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 February 2022. The Tribunal, having heard parties' submissions; Directs that the Respondent's criminal conviction as set out in the Complaint is admissible in evidence; Directs that at any future hearing of this case the Respondent shall be taken to have committed that offence unless the contrary is proved; Invites written submissions on the appropriate next step in procedure; and Reserves all questions of publicity and expenses meantime.

[redacted]

Ben Kemp
Vice Chair

NOTE

The Complainers brought a Complaint of professional misconduct against the Respondent. That Complaint relies on the Respondent's conviction after trial for a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. The Respondent admits he was so convicted but denies that he acted in a threatening and abusive manner. He contends that the Sheriff was mistaken regarding the evidence at trial. He wishes to lead evidence before this Tribunal that he did not act in a threatening and abusive manner, and consequently is not guilty of professional misconduct.

Following a virtual procedural hearing on 12 October 2021, both parties invited the Tribunal to continue the case to a preliminary hearing to determine whether the Respondent had proved that he did not commit the offence and had therefore overcome the presumption in section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 ("the 1968 Act"). The Tribunal was not prepared to fix a preliminary hearing at that stage and continued the case to a virtual procedural hearing on 4 November 2021 for parties to make detailed submissions on suggested procedure.

At the virtual procedural hearing on 4 November 2021, the matter was continued again for further submissions on the applicability of Section 10 of the 1968 Act to this Tribunal. Parties were asked to address at the next procedural hearing whether section 10 of the 1968 Act applied to these proceedings. If it did apply, the Tribunal wished to be addressed on what tests, if any, the Respondent would have to satisfy for the Tribunal to allow a challenge to the presumption in section 10. If section 10 did not apply, the Tribunal wished to be addressed on whether there were any restrictions preventing a challenge to a conviction other than by way of an appeal against conviction.

At the continued virtual procedural hearing on 7 December 2021, parties made submissions. On joint motion, the Tribunal fixed a virtual preliminary hearing for 1 February 2022 and directed that it would take the form of a legal debate. The Tribunal invited parties to address it on the following three questions:

1. What is the evidential status of the conviction in relation to these proceedings having regard to:
    a. section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968;
    b. the common law;
    c. the Tribunal's own rules and the statutory framework;
    d. any other relevant considerations?

2. To what extent, if at all, is the Respondent entitled in this case to lead evidence tending to show that he did not commit the offence of which he was convicted?
3. What, if any, are the implications for the onus of proof?

At the virtual preliminary hearing on 1 February 2022, 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: the Complaint as adjusted; Answers for the Respondent; an Inventory of Productions for the Complainers; two Inventories of Productions for the Respondent; parties' written submissions lodged in advance of the virtual procedural hearings on 4 November 2021 and 7 December 2021; written submissions on behalf of the Complainers lodged in advance of the virtual preliminary hearing on 1 February 2022; a list of authorities for the Complainers, a list of authorities for the Respondent; and the Tribunal's Interlocutors and accompanying Notes of 1 September 2021 and 12 October 2021. Parties made submissions on the questions outlined by the Tribunal.

SUBMISSIONS FOR THE COMPLAINERS

The Complainers' evolving view on the questions which were the subject matter of this preliminary hearing could be traced through their three sets of written submissions. The final position was outlined by the Fiscal in oral submissions which amplified the written note he had provided in advance of this preliminary hearing.

The Fiscal submitted that, at common law, a conviction is irrelevant and inadmissible (Hollington-v-F Hewthorn & Co Ltd [1943] KB 587 and Calyon-v-Michailaidis [2009] UKPC 34). However, as this Tribunal is not bound by the common law strict rules of evidence, it does not have to apply this evidential rule.

The Fiscal's view was that section 10 of the 1968 Act did not apply to these proceedings. That was because according to section 17 of that Act, the rule contained in section 10 does not apply to Tribunals which do not apply "the strict rules of evidence".

The Fiscal noted that the Tribunal is part of the same regulatory scheme as the Scottish Legal Complaints Commission ("SLCC") which can admit evidence which would be inadmissible in an ordinary civil action (Rule 3 of the Scottish Legal Complaints Commission Rules 2016). The SLCC does not apply the strict rules of evidence. There was an argument that the Tribunal should not do so either.

However, the Fiscal noted that there were statutory provisions suggesting that the Tribunal applies some rules of evidence. The Tribunal administers oaths and receives affirmations. There are statutory provisions for parties to require evidence of witnesses and call for and recover evidence and documents. These provisions are limited by the caveat that no person is compelled to produce any document which could not be compelled in an action (Paragraphs 11-12 of Schedule 4 of the Solicitors (Scotland) Act 1980).

Re A Solicitor (DC) [1992] 2 WLR 552 concerned Rule 39A of the England and Wales Solicitors' Disciplinary Tribunal Rules 1985 which allowed that Tribunal to regulate its own procedure. The Lord Chief Justice said that the Solicitors Disciplinary Tribunal was *"a Tribunal which can, subject to its own rules, use evidence which might in strict law be inadmissible."* The Fiscal noted that the present Tribunal has a similar provision in Rule 40 of its own Rules. He submitted that the interpretation applied to Rule 39A in Re A Solicitor ought also to be applied to Rule 40 of this Tribunal's Rules (Barras-v-Aberdeen Steam Trawling and Fishing Co 1933 SC (HL) 21).

If this Tribunal does not apply the strict rules of evidence, section 10 of the 1968 Act does not apply to these proceedings. This is because Tribunals which do not apply the strict rules of evidence are excluded from the scope of section 10 by the terms of section 17 of the 1968 Act. If the Tribunal was not with him on that, and section 10 of the 1960 Act does apply, the conviction demonstrates criminal guilt unless the Respondent rebuts the statutory presumption. In either case, the Tribunal could consider evidence of the conviction. The weight to be attached to a conviction will vary depending on the facts. The onus of proof will always be on the Complainers.

The Fiscal submitted that if, contrary to his primary position, section 10 applied to its proceedings, the Tribunal ought to restrict the application of the provision using Rule 40 of the Tribunal's rules to incorporate an "exceptional circumstances" test as applied by the Solicitors 'Disciplinary Tribunal and the Bar Disciplinary Tribunal in Shepherd-v-Law Society [1996] EWCA 977 and Shrimpton-v-Bar Standards Board [2019] EWHC 677 respectively.

If neither the common law nor section 10 of the 1968 Act applied, the conviction is an adminicle of evidence which can be overcome. However, the Tribunal still ought to use Rule 40 as applied by Re A Solicitor (DC) [1992] 2 WLR 552 to place restrictions on the evidence the Respondent could lead by imposing an

"exceptional circumstances" test. The Fiscal noted that the Bar Disciplinary Tribunal does not have an exceptional circumstances test in its rules, but thought it appropriate to import one in Shrimpton.

The Fiscal invited the Tribunal to consider the Respondent's Answers and determine whether there was sufficient averred there to meet an exceptional circumstances test. The Fiscal outlined various reasons why the Tribunal should give weight to the conviction. He said the Complainers should not be required to lead a victim of domestic abuse in evidence. This might conflict with the Complainers 'statutory duty to act in the public interest. This has wide-ranging implications for the regulatory regime.

SUBMISSIONS FOR THE RESPONDENT

Mr Munro noted the Fiscal's written position that the Respondent was entitled to lead evidence in challenge of the conviction. However, the Fiscal's oral submission was that the Tribunal should not allow this because there was insufficient information contained in the Respondent's Answers to meet the test. He submitted that it would not be fair to the Respondent if he was precluded from leading evidence based on his Answers alone.

Mr Munro outlined the circumstances giving rise to the conviction, the conviction itself, the sentence and the appeal against sentence which was unsuccessful. The Respondent did not appeal the conviction. He has always disputed that he behaved in a threatening and abusive way. He contends that the conviction was an error due to the Court's acceptance of his son's evidence as corroboration. These unusual circumstances justify the Respondent's position. The fact of conviction is admitted at paragraph 3.2 of the Answers, but the underlying conduct is denied.

The Complainers and Respondent are agreed that, at common law, a criminal conviction is neither relevant nor admissible in civil proceedings. Mr Munro did not challenge the English authorities relied upon by the Fiscal but noted similar Scottish authorities to the same effect (Devlin-v-Earl (1895) 3 SLT 166 and Dennison-v-Chief Constable, Strathclyde Police 1996 SLT 74).

With reference to sections 10 and 17 of the 1968 Act, Mr Munro asked the Tribunal to consider whether the conviction was "subsisting" and referred the Tribunal to section 5J(1)(b) of the Rehabilitation of Offenders Act 1974 which provides that there is no disclosure period for convictions resulting in admonition.

Mr Munro had been unable to find a definition of "the strict rules of evidence" and it is not defined in the Tribunal's rules. If section 10 does not apply, the Complainers suggest that the Tribunal follows Re A Solicitor. However, that decision is still consistent with use of section 10. The Tribunal is able to admit the conviction and proceed on the basis that the conduct occurred, and it is for the Respondent to rebut that presumption. There are no statutory interpretation difficulties requiring the Barras principle but even if that was the correct approach, it is not appropriate to assume knowledge of caselaw from outwith the jurisdiction.

Mr Munro referred to the Human Rights Act 1998 and the obligation on public authorities (including in this context, the Complainers and the Tribunal) to act in a Convention-compliant manner. Article 6 protections apply to disciplinary proceedings (Albert and Le Compte-v-Belgium (1983) 5 EHRR 533).

It is clear from section 9 of the Tribunal's own recent consultation document on its procedural rules that it is unclear whether section 10 of the 1968 Act applies to the Tribunal.

With reference to the strict rules of evidence, Mr Munro noted that all courts have a degree of flexibility regarding the admission of evidence. The rules on hearsay might provide a good "litmus test". Even in criminal proceedings hearsay can sometimes be admissible (section 259 Criminal Procedure (Scotland) Act 1995). The civil courts will admit all kinds of evidence, sometimes even that which has been illegally obtained. "Anything goes", provided the evidence will assist the court or tribunal. This Tribunal is not in a different position from other courts and tribunals when it comes to the rules of evidence.

Mr Munro said it would be fundamentally unfair to "parachute in" English decisions (Shepherd and Shrimpton) to create a rule which did not previously exist. It would be inconsistent with justice, section 10 of the 1968 Act, and Article 6 of the European Convention on Human Rights. It was fundamentally misconceived in any event because Shepherd and Shrimpton proceeded on a different statutory footing and applied different rules. Shepherd is a relatively brief report and does not refer to a particular rule. In referring to Shepherd, the court in Shrimpton noted that the Solicitors Disciplinary Tribunal Rules had incorporated section 11 of the Civil Evidence Act 1968. Mr Munro referred the Tribunal to Rule 15 of the Solicitors Disciplinary Tribunal Rules 2007 which was a later iteration of the rule discussed in Shepherd. Rule 15(2) specifically provides for findings in fact upon which a conviction is based to be admissible as conclusive proof of those facts "save in exceptional circumstances".

If an exceptional circumstances threshold is required, it creates several procedural issues. The Tribunal would essentially be re-writing its rules. Even if it was appropriate to do so, the Respondent needs an opportunity to make his case on exceptional circumstances. It would be absurd to hold him to his pleadings only for the Tribunal to "move the goalposts".

The onus of proof will always remain on the Complainers. Admission of the conviction under section 10 allows a mechanism for the Complainers to have the previous conviction admitted and a rebuttable presumption applied. It does not affect the question of professional misconduct. It is just one part of the case. All cases come down to weight. The Tribunal might take some persuading that the conviction should be overcome. However, there are cogent reasons why in this case, the Tribunal should keep an open mind. The Respondent accepts the conviction, but says that it was predicated upon a misunderstanding of his son's evidence. An artificial limit should not be placed on section 10. There is no exceptional circumstances test in the statute.

If section 10 did not apply, the Tribunal would have to fall back on the common law. However, there is an admission on record that the Respondent was convicted. Further proof of the conviction is not required. Whether the Complainers require further evidence to prove misconduct is a prosecutorial decision for them.

ADDITIONAL SUBMISSIONS FOR THE COMPLAINERS

The Fiscal invited the Tribunal to treat the Respondent's son's statement taken many years after the event "with a pinch of salt". The Respondent did not appeal his conviction and his applications to the Scottish Criminal Cases Review Commission have been rejected. The written submissions gave fair notice of the Complainers' position on exceptional circumstances.

The Fiscal submitted that the decision in Shepherd was based upon section 11 of the Civil Evidence Act 1968 as mirrored in the Tribunal's rules. There was no question of a particular rule being considered. Shrimpton referred to Shepherd and to section 11 being incorporated into the rules of the Solicitors Disciplinary Tribunal.

The Tribunal must be able to identify "the strict rules of evidence" for section 10 of the 1968 Act to apply.

With regard to exceptional circumstances, the Tribunal has the power to determine its own procedure and it is entitled to look at other regulatory regimes.

ADDITIONAL SUBMISSIONS FOR THE RESPONDENT

Mr Munro had relied on the Fiscal's written submission that the Respondent was entitled to lead evidence. However, the Fiscal now invited the Tribunal to restrict his right to do so. This was not fair.

DECISION

At common law, evidence of a criminal conviction is not admissible in other proceedings. That common law position was modified in civil proceedings by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968. Doubts arose relating to the applicability of that Act in these Tribunal proceedings; firstly, as to whether the conviction is admissible at all, and secondly, if the conviction is admissible, the extent to which it can be challenged by the Respondent. The Tribunal is not aware of these specific questions having arisen previously in proceedings before it. However, convictions are frequently proved by production of an extract conviction in cases brought under section 53(1)(a) and section 53(1)(b) of the Solicitors (Scotland) Act 1980.

Section 10(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 provides that in civil proceedings, the fact that a person has been convicted of an offence shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, but no conviction other than a subsisting one is admissible. Section 10(2) of the 1968 Act provides that in civil proceedings, where a person is proved to have been convicted of an offence by virtue of subsection (1), that person shall be taken to have committed that offence unless the contrary is proved. The statute therefore creates a rebuttable presumption following conviction that the convicted person committed the offence. "Civil proceedings" are defined in section 17 of the 1968 Act as including civil proceedings before any other tribunal, except proceedings in relation to which the strict rules of evidence do not apply. It has been queried whether this Tribunal is one to which the strict rules of evidence apply. If they apply, then the provisions of the 1968 Act also apply. However, if they do not apply, the rebuttable presumption in the 1968 Act would not be applicable and questions arise regarding the procedure to be followed in such a case. To determine whether these provisions of the 1968 apply to the Tribunal, it must be established

what is meant by "the strict rules of evidence". This concept does not appear to have been conclusively defined and parties did not place any specific authority before the Tribunal on this point.

When the 1968 Act came into force, two fundamental rules of evidence applied to most civil court proceedings, as they did to proceedings before this Tribunal, namely the requirement for corroboration and the rule against hearsay. These rules do not now apply in any civil proceedings (Civil Evidence (Scotland) Act 1988). The distinction between courts and tribunals which apply "the strict rules of evidence" and those which do not, is therefore not as clear as it was in 1968. This Tribunal has referred to itself on occasion as being a tribunal which does not apply the strict rules of evidence although this is usually followed by reference to corroboration and hearsay.

Section 18 of the Civil Evidence Act 1968 contains a similar provision to that at section 17 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968. It has been noted that the strict rules of evidence do not apply to the wardship jurisdiction of the High Court or the Court of Protection, Coroners Courts, Prize Courts, Ecclesiastical Courts and Election Court. Proceedings before those courts are therefore excluded from the operation of the Civil Evidence Act 1968 along with proceedings of other tribunals and inquiries unless the strict rules of evidence are applied by that particular tribunal, for example, the Lands Tribunal (paragraph 2.6 of Law Commission Report 216, "The Hearsay Rule in Civil Proceedings").

The test of whether a particular tribunal is bound by the rules of evidence depends upon the interpretation of the provisions which constitute or regulate it (Scots Law Commission Report 149 "Evidence: Report on Hearsay Evidence in Criminal Proceedings" at paragraph 2.6 citing Halsbury's Laws of England 4th Edition Volume 17 Paragraph 3). The Tribunal therefore considered the provisions which constitute and regulate it.

The Tribunal is constituted by section 50 of the Solicitors (Scotland) Act 1980. The Tribunal has the power, with the concurrence of the Lord President, to make rules for regulating the making, hearing and determining of complaints and generally as to the procedure of the Tribunal (Section 52(2) of the Solicitors (Scotland) Act 1980). The Scottish Solicitors 'Discipline Tribunal Rules 2008 are the current procedural rules applicable to the Tribunal. Provision is contained therein for the Tribunal to regulate its own procedure and for issuing directions to the parties as to how a case is to be dealt with (Rule 40). There are specific procedural rules dealing with evidential issues such as production of documents (Rule 13) and the power of the Tribunal to take account of documents and affidavits lodged in cases where the Respondent

fails to appear or be represented (Rule 14). Provision is also made in the 1980 Act for the Tribunal to administer oaths and receive affirmations. Parties are entitled to require evidence of witnesses and can call for and recover such evidence and documents and examine such witnesses as they think proper. However, no person is compelled to produce any document which could not be compelled in an action. Parties can apply to the court for warrant for the citation of witnesses and havers to give evidence or produce documents before the Tribunal. They can apply to the court to grant warrant for the recovery of documents. They can request the court to appoint commissioners to take the evidence of witnesses, to examine havers and to receive exhibits and productions (paragraphs 11 and 12 of Schedule 4 to the Solicitors (Scotland) Act 1980).

The Tribunal applies other rules of evidence as a matter of practice, although these are not contained in the Rules or statute. It applies the criminal standard of proof to Complaints of professional misconduct. In such cases, the onus of proof is on the Complainers. Fair notice of each party's case must be given in their pleadings. The Tribunal will exclude irrelevant or other inadmissible evidence. It has procedural rules to facilitate challenges to evidence. It has made determinations about the admissibility of irregularly obtained evidence (Law Society-v-Kevin MacPherson (2019)). It weighs evidence and applies evidential rules regarding the reliability of witnesses. Therefore, the Tribunal does apply some evidential rules, although in common with other civil courts and tribunals following the 1988 Act, it no longer requires corroboration and will admit hearsay evidence. It also has a flexibility regarding evidence and procedure in some areas that might not be available in the civil courts.

The Tribunal considered the approach of the Solicitors Disciplinary Tribunal and the Bar Disciplinary Tribunal as close examples of other tribunals concerned with the discipline of legal professionals. The general position in England and Wales regarding criminal convictions in civil proceedings is governed by section 11 of the Civil Evidence Act 1968 which is the statutory equivalent of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968. Neither the Solicitors Disciplinary Tribunal nor the Bar Disciplinary Tribunal claim to apply the strict rules of evidence and both bodies have created rules about the admissibility of convictions, albeit that they are based on section 11 of the Civil Evidence Act 1968.

In Re A Solicitor (DC) [1992] 2 WLR 552, the Lord Chief Justice said that the Solicitors Disciplinary Tribunal was *"a Tribunal which can, subject to its own rules, use evidence which might in strict law be inadmissible."* The current rules governing that Tribunal's procedure, the Solicitors (Disciplinary Proceedings) Rules 2019 provide at Rule 38(2) that the Tribunal *"may, at any hearing, dispense with the strict rules of evidence"*. It would seem that the Solicitors Disciplinary Tribunal therefore generally applies

the strict rules of evidence, but it may dispense with them at any hearing. This is not inconsistent with the flexible approach taken by the present Tribunal.

The Solicitors (Disciplinary Proceedings) Rules 2019 also say that the Solicitors Disciplinary Tribunal may admit any evidence whether or not it would be admissible in a civil trial in England and Wales (Rule 27(2)(a)). That Tribunal has powers to exclude evidence that would otherwise be admissible (Rule 27(2)(b)). Convictions can be proved before that Tribunal by the production of a certified copy of the certificate of conviction relating to the offence, and proof of a conviction will constitute evidence that the person in question was guilty of the offence. The findings in fact upon which the conviction was based are admissible as conclusive proof of those facts "save in exceptional circumstances" (Rule 32(1)).

The Bar Tribunals and Adjudication Service "Newsletter" titled "Admissibility of Evidence" notes that Tribunals in regulatory proceedings are often provided with a wide discretion to admit evidence and are rarely bound by the strict rules of evidence in criminal or civil jurisdictions. It is said that the same is true of the Bar Disciplinary Tribunal and its regulations provide a wide discretion to admit evidence. It gives the example of evidence contained in letter form being admissible rather than a witness statement being required.

According to the Bar Disciplinary Tribunal Regulations, that Tribunal may admit any evidence whether direct or hearsay, and whether or not it would be admissible in a court of law. It can give directions about the admission of evidence at the hearing as it considers appropriate, ensuring that a respondent has a proper opportunity to answer the charge. It can exclude hearsay evidence if it is not satisfied that reasonable steps have been taken to obtain direct evidence of the facts sought to be proved by the hearsay evidence (rE166). Proceedings which involve the decision of a court or tribunal in previous proceedings to which the respondent was a party, a copy of the certificate or memorandum of conviction relating to the offence shall be conclusive proof that the Respondent committed the offence. Any court record of the findings of fact upon which the conviction was based shall be proof of those facts, unless proved to be inaccurate (rE169).

Taking all this into account, it therefore appears to this Tribunal that the distinction between courts and tribunals which do and do not apply the strict rules of evidence is less clear than it was in 1968. This Tribunal operates similarly to other civil courts and tribunals. It has a degree of flexibility regarding evidence and procedure but so do many other courts and tribunals. The modern approach in all forums is to lessen the burden of restrictive rules of evidence where possible and consistent with the interests of

justice. For example, the Courts Reform (Scotland) Act 2014 section 103(2)(o) makes provision for the Court of Session to make provision by act of sederunt about witnesses and evidence, including modifying the rules of evidence as they apply to proceedings.

An argument could therefore be made that section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 applies to this Tribunal as it applies in other civil proceedings. However, even if it does not, and the Tribunal accepts that there is ambiguity regarding the definition contained in section 17 of the 1968 Act, if the strict rules of evidence do not apply to it, the Tribunal can be flexible about the evidence it will admit, and that can include convictions.

The Tribunal's long-established procedure has been to accept evidence of convictions and to follow the principle that is contained within section 10 of the 1968 Act, namely that the Respondent is taken to have committed that offence of which he was convicted. As far as the Tribunal is aware, no Respondent has attempted to prove the contrary although the issue was raised but did not have to be determined in Law Society-v-Benjamin Hann (2021) and Law Society-v-Kevin Davidson (2018).

The Tribunal is satisfied that convictions can be used in evidence. In this case, that issue is moot since the fact of the conviction itself is admitted by the Respondent at paragraph 3.2 of the Answers. However, even if the conviction was not admitted by the Respondent, it would be admissible under Section 10 of the 1968 Act or by the Tribunal's long-established practice to accept evidence of a conviction by way of production of an extract conviction in Complaints brought under Section 53(1)(a) of the Solicitors (Scotland) Act 1980 (see as an example, Law Society of Scotland-v-Sophina Ali (2015)).

The next question arising is the extent to which the Respondent can challenge the conviction. Whether or not the 1968 Act applies to these proceedings, the Tribunal considers that the rebuttable presumption contained therein provides a fair and appropriate way to determine this issue. The mechanism allows challenge to be made in appropriate cases to ensure fairness to Respondents. The Tribunal must act in accordance with the rules of natural justice and in a way that is consistent with the Respondent's Article 6 rights, where applicable, to a fair trial. Although the question is a novel one for this Tribunal, the presumption is well known and has been applied in civil proceedings since the 1968 Act came into force. Therefore, if section 10 of the 1968 Act does not apply to these proceedings, the Tribunal will apply this rebuttable presumption to its own proceedings using Rule 40 of its own Rules.

It ought to be noted that criminal convictions generally carry significant weight. The Tribunal will give court decisions due deference, particularly since a criminal finding of guilt is based on facts proved beyond reasonable doubt. The Complainers can proceed with their case in the knowledge that the Tribunal starts from the position that the Respondent has committed the offence. It will be for the Respondent to overturn this presumption (albeit the overall onus of proof will of course rest, as both parties agreed, on the Complainers). The Tribunal, as Mr Munro accepts, might take some persuading to rebut the presumption. However, the weight to be applied to the evidence led by the Respondent is a matter for the Tribunal at a substantive hearing or other hearing fixed for that purpose.

The Tribunal was asked to consider applying an "exceptional circumstances" test as used by the Solicitors Disciplinary Tribunal in England and Wales, and the Bar Disciplinary Tribunal. The Solicitors (Disciplinary Proceedings) Rules 2019 provide that the findings in fact upon which the conviction was based are admissible as conclusive proof of those facts "save in exceptional circumstances" (Rule 32(1)). The Bar Disciplinary Tribunal applies a rule that the extract conviction is conclusive proof that the Respondent committed the offence. Any court record of the findings in fact upon which the conviction was based shall be proof of those facts, unless proved to be inaccurate (rE169).

Earlier iterations of the rules of these Tribunals were discussed in the regulatory cases Shepherd v The Law Society [1996] EWCA Civ 977 and Shrimpton v Bar Standards Board [2019] EWHC 677 (Admin).

In Shepherd, a case before the English Court of Appeal, the applicant sought leave to appeal against the rejection by the Divisional Court of his appeal against the findings and order of the Solicitors Disciplinary Tribunal. Before the Tribunal a certificate of conviction had been admitted without objection. The ground of appeal related to the Tribunal's refusal to allow the applicant to adduce evidence in support of his assertion that he was not in fact guilty of the offences of which he had been convicted. The Court of Appeal agreed with the Divisional Court that to permit Mr Shepherd, who had not challenged his conviction on appeal, to assert that it was wrongful, would be an abuse of process. Leave to appeal was therefore refused. The Court of Appeal highlighted the following part of the Divisional Court's judgement as being "particularly important":

"Public policy requires that, save in exceptional circumstances, a challenge to a criminal conviction should not be entertained by a Disciplinary Tribunal...In the absence of some significant fresh evidence or other exceptional circumstances such an outcome could not be in the public interest. Here the appellant had not

even applied for leave to appeal. There were no exceptional circumstances. What he wished to do was to have a rehearing of the criminal trial in which he could conduct his own case, as he submitted to us, better than his leading counsel. We are in no doubt that the Tribunal were right...to refuse the appellant an opportunity to mount such an operation."

In Shrimpton, a decision of the Administrative Court, the appellant, a barrister, had two criminal convictions which led to disciplinary proceedings and disbarment. He maintained his innocence. The thrust of his appeal was that the Tribunal was wrong not to allow him to adduce evidence on which, he submitted, it ought to have concluded, on the balance of probabilities, that he was, in fact, innocent of all the offences of which he had been convicted.

The Court noted at paragraph 33 of its judgment, the case of Stannard-v-General Council of the Bar (2006), in which a barrister had sought to argue that while the Tribunal could have regard to the jury's verdict, they could also take other evidence into account. A central issue was identified as being the extent to which it was open to the Tribunal to go behind the conviction. The Tribunal in Stannard relied upon the Shepherd decision and decided that exactly the same policy considerations applied to the Disciplinary Tribunal of the Bar which was similarly entitled to refuse to go behind the conviction save in exceptional circumstances.

The Court in Shrimpton was of the view that the decision in Shepherd was binding upon it. While the decision in Stannard was not binding, it was a decision of a High Court judge which should be given due regard. It follows a policy as to the conduct of regulatory tribunals which is both fair and practical in its application (paragraph 35).

In Shrimpton, the Court accepted that the rules of natural justice permitted the Tribunal to go behind the convictions where there were exceptional circumstances (paragraph 41). The Court approved of the Tribunal's approach which was to hear submissions and have regard to relevant authorities when determining the issue of exceptional circumstances, rather than hearing evidence on the matter. Following this exercise, the Tribunal found that there was no significant evidence that the Respondent could produce and no exceptional circumstances which would justify the Tribunal hearing oral evidence on behalf of Mr Shrimpton as he sought to go behind the fact of his criminal conviction (paragraph 41).

Therefore, in disciplinary proceedings for solicitors and barristers south of the border, to challenge a conviction, the Respondent must demonstrate first that there are exceptional circumstances justifying this

course of action. However, the present Tribunal was reticent about importing an exceptional circumstances test in the absence of a specific Tribunal rule or practice about exceptional circumstances, or judicial precedent binding on the Tribunal. It would not be appropriate to adopt a test applied elsewhere in a different context. This may be something which the Tribunal chooses to address in its next set of procedural rules.

The Tribunal also considered the Scottish case Friel-v-Brown 2020 SC 273, an Inner House decision about the use of criminal convictions in civil proceedings. Section 10 of the 1968 Act applied. A person convicted of death by dangerous driving tried to raise a negligence action against his GP which related to prescription of certain drugs, although the jury in the criminal case had rejected his automatism defence. The court considered the action to be a "collateral attack" on the criminal conviction. For public policy reasons, it was said that Section 10 of the 1968 Act is not a vehicle for mounting a collateral challenge to a criminal conviction. If a convicted person wished to challenge a conviction he must first do so by way of appeal. The same issue should not be litigated repeatedly between the same parties on substantially the same basis. The Court thought it undesirable to have 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.

The Court noted that section 10 of the 1968 Act does not permit a convicted pursuer to make reference to his conviction and then to rely upon its existence for his damages claim, with a view to using section 10(2) to rebut the presumption that the conviction was sound. Such a course would conflict with public policy considerations (paragraph 23). However, the Court noted that it was different if there had been an acquittal and the pursuer sought to prove on the balance of probability that the defender committed the offence (paragraph 22). It was also different when the convicted person is the defender. In those circumstances, section 10 of the 1968 Act would apply (paragraph 23). In these present proceedings, the convicted person (the Respondent) is in a similar position to that of a defender in civil proceedings.

Therefore, in these present proceedings, the Respondent shall be taken to have committed the offence unless he proves to the contrary. While the Tribunal will not impose an exceptional circumstances test for the Respondent to overcome before being allowed to lead evidence about the conviction, the evidence the Respondent will have to adduce will require to be of sufficient cogency and weight in order to overcome the presumption that he did commit the offence. The presumption will not be easily overcome. This is due

to reasons relating to the conviction itself, including the standard of proof employed by the criminal courts, but also for the public policy reasons referred to. Once evidence has been led, parties can make submissions on the application of the presumption, the persuasiveness of the evidence led by the Respondent, and any relevant public policy arguments in submissions to the Tribunal.

Mr Munro raised the question of whether a "spent" conviction was a subsisting one in terms of the 1968 Act and the Rehabilitation of Offenders Act 1974. Given the Tribunal's position on the application of the principle contained in 1968 Act through the Tribunal's own rules, it was not necessary to determine this issue, but the Tribunal's view was that all convictions can be admitted for the purpose of disciplinary proceedings, whether under the 1968 Act or not (paragraph 3 of the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 which refers to schedules 1 and 4 of that Order).

Therefore, in summary, the Tribunal answers the questions posed at the legal debate as follows:

1. The Respondent shall be taken to have committed the offence narrated in the Complaint unless the contrary is proved, in accordance with the admission contained in the Answers and the principle contained in section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, even if that statutory provision is not binding on this Tribunal;
2. The Respondent is entitled to lead evidence tending to show that he did not commit the offence in order to attempt to rebut the presumption that he did commit the offence;
3. The onus of proof remains on the Complainers at all times to prove their case beyond reasonable doubt. Assuming that the complainers will rely upon the evidential presumption attaching to the conviction, it will then in practice be for the Respondent to attempt to rebut this, should he wish to do so.

The Tribunal proposes to fix a substantive hearing at which the Complainers can, should they see so fit, rely upon the evidential weight attaching to the conviction and the Respondent can, should he see so fit, lead evidence in support of his position and attempt to rebut the presumption that he committed the offence. Even if he is unsuccessful in that goal, it is still for the Complainers to establish that, and ultimately a question for the Tribunal whether or not, he has committed professional misconduct. It is a matter for parties which evidence to lead or witnesses to call.

The Tribunal is aware that parties did not have an opportunity to address it at the virtual preliminary hearing on its proposal to fix a substantive hearing, rather than fixing another preliminary hearing. The Tribunal will therefore accept written submissions on the next appropriate steps in procedure within 14 days of intimation of these findings. All questions of publicity and expenses were reserved.

Ben Kemp

Vice Chair