The reports are almost completely silent on the matter of assault - the wife's allegation against the respondent (which resulted in acquittal) or the wife's assault on the respondent (which was supported by largely uncontested expert forensic evidence from two independent sources). The sheriff gives no explanation for the acquittal on the assault charge. He says nothing about his view on the forensic evidence. This despite the sheriff remarking at the hearing that the respondent was acquitted of the assault charge largely on the basis of Dr Douglas Robert Sheasby, honorary senior clinical lecturer in forensic odontology at the University of Glasgow's, evidence.

1.5 At no stage moreover do the adjustments or answers address how the respondent's alleged behaviour was either fraudulent or deceitful. To the extent that this is a reference to the evidence led at trial, the fact that the sheriff accepted the evidence of the wife over that of the respondent does not mean that the respondent was fraudulent or deceitful in giving his evidence.

1.6 Article 3.9 provides that '*[t]he Sheriff "did not find [the Respondent] credible or reliable" in large parts of his evidence.*' It is unclear from this whether the sheriff found the respondent's evidence to be incredible or if the sheriff found the respondent's evidence to be unreliable or a combination of the two (though it is difficult to envisage how the sheriff could determine the evidence to be both incredible *and* unreliable). This demonstrates the difficulty in relying upon the sheriff's reports, prepared in very particular circumstances, instead of making clear and specific averments.

2. Relevancy

2.1 The respondent was charged with assaulting his wife. That charge was found not proven, after the respondent led evidence about injuries that he had sustained. Expert witnesses testified that his injuries were the result of '*moderate and severe forces*' and his being the victim of an assault.

2.2 Virtually nothing is said about these matters by the sheriff, no doubt because the reports were prepared in the specific context of a sentence appeal, and in particular to address his decision not to grant an absolute discharge. There are no findings in fact (as would have been required had there been a timeous appeal against conviction). The respondent was advised by previous solicitors to appeal sentence. Instead, we have a partial record of the evidence given. We have no indication of what the sheriff made of the evidence of the expert witnesses; how that interacted with the (wholly consistent) account of the respondent and the (wholly inconsistent) account of the wife; and how, for instance, the sheriff thought the respondent had come by his injuries.

2.3 The respondent maintains that he did not shout and swear at his wife. But *esto* (i) that represents the basis of the complaint against him and (ii) the tribunal proceeds on the basis that the conduct occurred, the respondent submits that, in context, the conduct could not be regarded as sufficient to establish professional misconduct. There was a body of independent evidence to support the respondent's claim that he was seriously assaulted by his wife. Shouting and swearing in the course of such an attack cannot be regarded as conduct capable of justifying a finding of professional misconduct.

2.4 The sheriff decided to defer sentence on the respondent for a period before admonishing him. The ultimate disposal was, save for absolute discharge, the least that could competently be imposed.

2.5 At article 5.2 the complainer avers:

the alleged assault does not vitiate the respondents conduct. He cannot rely upon actions of another to justify his breach of the criminal law.

2.6 The respondent does not seek to justify any actions (which in any event he denies) based on the assault upon him. Rather, he wishes to set out the proper context of the claimed events. During the incident he was bitten to such a severe degree that, following advice from Police Scotland, he required to attend the Victoria Infirmary Accident & Emergency Department, as admitted by the complainer in its answer at article 3.2.

2.7 At article 5.2, the complainer avers:

Section 38(2) contains a defence, in effect that the Respondent's behaviour in the circumstances was reasonable, such reasonableness may be a reaction to an assault (which is not known and not admitted). It is reasonable to infer that the Sheriff rejected the respondent's wider context as defence to the criminal behaviour/conduct.

2.8 At trial, the sheriff was never addressed on the issue of reasonableness as the respondent at all times maintained his innocence to both charges. The sheriff's reports moreover make no mention of having

> carried out this assessment as they make no mention of the assault at all. We cannot know, or reasonably infer on the basis of the information available, what the sheriff did or did not consider. Again, this demonstrates the difficulty in relying upon reports prepared for an alternative purpose. If inferences are capable of being drawn, as the respondent was acquitted of the assault charge, it can be inferred that the sheriff accepted the respondent's evidence that it was he who was in fact assaulted by his wife."

Mr Munro submitted that it would be of assistance to the Tribunal for him to set out the background to the Complaint which he proceeded to do.

Thereafter, the first issue addressed was that of specification. Mr Munro referred the Tribunal to MacPhail, Sheriff Court Practice, 3rd Edition, paragraphs 9.07, 9.12 and 9.29 to 9.31. He submitted that the Respondent is entitled to know what it is that the Complainers say he has done and why that amounts to misconduct. He emphasised that where a party is pleading concepts, it is particularly important to set out the basis on which the concept is breached.

The alleged conduct is averred at paragraph 3 of the Complaint, duties are set out in paragraph 4 of the Complaint and the misconduct is averred in paragraph 5. He confirmed that none of the duties set out within paragraph 4 in themselves were disputed. The main issue related to paragraph 5 where the conduct averred in paragraph 3 and the Rules in paragraph 4 are transposed into misconduct. He argued that it was not clear what conduct the Complainers were striking at in paragraph 5.2 as it related to the Respondent's "conduct as narrated in articles 3.2 through 3.9" of the Complaint. These paragraphs included averments relating to the Respondent's defence of the criminal charge and the various steps taken by him since his conviction to appeal. The concern of the Respondent was that it was not clear whether the misconduct being alleged was restricted to the criminal conviction or whether it was being suggested that his conduct in the defence of these allegations somehow amounted to misconduct.

Additionally, his concerns went a little further than that. Even if the Fiscal confirmed that the Complaint related to the matters within the criminal charge, it was not clear in what context the Complainers were saying that the conduct occurred. Beyond the precise terms of the conviction itself, the only information provided was the two notes prepared by the Sheriff. Mr Munro explained that it was important for the Tribunal to understand that these reports were prepared for a specific purpose, namely the Respondent's then appeal against sentence. Consequently, the reports did not address all of the evidence given at trial. In particular, they provided little detail regarding the acquittal of the Respondent in relation to a charge of

assault and made no reference to the Respondent's evidence within the trial that he himself had been assaulted, in support of which two expert witnesses had given evidence. In other words, in his submission, the two notes did not tell the whole story. He submitted that behaviour is all about context especially in relation to the use of language. Even if the Respondent had made the abusive remarks referred to in the conviction, if these remarks were made in the context of the Respondent being assaulted, they would be considered in a quite different light to other circumstances.

As well as the common law position set out in MacPhail, he submitted that Article 6 of the Human Rights Act 1998 and the case of Albert and Le Compte-v-Belgium [1983] 5 EHRR 533 indicate that an accused person is entitled to be told of the case against him and this applies in disciplinary proceedings.

Mr Munro indicated that he accepted that if the Tribunal was with him with regard to the specification issue, it was likely that the Complainers would move to amend.

The second issue addressed was that of the relevancy of the Complaint. He argued that if the Tribunal was dealing purely with the allegation of abusive remarks, then that was not capable of meeting the test for professional misconduct set out within the case of Sharp v CLSS 1984 SLT 313. He argued that the conduct required to be put in context. He submitted that expert evidence had been led within the criminal trial relating to the assault upon the Respondent which had not been disputed by the Crown. The Respondent was ultimately admonished which he argued, in the context here, suggested that the conduct was not capable of amounting to professional misconduct.

Mr Munro referred the Tribunal to his written argument at paragraphs 2.1 onwards.

He submitted that it has never been the case that every criminal conviction amounts to professional misconduct. He drew the Tribunal's attention to Section 53(1)(b) of the Solicitors (Scotland) Act 1980. There, Parliament has set out a threshold in relation to convictions which automatically allows the Tribunal to act. If a solicitor is convicted of an act involving dishonesty, has been fined an amount equivalent to level 4 on the standard scale or sentenced to imprisonment for a term of 12 months or more the Tribunal has the power to act. The question arises as to the significance of criminal convictions resulting in a penalty less than this threshold. If Parliament had intended that any conviction would entitle the Tribunal to act then it could have said so.

Mr Munro submitted that it was appropriate for the Tribunal to consider how the Tribunal had looked at conviction cases in the past. He referred the Tribunal to paragraph 1.23 of Paterson and Ritchie, "Law, Practice and Conduct for Solicitors". He also referred to two Tribunal decisions, CLSS-v-Martha Anne Rafferty [2015] and CLSS-v-Martha Anne Rafferty [2019]. He argued that it was apparent from the 2015 decision that the Law Society had not considered a conviction for drink-driving, that resulted in a substantial fine and period of disqualification, to be sufficient to reach the threshold. Both cases suggest that it was the pattern of offending and course of conduct that brought the level of seriousness to meet the test set out in Sharp. He emphasised that the test in Sharp required the Tribunal to consider all of the facts and circumstances of the case. Conduct required to be considered serious and reprehensible. The penalty imposed must be relevant in considering this assessment given the threshold set out by Parliament in Section 53(1)(b).

Here, the Respondent had been admonished. This was the next step up from absolute discharge. It would be misleading to suggest that this conviction was a serious matter given the disposal. Nor was it appropriate to place emphasis on remarks made by the Sheriff within his notes as the notes were prepared for a specific purpose i.e. explaining why the accused was admonished rather than granted an absolute discharge.

He submitted that the Tribunal could not ignore the context within which the conduct had taken place, namely the Respondent having been assaulted. If the Sharp test was applied then, even taking the Complainers' case at its highest, the conduct of which the Respondent was found guilty could not reach the threshold for professional misconduct and so the Complaint was irrelevant and should be dismissed.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal explained that he considered it appropriate to address the Respondent's submissions in relation to the background of the Complaint before turning to his written submissions. In particular he explained that several of the submissions made on behalf of the Respondent were not accepted by the Complainers. In particular, it was not accepted that the Sheriff had held that the Respondent was assaulted by the complainer in the criminal charge. Section 38(2) of the Criminal Justice and Licensing (Scotland) Act 2010 provides a defence of reasonableness. The fact that the Sheriff had convicted the Respondent suggested that the Sheriff did not accept that the Respondent's conduct had been reasonable.

Whilst he recognised that it was his pleadings being tested at this hearing, he invited the Tribunal to consider whether it was a reasonable stance to take in the Respondent's Answers to say that he did not behave in the way described in the conviction but that, if he did, such conduct would have been reasonable.

This was a domestic dispute involving the Respondent's spouse. It had occurred outwith the matrimonial home and in front of three children under the age of 12. The police had required to attend and the conduct resulted in a conviction. Accordingly, he submitted that the Tribunal could not say that the conduct could not meet the test for professional misconduct.

The Fiscal then proceeded to take the Tribunal through his written submissions in relation to specification and relevancy which were as follows:-

"

1. General

1.1. The functions of pleadings is to give a full disclosure of facts and a the full statement of the grounds of action as connected with those fact. Each party must set out the facts and proposition of law on which they intend to rely before the tribunal. The pleadings give notice to the opposing party and Tribunal of a summary of the maters which he must prove and the arguments which he must present in order to succeed.

1.2. The Scottish Solicitors' Discipline tribunal Rules 2008 narrate at paragraph 6(1)(b) the manner in which complaint is to be made – in Form No 1 set out in the schedule, or as near thereto as circumstances permit.

1.3. Form 1 requires *[Please give in short numbered paragraphs the facts upon which the complaint is based and which the complainer is willing to prove].*

1.4. There is no requirement to narrate averments of professional duty nor the averments of professional misconduct.

1.5. The Council by making the averments in paragraphs 4 & 5 go beyond the minimum requirement of the rules. In terms of the rules the Council could have omitted the these paragraphs and would have complied with the rules. The Council has been adding these paragraph taken steps to meet assist parties, to concentrate the answers and distil the issues between the parties the general requires of written pleadings narrate at 1.1 above. It does not require to do in terms of the Tribunal Rules. The case should not be dismissed if there is a lack of specification or relevancy in those paragraphs(which the Council will argue does not exist).

2. Specification

2.1. Averments must specify sufficient facts to allow the party to lead all the evidence he desires to lead ...and to give fair notice of what the party hopes to establish fact

2.2. The Council seeks to rely upon the fact the respondent has been convicted of a breach of the criminal law. That that crime was committed in a domestic setting.

2.3. The Council seeks to rely upon the Sheriff's reports which narrate a precis of the evidence lead before him and upon which he based his conviction.

2.4. The Council seeks to rely upon the fact that all appeal routes have been exhausted.

2.5. The Council seeks to rely upon the fact that six applications have been made to the Scottish Criminal Case Review Commission – none of which have resulted in a referral to the High court – no miscarriage of justice has occurred.

2.6. That it should be concluded after consideration of these facts the respondent's behaviour amounts to professional misconduct.

2.7. There is sufficiency in the facts averred to allow the evidence to be led to establish each of these propositions.

2.8. The respondent's argues at 1.2 of his note that the Council makes no averment about the conduct, this is incorrect the Sheriff's reports contain narration of the conduct and are incorporated in paragraph 3.7.

2.9. The Council plead Rule B1.2 in its entirety, it is most proper to do so as to give fair notice the Society considers the conduct of the responded has breached at least one element of the rule. The rule makes reference to a number of elements of a solicitors conduct, honesty, deceit fraud and integrity.

2.10. The respondent argues at para 1.4 of his note, that there is no averment of fact surrounding the allegation of assault, that is correct, the Society does not seek to rely upon the allegation of assault.

2.11. Re para 1.5 the Council does not intend to rely upon the difference in the respondent's evidence and the finding of the Sheriff in support of the complaint before the tribunal.

2.12. Re para 1.6 of the Sheriff's note has been incorporated and his assessment is admissible evidence.

3. Relevancy

3.1. An irrelevant case is one in which even if all averments of fact are proved the party cannot prevail because, the averred facts (or the omission of an essential fact) would not justify the application of the legal principle which the party appeals.

3.2. In other words in this case if the Council prove all their averments it could not lead to finding of professional misconduct.

3.3. The action should only be dismissed (should the Tribunal rule against the grounds in paragraph 1) if the Council's case must necessary fail even if all the Council's averments are proved. Jamieson v Jamieson 1952 Sc (HL) 44 pr Lords Normand at 50 & Reid at 63)

3.4. The argument made at par 2.3 of the respondent's note is matter at large for the tribunal, it cannot be said that the committing of criminal offence in a domestic situation in the face of (an alleged) provocative situation will necessary fail.
Solicitors have a statutory duty to the profession and public. The crime with which he was charged had a statutory defence to it, that the respondent's actions were reasonable. In convicting the respondent, the Sheriff rejected that defence, The suggestion in the note is that the tribunal should ignore the Sheriff's finding that is concerning, Its is stated in Friel v Brown 2020 SC 273 at para 22

> *"The public policy considerations are clear. There ought not to be two conflicting court decisions: a High Court jury determination that finds it proved beyond reasonable doubt that the drug, which the defender had prescribed, did not cause the pursuer to lose consciousness; and a Court of Session finding in an action raised by the convicted person that, on the balance of probability, it did."*

3.5. Paragraph 2.8 of the respondent's note raises the difficulty of relying on the Sheriff's report – it is a matter for the Tribunal to consider the weight to be attached to the Shrieval report at time of the full hearing, not as preliminary point on relevancy of pleading – it is a weight of evidence question. It is the best evidence of the matters the Sheriff took into consideration when reaching his decision to convict the respondent. The suggestion that the Sheriff was not addressed on the reasonableness of his behaviour is red herring – the respondent denies the constitute element of the offence. The suggestion before the tribunal, is now , that even if I did breach Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010, I should be allowed to run an esto case that my behaviour was reasonable. There is on respondent, a duty of candour in his pleadings, he is required to aver clearly his position regarding his behaviour – either he did not act in a way which contravened the statutory provision or he did, and never the less, the contravention was reasonable and he could afford himself of the statutory defence.

3.6. The criticism of the potential strength of the evidence available is not sufficient to allow the Tribunal find that the Council's case as pled necessary fail at his stage."

The Fiscal emphasised that the Sheriff's two notes had been incorporated "*brevitatis causa*" in the Complaint. They contain a precis of the facts on which the Sheriff based his conviction. These reports are admissible evidence and the weight the Tribunal should give to them is not a matter for this hearing but is a matter of proof.

The Complainers were relying upon the fact that the Respondent had significant opportunities to overturn the conviction in order to demonstrate that the Society had not taken a knee-jerk reaction to the conviction. The Respondent had been allowed to exhaust the appeal process. In paragraph 2.11 of his written submissions, it was conceded that the Respondent was entitled to lead an appropriate defence.

The Respondent had attended at a property which was not the matrimonial home and had engaged in an exchange of words that the Sheriff had held put the Respondent's wife into a state of fear and alarm. The Fiscal submitted that the Tribunal could not say that a case of this nature, where the conduct had occurred in front of children, could not amount to serious and reprehensible conduct. The Tribunal today did not have to decide whether the Respondent had been a victim of assault. That was a matter for the Respondent to raise at proof.

The Fiscal referred the Tribunal to CLSS-v-Gilbert Anderson [6 November 2018]. He submitted that this case supported the contention that one conviction was sufficient to amount to professional misconduct. Whilst he accepted that the conviction in the Anderson case was for assault and therefore more serious, there were similarities. It was domestic in nature. The conduct put the victim into a state of fear and alarm. The Respondent in that case having his conduct assessed as criminal brought the profession into disrepute.

The Fiscal referred the Tribunal to Section 53ZA of the 1980 Act and reminded the Tribunal that in a Complaint of misconduct, if after enquiry the Tribunal is not satisfied that the Respondent is guilty of professional misconduct the Tribunal is obliged to consider the question of unsatisfactory professional conduct. He submitted that, in order to succeed in persuading the Tribunal to dismiss the Complaint today, the Respondent had to satisfy the Tribunal that the conduct averred did not even amount to unsatisfactory professional conduct. It was a high test for the Respondent to satisfy that the Complaint did not meet the test for professional misconduct and an even higher test in relation to unsatisfactory professional conduct.

The Fiscal emphasised that the evidential weight to be given to the Sheriff's report was not a question for this hearing. It was his position that, in order to succeed today, the Respondent required to persuade the Tribunal that conduct putting a solicitor's wife into a state of fear and alarm could never amount to professional misconduct or even unsatisfactory professional conduct.

RESPONSE FOR THE RESPONDENT

Mr Munro questioned whether the Fiscal was suggesting that the common law requirements of specification in pleadings did not apply to the Fiscal's Complaint.

He noted that the Fiscal indicated that he was seeking to rely on the Respondent having "significant bites at the cherry" in attempting to overturn his conviction but that the Fiscal was not suggesting that the Respondent was wrong to persist. He appreciated that concession.

He was also grateful for the concession that the accused's evidence at trial did not play any part in the question of misconduct in these proceedings.

He did not accept that the Respondent's Answers lacked candour. He submitted that the pleadings were entirely clear. The Respondent's basic position was that he did not say the words he was convicted of saying but he accepts that the Sheriff says he said those words.

Mr Munro emphasised that, although the Sheriff may well have had to consider the question of whether the conduct was reasonable or not, this was not an issue specifically raised by the Respondent at trial. The Respondent was not raising the issue of reasonableness now in terms of Section 38 but was applying the Sharp test. It was accepted that it was not for the Tribunal to rerun the criminal trial. It was for the Tribunal to make findings of what happened and whether or not what happened amounted to professional misconduct.

He distinguished the case of Anderson emphasising that the conviction was one of assault resulting in a community payback order.

Mr Munro did not dispute what Section 53ZA of the 1980 Act states but noted that there was nothing pled in the Complaint and the Complainers had not produced any authorities.

The Tribunal drew Mr Munro's attention to the second report of the Sheriff at paragraph 4 and asked if Mr Munro was saying that the Sheriff was wrong in his assessment. Mr Munro responded that the Tribunal had to approach the Sheriff's reports bearing in mind the purpose for which they were written. This report was written to explain why the Sheriff had chosen not to absolutely discharge the Respondent. These comments

had to be seen in the light of the Respondent having been admonished at the end of the day. If the conviction was to be seen as a serious one on an objective consideration then a different penalty would have been expected. He submitted that if the Tribunal considered the issues objectively, (1) words characterised as abusive (2) the eventual penalty of admonition and (3) comparative Tribunal cases, the conduct here fell below the threshold for professional misconduct.

Mr Munro confirmed that there was no active appeal process ongoing although the Respondent is keen to pursue a further application to the Scottish Criminal Case Review Commission.

In answer to a question from the Tribunal, the Fiscal confirmed that it was not his position that the conduct of the Respondent after conviction forms any part of the averments of misconduct.

DECISION

This preliminary hearing was fixed in order to consider the Respondent's preliminary pleas.

The Respondent presented his argument under two heads: (1) lack of specification and (2) relevancy.

His first argument was that the averments of misconduct at article 5.2 did not give clear notice of what was said to amount to professional misconduct. Article 5.2 read "his conduct as narrated in Articles 3.2 through 3.9 which resulted in the conviction and his conviction for acting in a threatening and abusive manner have contravened the duties narrated at 4.2 through 4.6".

Mr Munro argued that this could be read as including the Respondent's conduct in defending the charge and later attempting to overturn the conviction. Whilst the Tribunal did not necessarily agree with that interpretation, having regard to the phrase "which resulted in the conviction", it did agree that the averment was not as clear as it could have been. This matter, however, was resolved by the Fiscal clarifying that it was not his intention to rely in any way upon the Respondent's conduct in defending the criminal charge or attempting to overturn the conviction as a basis for a finding of professional misconduct.

The Respondent's attack on the specification of the Complaint had a second head that the averments within the Complaint did not give sufficient context for the conduct. The Fiscal responded that the Complaint set out the libel of the conviction and repeated *brevitatis causa* the two notes prepared by the Sheriff setting

out the evidence upon which he based his conviction. The Tribunal agreed that the issue of what weight to put on the content of the notes was a matter that required to be considered at a full hearing. The Tribunal accepted that the basic principles of fair notice, or specification, apply to Tribunal proceedings. At paragraph 9.29, MacPhail states *"When deciding whether the defender has been given fair notice of the pursuer's case, the court will consider the matter broadly, and will regard a complaint of lack of fair notice as justifiable only if it is likely to result in material prejudice to the defender."* The Tribunal considered that the Complainers had set out the conduct they were alleging amounted to professional misconduct in sufficiently clear detail. If the Respondent was of the view that some relevant detail was not included in the Sheriff's notes, then it was always open to him, subject to the rules of evidence and procedure, to lead evidence of these matters at a full hearing.

Accordingly, the Tribunal determined to repel the plea to the specification of the Complaint.

The second head of the Respondent's attack on the Complainers' pleadings was that the Complaint was irrelevant. It was Mr Munro's contention that a single conviction of using abusive language, as set out within the libel of the conviction, resulting in a sentence of admonition could never reach the standard of serious and reprehensible as set out in the Sharp test. The Tribunal considered that a single conviction could, in the appropriate circumstances, amount to professional misconduct. Whilst it can be useful to consider previous decisions of the Tribunal, it must always be remembered that each case must be considered in its own facts and circumstances. The Sharp test requires the conduct to be *"regarded by competent and reputable solicitors as serious and reprehensible"*. The Sheriff initially deferred sentence for good behaviour before then admonishing the Respondent. Many factors can influence the sentencer in the choice of final sentence, not just the seriousness of the offence. The Tribunal could not conclude that conduct causing fear and alarm to a solicitor's spouse, occurring in the presence of three children aged 12 or under, and resulting in the conviction of the solicitor in a criminal court could never amount to professional misconduct. The Tribunal considered that this was something that required to be given full consideration after hearing evidence at a full hearing.

Accordingly, the Tribunal determined to repel the Respondent's plea to the relevancy.

After hearing further submissions from both parties, the Tribunal fixed a virtual procedural hearing for 12 October 2021 at 10am. This is to allow both parties to consider what arrangements will require to be made

for a full hearing, including the likely duration and whether or not the hearing requires to be in-person. All question of expenses was reserved to the end of the case.

Colin Bell

Chair