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

F I N D I N G S

in Complaint

by

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

Complainers

against

ALLAN RICHARD MORISON STEELE, WS, 22 Forres Avenue, Giffnock, Glasgow

Respondent

1. A Complaint dated 20 April 2021 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") averring that Allan Richard Morison Steele, WS, 22 Forres Avenue, Giffnock, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was no Secondary Complainer.

3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.

4. The case called for a preliminary hearing on 1 September 2021, procedural hearings on 12 October 2021, 4 November 2021, 7 December 2021, a preliminary hearing on 1 February 2022 and a procedural hearing on 23 May 2022. All these hearings were held by video conference. Interlocutors and Notes were produced after some of these hearings. These are dated 1 September 2021, 12 October 2021, 1 February 2022 and 23 May 2022.

5. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 29 and 30 September 2022 and notice thereof was duly served on the Respondent.

6. At the hearing on 29 and 30 September 2022, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Stuart Munro, Solicitor, Glasgow. Due to lack of Tribunal time, the hearing was continued to 14 December 2022.

7. At the continued hearing on 14 December 2022, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Stuart Munro, Solicitor, Glasgow.

8. Having given careful consideration to the documents before it, the Tribunal found the following facts established:-

8.1 The Respondent is Mr Allan Richard Morison Steele, WS, of 22 Forres Avenue, Giffnock, Glasgow. His date of birth is 19 April 1974. He was admitted to the Roll of Solicitors on the 28 September 1998. He was employed by Balfour & Manson between 13 October 1998 and the 27 August 1999; Boyds Solicitors between 1 September 1999 and 2 January 2001; Dallas Macmillan between the 3 January 2001 and 30 November 2001; Strathclyde Passenger Transport Executive between 17 December 2001 and 1 February 2003; then the Royal Air Force until the 30 March 2020. The Respondent commenced practice as the principal of ARMS Legal Services WS from the address in the instance on the 1 September 2020 from where he continues to practise.

8.2 On the 16 September 2016, following a summary trial lasting three days at Kilmarnock Sheriff Court the Sheriff delivered a verdict that a complaint against the Respondent was not proven in respect of an alleged assault on his wife but found the Respondent guilty of a contravention of the Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. The charge the Respondent was found guilty of was as follows:

"On 18th July 2016 at [an address in Ayrshire], you Mr Allan Steele, did behave in a threatening or abusive manner which was likely to cause a reasonable person fear or alarm in that he behaved in an aggressive manner towards Linzie Steele, your wife, care of the Police Service of Scotland,

and did shout abuse at her and swear at her; CONTRARY to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010."

8.3 The Criminal Justice and Licensing (Scotland) Act 2010 section 38 "Threatening or Abusive Behaviour" states that:

"(1) A person ("A") commits an offence if –

(a) A behaves in a threatening and abusive manner,

(b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and

(c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.

(2) It is a defence for a person charged with an offence under subsection (1) to show that the behaviour was, in the particular circumstances, reasonable.

(3) Subsection (1) applies to –

(a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done, and

(b) behaviour consisting of –

(i) a single act, or

(ii) a course of conduct.

(4) A person guilty of an offence under subsection (1) is liable –

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both."

8.4 Following the trial, the Sheriff considered the plea in mitigation that the Respondent should be discharged absolutely without recording a conviction. The Sheriff declined to so do. Instead, he deferred sentence for a period of three months and ordered the Respondent to be of good behaviour. Following that period, the Respondent was admonished.

8.5 The Respondent appealed the decision of the Sheriff not to grant an absolute discharge to the Sheriff Appeal Court. In the Appeal, the Respondent did not challenge the Sheriff's findings that he committed the offence. On the 31 January

2017 the Sheriff Appeal Court held that there was no miscarriage of Justice and refused the appeal.

8.6 The Respondent later sought to commence an appeal against conviction. No attempt has passed the sift stage. The Respondent has made six applications to the Scottish Criminal Cases Review Commission. None have resulted in the Commission referring the application to the High Court to reconsider the conviction.

8.7 The Sheriff who presided over the Summary trial provided a report dated 29 September 2016 and a supplementary report dated 8 November 2016 to the Sheriff Appeal Court. The reports narrate the Respondent's behaviour.

8.8 The Sheriff's factual basis for his decision include inter alia, "*...the Appellant's wife and her 3 children were caused great fear and alarm by the Appellant's behaviour. They themselves spoke to being upset, the children crying, and an independent witness, a neighbour from across the street, spoke to hearing a woman screaming on several occasions, and finding children out on the street crying. The Appellant's 12 year old son described him as looking "really angry, and not looking right". He described his brother, sister and mother, as all being very upset and scared as to what was happening. It cannot be overstated how damaging to children such behaviour carried out in their presence is likely to be in that regard the degree of harm may be assessed as high.*"

8.9 The Sheriff accepted the evidence of the Respondent's wife and 12 year old son that the Respondent shouted and swore at the wife including calling her a 'whore' and telling her to shut up. The Sheriff "*did not find* [the Respondent] *credible or reliable*" in large parts of his evidence.

9. Having considered the foregoing circumstances,and the evidence and submissions presented to it as to the relevant contextual circumstances in which these events arose, the Tribunal found the Respondent not guilty of Professional Misconduct but considered that the Respondent may be guilty of unsatisfactory professional conduct.

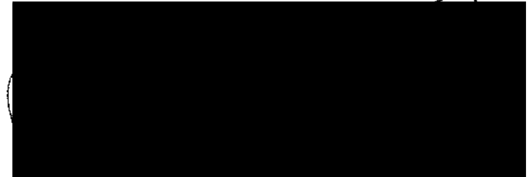
10. The Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 14 December 2022. The Tribunal, having considered the Complaint dated 20 April 2021 at the instance of the Council of the Law Society of Scotland against Allan Richard Morison Steele, WS, 22 Forres Avenue, Giffnock, Glasgow; Finds the Respondent not guilty of professional misconduct; Remits the Complaint to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980; Insofar as expenses have not already been awarded, Finds no expenses due to or by either party; and Directs that publicity will be given to this decision and the Tribunal's previous Interlocutors and Notes of 1 September 2021, 12 October 2021, 1 February 2022 and 23 May 2022 and that this publicity should include the name of the Respondent and his wife but need not identify any other person.

(signed)
Benjamin Kemp
Vice Chair

11. 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 Respondent by recorded delivery service on 27 JANUARY 2023.

IN THE NAME OF THE TRIBUNAL



Benjamin Kemp

Vice Chair

NOTE

At the Hearing on 29 and 30 September 2022, the Tribunal had before it the Complaint as adjusted to 17 June 2021, Answers, a Joint Minute, Lists of Witnesses for the Complainers and the Respondent, three Inventories of Productions for the Complainers, three Inventories of Productions for the Respondent, a statement by Child 2, an affidavit by Sarah Munro (a Notary Public and colleague of Mr Munro), and Lists of Authorities for the Complainers and the Respondent. During the hearing on 30 September 2022, the Fiscal lodged a fourth Inventory of Productions for the Complainers and Mr Munro lodged an additional authority for the Respondent.

At the outset of the hearing on 29 September 2022 there was discussion regarding the status of the statements of Child 1 (C1) and Child 2 (C2), and the relevance of parts of the Respondent's wife's affidavit. C1 had signed a statement in 2020 and it had been anticipated that he would provide an affidavit in these proceedings. However, he had not done so. Nevertheless, Mr Munro wished the Tribunal to take account of his 2020 statement. C2's statement did not record that he had been placed on oath before signing it. Mr Munro sought to cure this defect by relying upon an affidavit from the notary public who had administered the oath. The Tribunal proposed to admit all the statements meantime, hear the evidence under reservation and then invite parties to address it again on this question at the conclusion of the evidence. The Tribunal admitted the Respondent's third Inventory of Productions which contained Production 10, a letter from Police Scotland to the Respondent dated 26 June 2018.

The Fiscal indicated that the Complainers relied on the Joint Minute, the productions and the affidavits lodged by the Complainers. No witness evidence was led for the Complainers. Mr Munro called the Respondent.

EVIDENCE FOR THE RESPONDENT

Witness One: The Respondent

Evidence-In-Chief (29 September 2022)

The Respondent gave evidence on oath. He gave his full name and home address. He confirmed he had been a solicitor since 25 September 1998. He had not previously appeared before this Tribunal.

The Respondent gave a very detailed description of his legal career. From 2003 to 2020 he had worked as a legal officer for the Royal Air Force. He had been deployed all over the world. He spoke to the

documents in the first Inventory of Productions for the Respondent which contained details of medals and appraisals he had received during his time in the Royal Air Force (RAF). He described his work in the RAF as highly demanding. At times he worked in high pressure environments.

The Respondent got married in 2003. He and his wife had three children. In 2009, his wife moved back to Scotland with the children to ensure the continuity of their education. He returned to Scotland when he could. The frequency of his visits depended on where he was based. He said that his family was an important part of his life.

During the summer of 2016 the Respondent's wife told him she wanted to separate from him. He came to suspect that she was having an affair. She left the family home with the children and went to live with a friend. She made it clear to him that their relationship was over. He was devastated for himself and his children. At that time, his children were 12, 9 and 7 years old. A few days before the incident in question, the Respondent, along with his sister, picked the children up from the house where they were staying and took them swimming.

On the day of the incident, 18 July 2016, the Respondent had been in touch directly with his eldest child and had indicated he was going to take the children out again. He knew his wife had an appointment that day. He was running late. She sent him an email telling him he was late. He did not see the email until 40 minutes after it was sent. He drove down to the house where his family were staying.

The Respondent drove onto the driveway of the property. He got out of the car and walked round to the front door of the cottage which was about 10 metres away. The younger two children came out to greet him. His oldest child came out "looking glum". The children did not have any jackets or bags with them. His wife was in the hallway of the cottage, just over the threshold. The Respondent felt they had things to discuss. He said he needed to work out what was happening. His wife's friend had contacted him to say that they could not stay at her house for much longer as her house was not big enough. This was the first time he had seen his wife since he had learned of (what he believed to be) the affair. He was humiliated but was having to be brave. He was attempting to deal with the practicalities of their situation.

He and his wife started to talk. The conversation was not rude or abusive, but it was not appropriate to have it on the doorstep with the children around. They needed some privacy. The Respondent said he saw something in the house which caused him to be upset. He walked into the property. He turned into the kitchen and then the living room. He assumed the usual occupants of the property would be present within and went to acknowledge them. He saw a laptop sitting on a table. He picked it up. His wife told

him it belonged to C1. He apologised and put it down. No one else joined him. He said he was "feeling a bit exposed". He went back into the hall and made towards the front door. His wife was in a bedroom. There was a laptop on the edge of the bed in that room. The Respondent thought he would take that laptop because he needed a computer at home.

The Respondent picked up the laptop. His wife got in front of him and started pulling it from him. As he held it, she started to bite him between the thumb and finger on his right hand and then on the arm. The bite on the hand was superficial but the others were more serious. By the time he had been bitten for the fourth time he was in some sort of shock. He did not feel any pain but said it was distressing to see the skin three inches out from his arm. The biting started when his wife was unable to get the computer from him. He remained motionless. He pleaded quietly with her. He was conscious that the children might be present. Eventually she stopped although she was still holding on to his belt. The Respondent started to walk backwards while holding the computer. His wife was dragged along the floor. The Respondent was convinced she was having an affair because she was so keen that he should not take the computer. The Respondent backed into the hallway. His wife was on the floor. He was standing up. She grabbed his private parts with her right hand. He was wearing Ministry of Defence protective underwear. He was therefore not in pain but did feel completely humiliated at this attack which was taking place in front of his children. She lost her grip on him. He stepped over her and got out of the property. He was still holding on to the computer. The middle child was screaming.

The Respondent said he did not shout or swear during this incident and did not act in an aggressive manner. He left the property as he had been seriously assaulted. His wife ran past him and sat in the driver's seat of the car. He opened the passenger door and picked up his jacket and a phone. His wife appeared ready for further confrontation, so he walked on to the main road. The police became involved because C1 called them. The Respondent's wife had literally shouted to C1 that he should call 999. That direction occurred immediately after the biting and before the assault on his private parts.

The Respondent was first in contact with the police about one to one and a half hours later at Giffnock Police Office. He was told to go to hospital for treatment. He went to the Victoria Infirmary where his wounds were dressed. His father made an appointment for him at Kilmarnock Police Office that evening. He thought that was his opportunity to explain what had happened. The atmosphere with the police was convivial. However, he was told he was going to be charged. He was charged with assault and a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. In 2018 it was confirmed to him by the police that he was not charged with shouting. The Respondent was distressed that he was not allowed to give his version of events. He was seen by the medical officer because there

were concerns about his mental health. The medical officer noted the wounds on his arm. He prescribed an antibiotic. The Respondent was held in custody and appeared in court the next morning. He pleaded not guilty, and a trial was fixed.

The Respondent engaged John Scott QC to represent him. His lawyers investigated his defence. Experts were instructed. The Respondent spoke to the expert report at Production 7 in the second Inventory of Productions for the Respondent and the photographs of his injuries at Production 9 in the second Inventory of Productions for the Respondent which had been provided to the expert. He said that the photographs had been taken the day after the incident. The author of Production 7 gave evidence at the Respondent's trial. The Respondent also spoke to the expert report at Production 8 for the Respondent. That report was instructed after the trial had begun. The author is a forensic odontologist. The Respondent said that the author of that report also gave evidence at the trial. The expert was cross examined by the Procurator Fiscal Depute on the position of his wife when the bites occurred. He offered the view that his wife's account was inconsistent with the forensic evidence, although he could not say what position she was in. The Respondent believed this was critical in his acquittal on the assault charge.

The Respondent was found guilty of the section 38 charge. The Respondent thought that was unjust because "he did not do it". He considered an appeal against conviction but was given legal advice that there were no grounds for an appeal. Issues of credibility and reliability are for the decision-maker and there is very little that can be done to challenge the Sheriff on this. He was advised that an appeal against the decision not to apply an absolute discharge might be more successful. An absolute discharge (rather than an admonition) would reduce the impact of the case on the Respondent's military career.

The Respondent was referred to the two reports produced by Sheriff Hall (Productions 1 and 2 in the first Inventory of Productions for the Complainers). He agreed that these set out the Sheriff's views on the offence and the reasons for the sentence. The reports are focussed on the section 38 charge since the Respondent had been acquitted of assault. The Respondent was referred to Production 1 for the Complainers, the Sheriff's first report. In that report, the Sheriff summarises C1's evidence. At page 5 of the report, it was noted that C1 had been pressed by the Procurator Fiscal Depute to say what his father had called his mother but was reluctant to do so. The Sheriff invited him to write the words down and he wrote on a piece of paper, *"he called my mum a whore pretty much. That's really all I really heard."* The Respondent said he recalled C1 looking particularly uncomfortable and almost freezing up. The Sheriff suggested he write something down. The Respondent saw the piece of paper after C1 was finished writing. The Sheriff correctly recorded what was written on it.

The Respondent said there was a hearing at the Sheriff Appeal Court in November 2016 and another hearing in January 2017. His appeal was eventually rejected. He started to make applications to the Scottish Criminal Cases Review Commission (SCCRC) on a range of different grounds as they occurred to him or as facts arose. The Respondent strongly feels that "justice will out" and that he is innocent.

The Respondent indicated that the effect of the conviction had been traumatic and lasted his whole life. It has devastated his entire life and virtually every element of it. The RAF felt obliged to take action against him. It had a detrimental effect on his RAF career. He did not get a promotion which had been expected. He got a formal warning about two years after the incident. He said it "wrecked the whole trajectory" of his RAF career. It caused him to ask questions of the RAF about the length of time the process was taking.

The conviction continues to affect the Respondent's legal career because it is the basis of these professional proceedings. He considered leaving the law and getting into financial advice. He did a course with St James's Place, but they took the view that because of ongoing issues he could not go forward there. An element of that was to do with the Ministry of Defence (MOD). The Respondent had complained about them. The relationship with the RAF did not end happily.

The Respondent had been a member of the Scottish Liberal Democrats since 1993. He was a Parliamentary candidate in 2001 and a Scottish Parliamentary candidate in 2003. He had hoped one day to become an MP. He was Chair of the East Renfrewshire Liberal Democrats. He put out a leaflet in Giffnock. The media ran more stories about the conviction. The Scottish Liberal Democrats revoked his candidacy and suspended his membership. He resigned from the party in 2020.

The Respondent said that the conviction also had an effect on his "extra-curricular" legal work. He was asked to resign from the Law Society of Scotland in-house lawyers committee. He had joined Giffnock community council but was hounded by people on social media. He was abused. Newspaper headlines would be copied if he tried to engage in anything. Police Scotland have intervened and there is a live ongoing investigation regarding threats of violence made online. It was horrific and the conduct vile.

The Respondent was estranged from his children for 18 months. He could not go back to the family home due to the conditions of bail. This was his dream home. He had to impose himself on his parents. They had to take in their broken son returning from service. He became physically ill. He was told he had to take some time off work. He hated the idea but knew he could not continue for much longer. Although he was feeling fine on the day he was giving evidence, generally speaking his mental health

was "worrying". The Respondent said that after 6 years, it was more than he can take. He tries not to think too much about it. He is terrified of his email inbox. He lives on his nerves. Sometimes he does not sleep at all.

In 2018 the Respondent was pursuing an internal grievance complaint against the RAF. He was assigned an assisting officer (lay person) to help with welfare matters. His assisting officer spoke to C1. The intention was "to determine how bad things were". The assisting officer is not a solicitor or a notary. C1 said it would be good if the Respondent came home. He said the Respondent had not yelled on the day in question. The Respondent engaged Livingstone Brown in 2019. By that time, he had been placed on the persistent and repeated applications register of the SCCRC. The Respondent felt he had to do something with the conversation. He needed help. A solicitor was engaged to speak with C1. The Respondent had a concern about what had occurred in the witness room on the day of the trial. He wanted someone independently qualified to speak to C1 about what had happened. C1 signed a witness statement.

The Respondent was referred to Production 5 in the second Inventory of Productions for the Respondent. This was C1's witness statement which bore to have been signed electronically on 19 October 2020. It was noted that at the conclusion of the statement there is reference to it being a precognition. According to the Respondent, this statement reflected C1's position as at 19 October 2020. The Respondent was referred to various parts of the statement. In particular, he was referred to para 13 where it is said that the sheriff handed C1 a post-it note and asked him to write down what was said. C1 wrote down that the Respondent had called his mother "a whore pretty much". C1 says in his statement that the word "whore" was his own word. He was using shorthand.

The Respondent was asked if the statement gave the gist of the incident. The Respondent said the gist was correct regarding the improper relationship. However, he had not just discovered the affair. His wife had pretty much admitted it over the weekend. He agreed he did not use the word "whore". C1 had also used the term "petty argument" during trial. The situation was far from petty. The Respondent said he had winced when he was shown the piece of paper. He wondered why his 12-year-old was using the word "whore". He hoped it was not misunderstood but took solace from the fact C1 had described the argument as "petty".

The Respondent believed the Sheriff had relied on C1's evidence. The complainer had not performed well as a witness. The Sheriff had complimented C1. He was the most important witness and both parents should be proud of him. The Respondent had hoped that C1's statement would be converted into

an affidavit. However, C1 indicated to the Respondent recently that he did not want anything to do with these proceedings. He wrote to the Respondent to tell him this. He does not want to discuss events from six years ago. He loves the Respondent but does not want to discuss it anymore. The Respondent was initially disappointed but completely understood. C1 is about to go to university. He loves his mother. The Respondent does not want to affect that relationship.

The Respondent agreed that C2 had given a statement in these proceedings. C2 is the Respondent's youngest child. After a period of estrangement, the Respondent had spoken to C2, and he had confirmed that the Respondent had not shouted or sworn during the incident. The Respondent had not wanted to involve any of his children in this case. However, he needed to do so because his welfare is connected to their welfare.

The Respondent was referred to his wife's affidavit which was at Production 1 of the third Inventory of Productions for the Complainers. He recalled a conversation with her on 20 June 2016. She had been drinking and socialising. She indicated she wished a separation. He said he would do anything to make sure the family stayed intact. He said that he got the sleeper up to Scotland on 14 July 2016. He had left his iPhone in his quarters. He asked to use his wife's phone so he could use the maps element. Her reaction was extreme. He did not accuse her of having an affair; he assumed she was having an affair. He did not run off down the road holding the phone above his head. He disagreed that he had been told not to enter the cottage. He disagreed that he had driven at speed onto the driveway. He said he was not angry and upset. He was not shouting. He did not make abusive comments. He did not push past his daughter. He did not call his wife a slut or a whore. He said she is neither of those things. He did not run into the street with a laptop above his head. He is 6'4". He could not physically hold something above his head and get through the doorframe. He did not believe his younger two children were crying and screaming. He denied that the incident had unfolded as described in his wife's affidavit. He agreed that the affidavit was consistent with her evidence at trial.

The Respondent denied asking his wife to change her evidence. He has not spoken to her since the incident. He wrote her a text asking to speak about the children at one stage but did not receive a response. He has corresponded with her by email regarding aliment. His divorce solicitor has approached her.

The Respondent was asked to explain why the Tribunal should not take the same view as the Sheriff. The Respondent said it was because more evidence had come out which demonstrated that the abusive language and threatening behaviour did not happen. It was extremely upsetting for all members of the

family. He has no criticism of the Sheriff, Procurator Fiscal Depute, or John Scott QC. It is not anyone's fault. However, it is right and proper for him to bring additional evidence to the Tribunal's attention. He was trained to be disciplined and respectful. To have behaved in the manner alleged goes against his core value of being kind to people. The conviction portrays him as an abusive man. That is so far from the truth. He has no other convictions or pending criminal allegations.

Cross Examination (29 September 2022)

The Fiscal suggested that the Respondent's career was on a "high flier's wave" before this incident. The Respondent said he worked hard in the RAF and objectively was doing well. The Fiscal referred him to the appraisal contained at Production 2 of the first Inventory of Productions for the Respondent which contained a suggestion that he should be mindful of judging how best to land his point and when diplomacy may surpass tenacity as the best approach. The Respondent said the person making that comment had not worked with him. It was her opinion and she was welcome to it.

The Fiscal noted that the Respondent had said he did not have any criticism of the Sheriff. The Respondent said in retrospect he understood how the Sheriff had come to his conclusion. He did not wish to make any criticism of him now. This was not the appropriate forum and would not assist. He had appealed to the Sheriff Appeal Court as was his right. He accepted that he was convicted. He previously raised concerns about the handling of the trial but did not wish to make any criticism today. It was his right to raise defective representation with the SCCRC even if that body said he had not raised an arguable ground of appeal. He did not wish to churn up discord in the legal profession, but he had in the past raised concerns about the Procurator Fiscal Depute. He thought the Court had erred. An unfortunate sequence of events caused that to occur. In his view it is healthier to view fault as immaterial, see what went wrong, and try to fix it. The Respondent said he should have engaged solicitors earlier.

The Fiscal noted that the Respondent had said the RAF had been supportive of him. The Respondent said some members of the RAF had been supportive. However, the RAF as a corporate body ultimately took action against him. He resigned from the RAF. The Fiscal asked if the Respondent was dismissed. The Respondent said the matter was subject to Employment Tribunal proceedings. There are ongoing negotiations between the MOD and his solicitors. The Fiscal asked if the Respondent was dismissed. The Respondent said that members of the armed forces can be dismissed by court martial. The background to this was the situation which led to the Employment Tribunal, but it might be best if the Respondent did not delve into what is before that Tribunal.

The Fiscal noted that the Respondent had said the first time he spoke to his wife about the affair was at the cottage. The Respondent disagreed and said that he spoke to her on the telephone on Friday and Saturday but the first time he had seen her was at the cottage. The Fiscal asked whether he had accused her of an affair on the Thursday when he took her phone. The Respondent said he had not. He saw improper text messages. He spoke to her about it and asked who the person was. The Respondent denied he stole his wife's phone. He took it but did not steal it. He agreed that he kept it for two years.

Proceedings were adjourned at the end of the day on 29 September 2022 and the Tribunal reconvened on 30 September 2022.

Cross-examination (30 September 2022)

The Respondent was reminded he was still under oath. The Fiscal noted that on the previous day, the Respondent had admitted he kept his wife's phone for two years. The Respondent said it had been left in his parents' home. There was no requirement for it after the process was over. It had become irrelevant. His wife had a new phone. The Respondent eventually gave it to his daughter. He had not returned it to his wife after the incident because he thought it contained evidence. The Fiscal suggested the Respondent wanted to control information. The Respondent said he wanted to ensure it was used for correct purposes.

The Respondent said he wished to make a clarification about something which had arisen the previous day. The Tribunal was content to hear what the Respondent had to say on this matter.

The Respondent said he had been asked the previous day about his resignation from the RAF. He had resigned in November 2019 while sick. His resignation was a direct result of his treatment. He was advised his resignation had been actioned. He was discharged on 30 March 2020. He was not dismissed. However, between submitting his resignation and exit, a dispute arose between the Respondent and the MOD about what had happened. That matter is being handled by another solicitor. It is complex and it is subject to discussions between his solicitor and the MOD. The conviction is not the reason for the discharge. Several things occurred which resulted in him consulting solicitors familiar in discrimination law.

The Fiscal indicated he had an email contained in a fourth Inventory of Productions for the Complainers which he wished to use to test the Respondent's credibility. The email was from an officer in the RAF and referred to how the Respondent's career had concluded. The Fiscal referred to a passage in MacPhail's "Sheriff Court Procedure" as authority for a production being used in this way without being

lodged. The email he wished to use was dated 29 September 2022. The Fiscal said he had asked the Respondent yesterday whether he had left the RAF voluntarily and he did not give a straight answer.

Mr Munro indicated he was opposed to this line of questioning. It was regrettable that the Fiscal had not flagged the issue with him before now. The relevance was extremely questionable. The Respondent was asked about the impact on his life in general. The Tribunal was aware his time with the RAF came to an end and that there was a dispute. The Tribunal knows there is ongoing process regarding this. There was risk in the Tribunal weighing into another Tribunal's area. Any impact on the Respondent's credibility and reliability would be tangential.

The Fiscal said the question was whether the Respondent had misled the Tribunal. The issue was a straightforward one of credibility. The Respondent put forward his good character and career. He can be cross-examined on this.

The Tribunal retired to consider the issue. It had regard to the sections in Macphail dealing with this issue. According to paragraphs 16.25 and 16.77, documents used in the cross examination of a witness, whether or not a party, need not be lodged in advance of the cross-examination but, when used in cross-examination, should be exhibited to the court, to the witness and to the other party's advocate, and thereafter lodged. The Tribunal considered that it was not for this Tribunal to delve into a different process but that the matter might be relevant to the Respondent's credibility. It therefore indicated that it would receive the fourth Inventory of Productions for the Complainers and that the email could be put to the witness.

The Fiscal asked the Respondent if he was content with the clarification he had provided regarding the end of his RAF career. The Respondent said there was currently a dispute about how he came to leave the RAF. He was almost driven to mental collapse when he was off sick and downgraded. He had been bullied, harassed and tormented in the RAF. He was subjected to direct emails demanding his attention. He was suicidal and under psychiatric care. He submitted his resignation. He wrote to his commanding officer. He felt as though he had "jumped out of a burning tower block". He had "been in an inferno" and was "being consumed". By resigning he felt immediate relief but he was still falling. The RAF indicated that his resignation had been "actioned", and the mandatory notice period would be waived. He was given dates for resettlement leave and the date for discharge was set for 2020. After confirming the resignation had been actioned, the RAF held a Board at which representations were made that the Respondent ought to be discharged. The Respondent was invited to attend this hearing but did not do so. The RAF ignored the resignation. They decided to discharge him under the Queen's Regulation which

says that an officer can be invited to resign their commission. Despite that, they did not invite him to resign. He thinks that was because he had already resigned. At present the Respondent has a claim at an Employment Tribunal for harassment, direct discrimination on grounds of sex, race and religion, and victimisation. The issue is extremely complex and requires analysis of the Queen's Regulations. All this occurred at a time when the Respondent's health was low.

The Fiscal asked the Respondent whether he left the RAF voluntarily. He said he submitted his resignation with deep regret but had no other option. The RAF position is that it invited the resignation, but it did not. The situation is an utter mess. The situation is under challenge. It will be for the Employment Tribunal to work out what has happened. The details in the email are the subject to contested and complex legal argument between the MOD and the Respondent.

The Fiscal noted that the Respondent had said that family was everything to him. He asked him about the circumstances of receiving the email on 18 July 2016. The Respondent said he read the email on his parents' computer. He agreed he had arrived over an hour late. The Fiscal suggested this was not putting his family first. The Respondent's view was that there was no contradiction in loving his family and being late. He strives for high standards, but these were difficult circumstances.

The Fiscal noted he was there to see his children. The Respondent said journeys can have a number of purposes. He wanted to take his children home. It was responsible for their parents to discuss this. That was the essence of the conversation.

The Fiscal suggested that the Respondent and his wife could have had a private conversation in the hall. The Respondent said he thought it best to go into a room. He didn't close any doors because there were young children outside near a B road. He went in to say hello to the owners of the cottage.

The Fiscal suggested that the Respondent was looking for the laptop. He denied this. The Fiscal said the Respondent's evidence was false. This was denied. The Respondent denied shouting, calling his wife a whore and a slut. He said it was an extremely difficult situation. He still has not got over the incident. He would not have inflamed the situation by using that language. There was no sudden hot-headedness. There was nothing that happened to make him become a very angry man. He denied shouting and swearing. He noted the absence of shouting in the police charge. There was no suggestion he threatened or abused his wife.

The Respondent was referred to the Sheriff's report at Production 1 of the first Inventory of Productions for the Complainers. He agreed that he had come home on 14 July 2016. He had read his wife's messages because her reaction was panic when he asked to use her phone. This was in the context of her already telling him in the previous month that the marriage was over. When he realised the issue, his heart sank. He agreed that he took his wife's phone with him when he left that day but did not run out holding it above his head. He was distraught. He was invited to return home. He had seen certain texts. He did not remember ever saying his wife had been having an affair. The messages spoke for themselves.

With reference to his wife's affidavit (Production 1 in the third Inventory of Productions for the Complainers), the Respondent said there was screaming and crying by the stage of his wife's assault on his private parts and maybe at the stage he was bitten. He denied grabbing his wife from behind, pushing her onto a bed, digging his knees into her calf or trying to pull a laptop from her. He agreed that C1 called the police. Nobody said, "get off mummy". The laptop which he took was used by them both and was matrimonial property.

The Respondent was referred to page 1/6 in Production 1 of the third Inventory of Productions for the Complainers which was a draft statement attached to the Respondent's wife's affidavit. The Fiscal asked if the Respondent had drafted it. He said he would have to check his records. His family law solicitor had entered into discussion with his wife's solicitors to ascertain if a statement on these lines could be agreed. His solicitor was acting on his instructions. He did not ask his wife to change her evidence. The statement was crafted in such a way to say that she stood by her allegation of assault but that she did not claim to police that he shouted abuse or swore.

The Fiscal asked if the Respondent had asked his wife to change her evidence. The Respondent said the statement had been crafted by his solicitor. He noted the sentence contained within the statement which said, "I have not said anything untrue at any stage."

The Fiscal asked the Respondent about what had happened after he left the cottage. The Respondent said his father picked him up in (the Scottish hamlet of) Moscow. He dropped off the laptop for forensic analysis. He went to Giffnock Police Office. He agreed that domestic violence is serious but denied the offence.

The Respondent agreed he appealed twice to the Sheriff Appeal Court. An Appeal to the High Court was refused at sift. He made six applications to the SCCRC. All were refused. The Respondent was

referred to the applications he had made to the SCCRC and the rejections which were contained at productions 6-17 of the third Inventory of Productions for the Complainers.

The Respondent was referred to Production 10 in the third Inventory of Productions for the Complainers. This was a copy decision of the SCCRC dated 26 October 2018. The Respondent had submitted recordings of him talking to two of his children about the incident in question. The SCCRC noted it had taken the unusual step of stating categorically that it found the actions of the Respondent towards his children as deeply concerning. To have engaged in behaviour which involved covertly recording and questioning them was totally unacceptable. To do so repeatedly when it was clear that the children were uncomfortable with the subject matter, amounted to a deplorable course of conduct which the SCCRC Board found reprehensible. The Respondent said he accepted that criticism although at the time he found it upsetting and difficult to take. He said the recordings were taken to ensure there was no hint he had coached the children. He was recording his own questions as well as their answers. He wished he had engaged his solicitor before that. He was signed off sick at this time and his mental health was deteriorating. The Respondent said he had run the recordings by independent individuals. He wanted the SCCRC to hear them and then use their own investigative powers. He understood it was not ideal to record someone, but in the particular circumstances it was done with every good intention. He had become increasingly frustrated that every angle he approached failed. He knew the truth. The children knew the truth. He wanted to keep them out of it but by that stage everything was being rejected. The opportunity arose and he was desperate. It was regrettable but the whole situation was deplorable. A desperate situation can lead to desperate measures. He did not accept his actions were reprehensible.

The Respondent was referred to Production 17 in the third Inventory of Productions for the Complainers which was a copy application to the SCCRC dated 19 October 2020. This application did not claim to be a fresh evidence appeal. It was said that C1's account had not changed, rather that his age at the time of the trial meant that his account was not fully brought out and was accordingly misinterpreted by the court. It was said that the Respondent was a victim of a miscarriage of justice because the court essentially misunderstood the position of a child witness, thinking his account corroborated that of the complainer when it did not. Had C1's account been fully explored it would have become clear that C1 did not in fact provide corroboration, and the applicant would have been acquitted. The Fiscal noted that this was essentially the same point that the Respondent was trying to make in his defence of this Complaint, and it was a point that had been rejected by the SCCRC.

Questions by the Tribunal

The Tribunal noted that the Respondent had made a number of references to his mental health. He had referred to pressure from his military service before the incident. He had noted the toll on him since the incident. He was asked if there was anything he wanted to say about his mental health just before or at the time of the incident.

The Respondent said that between June 2015 and July 2016, he was under great strain due to the operational tempo of his deployments. He was sent to Afghanistan. He was working in a relatively safe environment in the middle of Kabul. It was a high profile, extremely responsible position. He had been chosen for this post because of his diplomacy and ability to get the work done. He was used to being separated from his family and did not want to overstate the impact of that. He found it difficult being deployed with a rifle and a pistol. He was required to make car journeys in Kabul. There was a very real risk to his life in undertaking these journeys and he had to confront his own mortality. The deployment came to an end sooner than expected. He told his family he would be home for Christmas. Shortly after that he was told that he would return briefly to the UK but then would be deployed to the Middle East. It was a more benign physical environment than Kabul, but the role was very stressful. He had to work long hours. He was not given essential post-operation leave to decompress. He felt the RAF were trying to sicken him. After the Middle East deployment, he was sent back to another job in the UK and that role meant he could be sent anywhere with only 48 hours' notice. He could be deployed anywhere for an unspecified amount of time. The Respondent said he was "shot to bits" and his nerves are "still shot to bits". He felt betrayed and let down by those closest to him. He had a mental health breakdown because he could not admit that he was struggling as he would not be able to continue in his role. The Respondent described some examples of the struggles he was having at that time.

The Tribunal asked why the Respondent was late to pick up his children on the day of the incident. The Respondent said it was because he was in Giffnock Police Office. He had sought advice from them about recovering one of the laptops from his wife. They had said they could not help as this was a private matter. He was advised to ask for it back. He was warned regarding contact with his wife and noted that people can be charged with section 38 offences in these situations. The Respondent said the lateness was caused by this meeting with the police.

The Tribunal asked about the purpose of the statement attached to his wife's affidavit which he said had been prepared by his solicitor. The Respondent said his career was being damaged by the imposition of a formal warning based on the conviction. The purpose of the statement was to show he was acquitted of assault and to see if there was a way to present something to the RAF to open their eyes about what

had occurred. His solicitor was happy to do that. It was for RAF purposes. His wife did not sign it at the time. He believed her signature appeared on it when she signed all pages of her affidavit.

The Tribunal asked if a representative of the RAF attended the trial. The Respondent said that representatives attended on all days of the trial.

Re-examination

Mr Munro noted that the Respondent had given a very full answer regarding his mental health and asked whether he considered stress had impacted upon his recollection of events. The Respondent answered in the negative. He noted that when he started the applications to the SCCRC, his mental health was in a worse position that in 2016 because he was seeing the effects of the conviction. By 2018, his health was undeniably in a different position, and it was breaking down. He can see now that the applications could have benefitted from greater objectivity than he could bring to bear at the time due to his mental health.

Mr Munro asked the Respondent about the range of sanctions available to the Sheriff. The Respondent believed that these included imprisonment, fine, community orders, admonition and absolute discharge. His solicitor invited the Sheriff to impose an absolute discharge, but this was declined. Instead, sentence was deferred for a period. The Respondent thought this was to allow for normality to return and to allow a cooling off period after a fraught situation. He was of good behaviour and was admonished.

Mr Munro asked about the SCCRC applications. The Respondent agreed that the final application was not considered on its merits. It went straight to the Chief Executive because he was on the list of persistent applicants.

SUBMISSIONS FOR THE COMPLAINERS

Firstly, the Fiscal addressed the admissibility of the statements lodged by the Respondent. In his submission, the statement of the youngest child was not a valid affidavit because it did not contain details of the place and date of signing, the name of the notary, and confirmation that the person signing did so after affirming or taking the oath. Without this, the statement had no evidential value. The Fiscal accepted that an affidavit can be sworn remotely, and a typed signature can be acceptable. However, there is no information on the face of the document that the witness swore the oath or affirmed. The Respondent wants the Tribunal to consider this defect cured by extrinsic evidence. The Fiscal asked why the Tribunal should do this. It would be simple to swear the affidavit again or have the witness

appear to speak to the statement. He questioned whether the Tribunal had the power to cure the defect. The Tribunal is a creature of statute. It can admit Dr Munro's affidavit. However, it has no power to cure the defect. The Respondent has been unable to produce any authority on this point. This is not an affidavit and cannot be treated as evidence on oath. The Tribunal is left with the typed statement with a typed signature. Parties need permission to lodge affidavits with this Tribunal. The Fiscal said that the document could be a precognition, but precognitions are inadmissible in evidence. There are only limited exceptions to this.

The Fiscal submitted that the statement of the eldest child was not an affidavit or a purported affidavit. The Respondent has tried to elevate this to a "signed statement" but it is actually a precognition. The signature is not witnessed and there is a section at the foot of the statement which specifically refers to it being a precognition. The criticism of precognitions is that they are filtered through the mind of the person taking the statement.

The Fiscal's primary submission was that the precognitions of the two children were inadmissible. Although the statements had been admitted, the evidence within had not yet been admitted. If the Tribunal did decide to admit this evidence, the issue became one of weight. The Fiscal argued that very little weight could be attached to them. The statement of the youngest child was produced six years after the incident. The Respondent admitted discussing the matter with him two years after the incident. There is evidence the Respondent asked his wife to change her evidence. There is a suggestion that C1's evidence is not untainted. The information in the precognition is wholly at odds with the other evidence in the case. Even within the statement C1 notes that "It was four years ago and that was a very upsetting day so a lot of it has gone from my memory".

The Fiscal made submissions on the Respondent's credibility and reliability. He noted that the Respondent's answers in evidence were lengthy and were not to the point. They contained significant irrelevant information.

The Fiscal noted that the Respondent had said he was late to pick up his children on 18 July 2022 because he was at Giffnock Police Office seeking advice on how to recover a laptop from his wife. The Fiscal referred the Tribunal to paragraph 3 of the Sheriff's supplementary report (Production 2 in the first Inventory of Productions for the Complainers) which notes that the Respondent had attended Giffnock Police Office in relation to the laptop on 17 July 2016, not 18 July 2016.

The Fiscal noted that the Respondent would not accept that his employment with the RAF had ended in the way described in the email in the fourth Inventory of Productions for the Complainers. The Respondent would not answer the question about whether he had left voluntarily. The Fiscal suggested that was because the Respondent had been caught out. He had seen the RAF observers approach the Fiscal during this hearing, the previous day. His evidence is unreliable.

The Fiscal suggested that it was not credible that the Respondent's recollection of events on 18 July 2016 was absolutely clear when he was experiencing such difficulties with his mental health. The Fiscal noted that the Tribunal has no medical opinion evidence before it. There was no question of lack of capacity during the criminal trial.

The Fiscal said the Respondent declined to agree that his choice to record his children was deplorable and reprehensible. Instead, he said that desperate times called for desperate measures.

The Fiscal invited the Tribunal to find that the Respondent's conduct which amounted to a breach of Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 was in all the circumstances a serious and reprehensible departure from the standards of competent and reputable solicitors and met the Sharp test for professional misconduct.

The Fiscal noted that the burden remains on the Complainers at all times to prove the case beyond reasonable doubt. He referred the Tribunal to Davidson on Evidence 4.78-4.81. He suggested that the facts had been established beyond reasonable doubt. The Respondent admits the conviction. He has made various appeals and applications to the SCCRC. All have been refused. The conviction is sound. The Tribunal would not normally look behind a conviction. The Tribunal needs to decide whether the Respondent's evidence is enough to rebut the presumption. There has already been a trial. The Tribunal knows what the Sheriff decided. The Respondent chose not to appeal against conviction. He was repeatedly told he did not have grounds to do so. The Sheriff's reports do not contain findings in fact because they were produced for a sentence appeal, but the essential and relevant matters are covered in the report. The Sheriff refers in the supplementary report to the factual basis upon which he based his decision to defer sentence. These are the facts of the case. The Fiscal invited the Tribunal to make a finding of misconduct based on the conviction, the sheriff's reports and the Respondent's wife's affidavit. The Fiscal suggested that the weight to be given to the wife's affidavit was "significant". It is very similar to the evidence she gave in court. There were no fanciful remarks. The Sheriff Principal referred to the Respondent's behaviour as jealous and controlling (paragraph 12 of the Sheriff Appeal

Court decision contained at Production 2 in the third Inventory of Productions for the Complainers). The Tribunal can take that into account.

The Fiscal invited the Tribunal to look at the Respondent's behaviour in the days leading up to the incident. There had been a breakdown in his marriage. He knew his wife wanted to separate. He stole and kept her phone. On one day he waited outside with his sister for the children to come out to him. On another day he attended alone and shouted and swore. The Respondent said in evidence that he was never told he could not enter the house, but that is not consistent with his behaviour on the earlier occasion when he waited in the car. There is evidence the wife was pushed in the hallway and that the Respondent stole and kept the laptop. He was acting in a jealous and controlling manner. These are classic examples of control.

The Tribunal has said that the Respondent shall be taken to have acted in a manner set out in his conviction unless the contrary is proved. The test to be applied to that is the balance of probabilities. In the Sheriff Court he only had to raise a reasonable doubt, but in these proceedings, the burden is on him to prove on the balance of probabilities that he did not do it. The Fiscal referred the Tribunal to Davidson on Evidence at paragraphs 4.84 onwards. When assessing the burden of proof, he said the Tribunal should keep in mind what was more probable than not. To overturn the conviction, the Tribunal would have to disagree with the Sheriff, the Sheriff Appeal Court and the SCCRC. The burden is on the Respondent, not the Complainers. The Complainers do not have to answer every point raised. Even if the Tribunal accepts the statements, there is not enough on the balance of probabilities. There is conflict regarding swearing but the Respondent's own evidence is insufficient to overcome the conviction on the balance of probabilities.

The Fiscal submitted that the GP and forensic odontologist reports did not help the Respondent in any way. Neither report addressed the positioning of each party. The GP report was silent on whether the Respondent could have been restraining the complainer. The expert was not asked for comment on whether the bites could have occurred in the way the complainer narrated.

The eldest son has washed his hands of the whole matter. The Tribunal cannot rely on his statement when he was not willing to come to the Tribunal or swear an affidavit. There was no reasonable doubt at Kilmarnock Sheriff Court when minds were fresh. It is not possible to overcome the conviction today.

The Fiscal referred to the Sharp Test. He submitted that the Respondent's conduct lacked integrity. He referred to SRA-v-Wingate [2018] 1 WLR 3969. He referred the Tribunal to paragraphs 1.22-1.23 of

Paterson and Ritchie's "Law, Practice and Conduct for Solicitors" which discusses cases where convictions have provided the basis for a finding of misconduct. The Fiscal referred the Tribunal to Law Society of Scotland-v-Gilbert Anderson. Even with the reference to established PTSD in that case there was a finding of misconduct. The conduct in the present case also represented a serious and reprehensible departure from the standards of competent and reputable solicitors.

The Fiscal said that society as a whole should protect the vulnerable from domestic harm, verbal or physical. Women are by far the greatest victims of domestic violence. As the Sheriff identified, it was a serious offence. The Sheriff Appeal Court viewed it that way and described his behaviour as angry and aggressive, jealous and controlling. The Respondent accepted his guilt before the Sheriff Appeal Court. Although there was no conviction for assault the conduct is still sufficiently serious to amount to professional misconduct. The breakdown of a marriage is a difficult time. However, it is disreputable to act in a threatening and abusive manner. A spouse who has moved out of the family home as a result of the other spouse's erratic behaviour should not be subjected to threatening and abusive conduct. This is properly labelled as reprehensible. The behaviour falls below the ethical standards of the profession. A solicitor should behave in private as he does in his professional life. The matter had been given media attention and the Respondent had brought the profession into disrepute.

The Chair asked about the burden on the Respondent being greater than the burden which applied in criminal proceedings. The Fiscal had referred to the civil standard applying to the discharge of the presumption. The Chair asked to be addressed further on this matter. The Fiscal said there was no burden on the Respondent in the criminal proceedings. For an acquittal the only thing required was a reasonable doubt. It is a different scenario before this Tribunal.

The Chair asked about the expert evidence in the case and the extent to which it was said to be inconsistent with the Respondent's wife's account. There was a question of the relevance of that to the Tribunal proceedings. The Fiscal said that the Tribunal should give little weight to what the Respondent said happened at trial. The Tribunal does not know what was asked of the experts in criminal proceedings. All the Tribunal could have regard to were the expert reports which were before it.

The Chair asked about lack of integrity and what it encompassed. He asked whether, following Wingate, lack of integrity covered any conviction. He asked how the Tribunal was to determine there was a lack of integrity. The Fiscal said that solicitors have a professional code and it was for the Tribunal to decide if there had been a breach of that professional code. The Tribunal had to determine whether there had been a serious and reprehensible departure from the standards of competent and reputable solicitors. The

Chair noted that was the test for misconduct and asked to be addressed on lack of integrity specifically. The Fiscal referred the Tribunal to his previous submissions and said that considering the list of items together demonstrated a lack of integrity on the part of the Respondent.

SUBMISSIONS FOR THE RESPONDENT

Mr Munro addressed the affidavit issue first. His position was the same regarding the affidavits of both sons. There was no real provision for affidavits in the Tribunal's rules. Hearsay is admissible. The Tribunal operates as it sees fit. There are no strict rules governing process before the Tribunal. Whether hearsay is introduced by affidavit, signed statement or oral testimony the question is one of weight. The formalities allow greater weight to be attached to an affidavit. Each piece of evidence should be viewed on its own basis. Mr Munro said the Fiscal had produced no authority for the proposition that the affidavit could not be so regarded. This is not trite law. An affidavit ought properly to lay out the oath. However, the Tribunal can have regard to his colleague's affidavit. There is no serious doubt about what happened. The youngest son was put on oath and he signed. The Complainers did not call the Respondent's wife because they do not want to put her through the same experience again. The same considerations apply to a child. This is trauma-informed advocacy.

Mr Munro said if the affidavit cannot be cured, it does not have to be a precognition, it can be a signed statement. While precognitions and statements used to be discrete in criminal law, there has been some blurring of the distinction. Beurskens-v-HMA 2015 JC 91 was authority for the proposition that something which starts life as a precognition can become a signed statement. The Court of Session regularly accepts signed statements short of affidavits, for example in the Commercial Court. Signed statements and affidavits are used interchangeably and there is a recognised procedure where the Court is happy to accept signed statements.

Mr Munro's primary position was that C2's statement was an affidavit and if not, was a signed statement. It is admissible and the question is then one of weight.

With regard to C1's statement, Mr Munro said the Tribunal could see how it developed as a precognition. This is not as good as an affidavit. However, it is a statement given by a material witness which is important and makes sense in the context of the body of evidence. The document has evidential value and ought to be considered.

Mr Munro said if the Respondent could discharge the presumption attaching to the conviction, and the Tribunal decides he did not commit the offence, he must be not guilty of professional misconduct. The context of the conduct and how it is defined must meet the test for professional misconduct. The Tribunal has already ruled the conviction is evidence. If the Respondent led no evidence, the facts would remain proved. The burden rests on the Respondent to rebut the presumption but the burden of establishing professional misconduct is always on the Complainers. The Tribunal must ask whether it is prepared to accept that the Respondent committed the offence. The Tribunal has heard the Respondent's account, and considered the productions, affidavits and statements.

At the outset of the hearing, Mr Munro flagged an objection to parts of the Respondent's wife's affidavit. This was on grounds of admissibility. Several parts of it do not relate to the matter before the Tribunal. She describes an assault, but the Tribunal can make no finding to that effect. She also speaks to a wider context, for example, knocking over one of the children. The Fiscal says the purpose of including those elements was to challenge the Respondent's account. Mr Munro understood this approach. The Tribunal will make of the affidavit what it will. However, it cannot find misconduct based on an allegation which the Complainers have not made.

Mr Munro commended the oral testimony of the Respondent to the Tribunal. He went on to address parts of the Fiscal's submission.

It was claimed that the Respondent misled the Tribunal about the times he attended Giffnock Police office. Mr Munro said he did not understand the basis of that complaint. There was no evidence about when he attended. It was clear he went more than once.

The Fiscal said the Respondent misled the Tribunal about the circumstances of his departure from the RAF. What the Fiscal said about that email was extraordinary. The Respondent said his departure was complex, was currently in the hands of lawyers and before an Employment Tribunal. An employer and employee can have different views. It is unreasonable to call this misleading. There was no evidence the Respondent had offered the explanation because the Fiscal had been approached by the RAF. There was no evidence of that. The Fiscal should take care before making such allegations. It is one thing to cast doubt and another to make an assertion of deliberate wrongdoing.

The Fiscal said the Respondent admitted the offence. This is not correct. The Respondent does not accept he committed the crime. He is unhappy about the conviction. It has been his life's work for a

substantial period to try and undo it. The Respondent's conduct is a world away from admitting he did it.

The Fiscal also referred to "classic controlling behaviour". There is no evidence of this and according to Mr Munro, this is not within judicial knowledge.

Mr Munro asked the Tribunal to accept the Respondent's evidence. It was balanced and reflective as would be expected six years after the incident. Insofar as his account differs from his wife's affidavit, it is instructive to look at the independent evidence.

Mr Munro invited the Tribunal to consider the letter from Police Scotland (Production 10 in the third Inventory of Productions for the Respondent). The Respondent is correct that the police did not include shouting in the charge.

Mr Munro noted that the Respondent's wife's affidavit refers to photographs of injuries which were not produced, and not referred to in the criminal case. There was no reference in the expert witness report to these. The Tribunal has to consider her credibility and reliability. The Tribunal is not here to retry the assault allegation or make findings adverse to the Respondent's wife.

In Mr Munro's submission, the expert evidence in the criminal trial was very significant. The Respondent gave evidence about how these reports were commissioned. Photographs of the Respondent's injuries were provided to the experts. The experts had the Respondent's wife's police statement and the independent forensic physician included part of this in his report (Production 7 in the second Inventory of Productions for the Respondent) but this had been redacted from the Tribunal's copy in accordance with sections 162 and 163 of the Criminal Justice and Licensing (Scotland) Act 2010. The Respondent described the expert evidence given at trial. The Tribunal can make its own assessment of that. The Respondent's evidence is consistent with the reports and what the Sheriff decided to do. The evidence points towards the Respondent's wife assaulting him. Contrary to the Fiscal's assertion, the reports assist the Respondent.

Mr Munro referred to C1's statement. He said that the Sheriff had found corroboration for the wife's account in the evidence of C1 who had written down *"he called my mum a whore pretty much. That's really all I really heard."* Solicitors subsequently took a statement from C1 who said he had used this word as "shorthand" for an affair. Mr Munro submitted that C1's statement is an independent check on the evidence of the Respondent and his wife. While by no means entirely favourable to the Respondent,

and the Respondent does not accept everything that C1 says, on the critical points, it supports the Respondent's position. The Respondent did not shout, swear or make threats.

Mr Munro noted that the Respondent had a difficult, demanding and stressful job. His wife was raising the children alone. They had different views of the relationship. Accusations of infidelity prompted a separation which was perhaps already on the cards. Issues of custody and finance were to be determined. There was a breakdown in communication. The question for the Tribunal is not whether the Respondent did everything right but rather whether what he did reached the threshold for a breach of section 38 of the Criminal Justice and Licensing Act 2010.

Mr Munro referred the Tribunal to section 38. The Tribunal had to determine whether the Respondent had behaved in a threatening or abusive manner. He may have been emotional. His behaviour might not have been optimal. However, he did not behave in a threatening or abusive manner. C1's statement does not support the detailed account given by his mother. Nor could it be interpreted in a manner corroborating her account. It is not in principle an offence to accuse a spouse of having an affair or having a disagreement or argument. Criminalisation of speech is a difficult area.

In Mr Munro's submission, there is a clear and logical basis for the Tribunal to find that the Respondent did not act in the manner found by the Sheriff. C1's evidence was misunderstood. That should be the basis for the Tribunal's finding. This kind of thing can occur when care is being taken not to expose a child witness to trauma in the witness box. C1 was caught in the middle of a dispute between his parents. He found it very difficult to say anything. It is not unreasonable that the Sheriff found his evidence that the Respondent "called her a whore pretty much" corroborated the Respondent's wife's account that he had called her a "slut". It can be seen how the Sheriff came to that conclusion. However, C1 has subsequently said that his words were not literal, and he was using his own shorthand. It is not that his evidence has changed. It is not that he has thought of something else. Rather, when he was asked for more detail, he offered clarification which was missing at trial. If his full position had been outlined to the court, the Sheriff would likely have come to a different conclusion.

The Tribunal can say the conviction should be given weight. The Tribunal can also say there is something odd here. There is a well vouched basis for coming to a different conclusion to the Sheriff. By the time C1's position was clarified, the Respondent was already on the persistent applicant's list at the SCCRC. The matter was never considered by that body on the merits.

Mr Munro invited the Tribunal to accept the account given by the Respondent, particularly in the light of the clarification in C1's statement. The Court *may* have fallen into error. The Respondent has discharged or overcome the presumption. If the Tribunal comes to that conclusion, either the conviction is given less weight or it is put to one side. On the basis of the evidence heard, the Respondent cannot be guilty of professional misconduct. Mr Munro invited the Tribunal to find the averments in Answer 3.2 proved. It automatically follows that the Respondent is not guilty of professional misconduct.

Mr Munro's secondary position was that even if the Tribunal does not consider the presumption to have been overcome, the conduct established was insufficient to amount to professional misconduct. The Tribunal needs to consider the context. The Tribunal ought to remember that the Sheriff's reports were produced for a sentence appeal. The conviction is in fairly generic terms. Certain chunks of evidence (for example the expert evidence) are not mentioned. That is because the Sheriff is justifying the sentence rather than conviction. The Tribunal is not getting the full picture. It does not know what the Sheriff thought about that evidence.

On any view, the incident resulted in the Respondent sustaining significant injuries. The fact the Respondent's wife was not charged with assault tells the Tribunal nothing. The die had already been cast by the time he arrived at Kilmarnock Police Office. The Tribunal knows that the Respondent's injuries required moderate or severe force and that he required medical treatment. Even if the Tribunal proceeds on the basis of the conviction, it cannot divorce this from the wider circumstances of the case. It is clear that a good reason for acquittal was the forensic odontologist report coupled with the rejection of the complainer's evidence. Context is everything. Even if the Respondent swore or made threatening comments, he would be less culpable and less unreasonable if made in the context of a serious assault resulting in injury.

Mr Munro noted that this was a private incident, unlike the incident in Law Society of Scotland-v-Gilbert Anderson. Children were present but it took place in the context of a breakdown of a marriage. This can be stressful and difficult. The Respondent was experiencing his own pressures. He believed his wife had been unfaithful. These factors do not exonerate but they may mitigate.

Mr Munro referred to section 53 of the Solicitors (Scotland) Act 1980 and the separate system for convictions cases under section 53(1)(b). He said this was a useful touchstone for the point at which professional misconduct might arise. Parliament has decided that some cases automatically result in conviction. That is the level at which the Tribunal ought to become involved. There is an area below that where professional misconduct may be established. He did not doubt that some domestic crimes can

constitute professional misconduct, but this case is qualitatively different to those like the Gilbert Anderson case.

Mr Munro also referred to Law Society of Scotland-v-Martha Rafferty (2015) and Law Society of Scotland-v-Martha Rafferty (2019). The Tribunal was asked to find professional misconduct in circumstances where the Respondent had been convicted for the second time of drink driving. Drink driving is a social ill. It causes enormous damage to the public. Solicitors who are found guilty of it have failed to comply with the law. However, Rafferty was presented as a course of conduct. There was some debate as to whether two drink driving convictions could amount to misconduct. The second Rafferty case had a number of features which could be seen to bring the profession into disrepute. However, the Tribunal found it a difficult case and based it again on the course of conduct.

Mr Munro noted that the conviction in the present case was as a result of prosecution on summary complaint. The prosecution led to admonition. The Fiscal invited the Sheriff to make a non-harassment order and he declined. There was no fine, the Respondent was not imprisoned, there were no community payback orders. The Respondent received the lowest penalty available. The culpability was at the lower end. He was acquitted of assault. The incident must be seen in context. The comments in the Sheriff's report about the offence being serious must be seen as being relative. Any conviction is a serious thing. The comment about it being serious must be seen in the context of his remarks to the Sheriff Appeal Court. These things were said in relation to a sentence choice between absolute discharge and admonition.

Mr Munro submitted that the publicity which had followed the conviction was neither here nor there. The Respondent was of good character. Mr Munro invited the Tribunal to find the Respondent not guilty of professional misconduct.

Due to lack of Tribunal time, the hearing was continued to 14 December 2022 at 11am, to take place by video conference.

DECISION

The Respondent was convicted in 2016 of a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. He was found guilty of behaving in a threatening or abusive manner which was likely to cause a reasonable person fear or alarm. The criminal complaint alleged that he had behaved in an aggressive manner towards his wife and shouted abuse at her and swore at her.

The Law Society brought a Complaint alleging professional misconduct against the Respondent. Although he accepted that he had been convicted, the Respondent denied that he had committed the offence. On 1 February 2022, the Tribunal indicated that for the purposes of these proceedings, the Respondent would be taken to have committed the offence narrated in the Complaint unless the contrary was proved. The Respondent would be entitled to lead evidence tending to show that he did not commit the offence in order to attempt to rebut the presumption. The onus of proof would always remain on the Complainers to prove their case beyond reasonable doubt.

On 23 May 2022, the Tribunal indicated that in the unusual circumstances of this case where witnesses had already given evidence in a sensitive matter in a criminal trial, and parties were agreed that the appropriate way to proceed was to lodge affidavits, the Tribunal was prepared on joint motion to receive that witness evidence in that way. Although there were some disadvantages in proceeding in this manner, presenting the evidence by affidavit provided some safeguards.

On the morning of 29 September 2022, the Respondent asked the Tribunal to take account of the statements of his children which he had lodged with the Tribunal. There was disagreement between parties regarding the status of those statements. In addition, the Respondent had some difficulties with some of the matters which had been included in the affidavit provided by his wife and lodged by the Complainers. The Tribunal considered the authority provided by the Respondent, Beurskens-v-HM Advocate 2015 JC 91 and bore in mind that the issue is one of fairness.

The first statement was that of C1, the Respondent's eldest child. It had been signed by him on 19 October 2020. The statement was headed "Witness Statement" but was also noted in the body of the statement to be a precognition. The Tribunal admitted the statement and considered it carefully but ultimately decided that very little weight, if any, could be given to the evidence contained within it. The statement was produced four years after the event in question. It was not sworn testimony. Within the statement, C1 said that the incident had occurred four years ago, that it was a very upsetting day, and a lot of it had gone from his memory. C1 had apparently been asked to provide an affidavit for these proceedings and he had refused to do so. The Tribunal heard evidence that the Respondent had spoken to his children about the incident when pursuing his applications to the SCCRC. In all these circumstances, the Tribunal decided that C1's statement could only carry limited weight.

The second statement was that of C2, the Respondent's youngest child. It had been provided on 29 August 2022. C2 was 13 years old. The statement did not describe on the face of the document that it

had been sworn on oath. The notary public who had taken his statement provided an affidavit of her own describing the process that had been followed. The Tribunal admitted C2's statement and considered it carefully but ultimately decided that very little weight, if any, could be given to the evidence contained within it. The statement was not an affidavit, and it was not clear to the Tribunal why C2 had not simply provided a fresh affidavit when the error had been noted. The statement was produced six years after the event in question and C2 had been only seven years old at the time of the incident. The Tribunal heard evidence during the hearing that the Respondent had spoken to his children about the incident when pursuing his applications to the SCCRC. In all these circumstances, the Tribunal decided that C2's statement could only carry limited weight.

The last statement considered by the Tribunal was the affidavit of the Respondent's wife. This was in proper affidavit form and the Tribunal gave it greater weight for this reason, although recognising that she had not been cross-examined and that the Tribunal had not had an opportunity to observe her when giving evidence. The Tribunal noted the Respondent's concerns that the affidavit contained evidence on matters which were not before the Tribunal. The Tribunal was content to admit the whole affidavit but to have regard in its decision-making only to the issue before it, which related to the Respondent's conduct which led to the section 38 conviction.

The Tribunal examined the evidence in the case and considered firstly whether the Respondent had rebutted the presumption that he had committed the offence. The onus was on him to establish that he had not committed the offence on the balance of probabilities. The Respondent gave a very detailed account. He believed he has been wrongly convicted. He said he did not shout or swear. He referred to a letter from Police Scotland which confirmed that the Police had not included reference to shouting when he had been charged. The Respondent asked the Tribunal to take account of his children's statements which say that he did not shout or swear during the incident in question. As has been discussed above, the Tribunal gave only limited weight to these statements. The evidence given at the relatively lengthy trial which took place two months after the event was consistent with the Respondent having behaved aggressively towards his wife. He entered the house and moved room to room within it. There was evidence that he did shout abuse at his wife and swear at her. As well as the evidence of the Respondent's wife and son, the Tribunal noted that the son had called 999 and went out into the street to call for help. A neighbour heard a woman screaming and found all three children to be upset and crying. Considering all the evidence as a whole, the Tribunal was not satisfied that the Respondent had led sufficient cogent and compelling evidence to rebut the presumption that he had acted in the way found by the Sheriff. Therefore, the Tribunal concluded that it was appropriate to confirm the findings

in fact at paragraph 8 above, reflecting the findings of the Sheriff court, insofar as these could be clearly discerned.

The next question for the Tribunal was whether the Respondent's conduct leading to conviction constituted professional misconduct. According to the definition of professional misconduct contained in Sharp v Council of the Law Society of Scotland 1984 SLT 313,

"There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of rules or some other actings or omissions, the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is to be made."

Parliament has provided that the Tribunal can sanction solicitors for certain offences under section 53(1)(b). The offence in this case is not covered by section 53(1)(b). The conduct leading to other convictions can also be professional misconduct. However, not every conviction constitutes professional misconduct.

The question for the Tribunal is whether the conduct in this case represented a serious and reprehensible departure from the standards expected of the profession. It is necessary to consider all the circumstances and the degree of the Respondent's culpability. Solicitors must observe a high standard of conduct but are not expected to be "paragons of virtue". In all cases the question is one of fact and degree. The Tribunal considered recent cases based on conduct which had led to a conviction (Law Society-v-Kevin Davidson (2018), Law Society-v-Gilbert Anderson (2019), Law Society-v-Benjamin Hann (2021) and Law Society-v-Michael McKeown (2022)). It considered carefully the context in which the conduct occurred, having regard in particular to the evidence of the Respondent before the Tribunal. The Tribunal had some difficulty in this case in reaching a decision on professional misconduct.

The Tribunal noted that this was a domestic incident committed in front of the Respondent's children, although there was no finding of a physical assault. The Tribunal noted the Sheriff Appeal Court's characterisation of the offending as "angry, abusive and aggressive behaviour of a controlling and jealous nature." However, it also noted that the incident was of short compass. The case was prosecuted on summary complaint and resulted in an admonition. The conduct occurred during a very difficult time

involving the breakdown of a marriage and significant other stressors. There was in the Tribunal's view no ongoing danger to the public or any effect on the Respondent's ability to practise. The Tribunal noted that the reputation of the profession was an important consideration insofar as the conduct had a propensity to bring the profession into disrepute. However, whether the matter had actually received media attention was irrelevant. Different considerations apply when considering on the one hand whether a crime has been committed, and on the other hand, whether professional misconduct is present.

Ultimately, taking all the circumstances into account, the Tribunal considered that the Respondent's conduct was undoubtedly capable of criticism and might be said to represent a departure from the standards of conduct to be expected of competent and reputable solicitors. However, it did not consider overall that such departure was serious and reprehensible. In particular, while not of itself determinative, the Tribunal did not consider that the conviction raised any question of lack of integrity. According to Wingate & Evans v SRA; SRA v Malins [2018] EWCA Civ 366 the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. Integrity connotes adherence to the ethical standards of one's own profession and involves more than mere honesty. The Tribunal did not consider that there was a basis to consider that the Respondent's conduct, while it could be criticised on other grounds, lacked integrity.

Therefore, the Tribunal found the Respondent not guilty of professional misconduct. According to section 46 of the Legal Profession and Legal Aid (Scotland) Act 2007, unsatisfactory professional conduct is professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor, but which does not amount to professional misconduct and which does not comprise merely inadequate professional service. In Hood-v-The Law Society of Scotland [2017] CSIH 21, Lord Drummond Young said:

"Unsatisfactory professional conduct is measured against the standard of the competent and reputable solicitor...Unsatisfactory professional conduct lies on a spectrum that runs from professional misconduct at the more serious end to inadequate professional service at the lesser end and determining where the conduct complained lies on that spectrum is a question for evaluation by the relevant disciplinary tribunal, either the Council of the Respondents or the Scottish Solicitors Discipline Tribunal."

The Tribunal considered that the Respondent's behaviour might constitute unsatisfactory professional conduct. Accordingly, it remitted the case to the Law Society under Section 53ZA of the Solicitors (Scotland) Act 1980.

The Tribunal's decision was communicated orally to parties on 14 December 2022. Parties made submissions on publicity and expenses. The Fiscal indicated that the Tribunal was bound by paragraph 14A of Schedule 4 to the Solicitors (Scotland) Act 1980. There were no grounds for the Tribunal to anonymise the complainer in the criminal case. However, he suggested that the children should be identified only by their initials. The Fiscal suggested that it was appropriate that there was no award of expenses due to or by either party. Although the Tribunal had taken the view the behaviour was not professional misconduct, the conduct might be categorised as unsatisfactory professional conduct. The Law Society was under a statutory duty to take disciplinary action and had been partially successful. The Fiscal referred to Baxendale-Walker-v-Law Society [2007] EWCA Civ 233. He noted that the Respondent had not dislodged the presumption and his attempts to do so had taken up a substantial amount of time.

Mr Munro also referred to paragraph 14A of Schedule 4 to the Solicitors (Scotland) Act 1980. He noted that the circumstances involved a family dispute. It was difficult to see how the children's names could be completely anonymised other than by not naming the Respondent, or not publishing the decision. The Respondent sought an award of expenses against the Law Society insofar as these had not already been dealt with. He noted that there is a measure of conformity between costs in England and expenses in Scotland, but these regimes are not the same. In normal civil proceedings, expenses would follow success although he appreciated this principle was not applied simplistically in professional misconduct cases. He noted that there had been a series of hearings on the same point in this case and the Law Society had changed its position throughout in contrast to the Respondent who had been consistent all the way through. Although the Tribunal had decided that the Respondent's behaviour might constitute unsatisfactory professional conduct, it had not yet been decided this was the case. It would be unreasonable and unfair for the Respondent to bear the expenses of such a long drawn-out process. While the Respondent had taken some time to give evidence, and that this was for the purpose of attempting to rebut the presumption, it was also relevant context to allow the Tribunal to make a decision on professional misconduct.

The Tribunal decided that publicity will be given to its decision and that the Respondent will be named in that decision in accordance with paragraph 14A of Schedule 4 to the Solicitors (Scotland) Act 1980. The Respondent's wife will be named, and the children referred to as child one and child two. The

Tribunal will also publish all Interlocutors produced during this case. These are dated 1 September 2021, 12 October 2021, 1 February 2022 and 23 May 2022.

With reference to expenses, the Tribunal considered Baxendale-Walker-v-Law Society [2007] EWCA Civ 233 and CMA-v-Flynn Pharma Ltd and Another [2022] UKSC 14. It considered that there had been a degree of mixed success in this case. The Respondent had been successful in securing an acquittal. However, the prosecution had been properly brought and it was possible that there might still be a finding of unsatisfactory professional conduct, although that was a matter for the Complainers' Professional Conduct Sub Committee. The Respondent had been unsuccessful in rebutting the presumption and that had taken up a significant proportion of the final substantive hearing. In all these circumstances, the fairest outcome was to make no award of expenses against either party.

Benjamin Kemp

Vice Chair