

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

INTERLOCUTOR

in Complaint

by

**THE COUNCIL OF THE LAW SOCIETY OF
SCOTLAND, Atria One, 44 Morrison Street,
Edinburgh**

Complainers

against

**GLENN JAMES FRASER, Fraser & Company
Criminal Defence Limited, Unit 2, Newyearfield
Business United, Hawk Brae, Ladywell,
Livingston**

Respondent

Edinburgh, 1 April 2019. The Tribunal having heard submissions in relation to the Complaint at the instance of the Council of the Law Society of Scotland against Glenn James Fraser, Fraser & Company Criminal Defence Limited, Unit 2, Newyearfield Business Units, Hawk Brae, Ladywell, Livingston; Repels the plea of Res Judicata; Repels the plea to the relevancy relating to paragraph 3.2; Upholds the plea to the relevancy of paragraph 4.4 and excludes from probation all of the words following the words "coinciding herewith." where they appear in line 3 of said paragraph; Repels the objection to the admissibility of the evidence of the witness Butler and Production 36 for the Complainers *in hoc statu*; Reserves the question of expenses to the conclusion of the case; and Continues the Complaint to the hearing previously assigned for 9 April 2019 at 10am.



**Eric Lumsden
Vice Chairman**

NOTE

The agent for the Respondent had lodged a motion with the Tribunal requesting that a preliminary hearing be assigned for parties to address issues raised within outline submissions attached to that motion. The Fiscal for the Complainers had intimated to the Tribunal Office that he objected to the assigning of a preliminary hearing. Both parties waived the requirement for the usual induciae in fixing a hearing and the Tribunal assigned 1 April 2019 at 10am as a procedural hearing which would move to a preliminary hearing depending on the parties' submissions.

At the hearing on 1 April 2019, the Complainers were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. The Respondent was represented by Nicola Irvine, Solicitor, Glasgow and was not present.

Ms Irvine made a motion to the Tribunal to be allowed to lodge a Production late. She indicated that in her submissions before the Tribunal today she required to refer to the report of the Professional Conduct Sub Committee of the Law Society of Scotland dated 9 February 2017 relating to the Respondent. Additionally, she made a motion to be allowed to insert two pleas in law into the Answers for the Respondent. The first of these pleas was a general plea to the relevancy of the Complainers' averments. The second was a plea of Res Judicata.

Mr Marshall indicated that he was withdrawing his objection to the assigning of a preliminary hearing and invited the Tribunal to move on to hearing the Respondent's submissions. Additionally, he had no objection to either of the Respondent's motions and accordingly the Tribunal allowed these.

SUBMISSIONS FOR THE RESPONDENT

Ms Irvine indicated that although she was seeking to include general pleas to the relevancy and Res Judicata, she would narrow down these pleas in her submissions to the Tribunal.

She submitted that the proceedings before the Tribunal arose as a result of two issues being referred to it by the Sub Committee. She took no issue with the averments as originally pled in the Complaint by the Complainers and no issue with regard to the admissibility of evidence relating to those averments. The issues today arose as a result of adjustments by the Complainers, the lodging of a Production, namely Production 36, and the inclusion in the List of Witnesses of the author of that report, Mr Butler.

Ms Irvine commenced with submissions relating to her objection to averments contained in paragraph 3.2 as adjusted. Ms Irvine drew the Tribunal's attention to line 16 of Complainers' averments. The passage to which she objected was the following:-

"The most recent example of that support was when the first name Secondary Complainer contacted the Respondent on 5 May 2014 to ask if he required support to cover the firm's commitments at Livingston Sheriff Court on 6 May 2014. On that occasion the Respondent advised that further support was not required. The relevant email exchange has been produced by the Council as documents 19 and 20."

She drew the Tribunal's attention to issue 6 within the Sub Committee's report. This referred to the following complaint:-

"Mr Fraser replied to an email regarding court cover for 6 May 2014 on 5 May 2015. At that time his response indicated that he would be available to CCL on 6 May 2014. He must have known that this was untrue. This meant that CCL did not have enough solicitors to cover court commitments on 6 May 2014."

Ms Irvine took the Tribunal through the Sub Committee report relating to issue 6 at pages 8 and 9 and noted that this complaint had resulted in the Sub Committee upholding a finding of unsatisfactory professional conduct. She submitted that it was plain from the terms of the Sub Committee decision that this complaint had been subject to determination by the Sub Committee already and therefore this averment should not form part of these proceedings before the Tribunal. She also submitted that the emails between the Secondary Complainers and the Respondent were not relevant to the removal of files, which was the averment of misconduct in

the current proceedings. She argued that the matter was irrelevant, had already been subject to determination and so was Res Judicata.

Ms Irvine then moved on to the issue of the witness Butler and Production 36 for the Complainers. She submitted that this Production was also subject to Res Judicata. It was her position that this Production must have been available to the Law Society's investigation prior to the Sub Committee considering the complaints. The report relates to the removal of electronic files. The Complaint before the Tribunal on this occasion contains an averment of misconduct regarding the removal of paper files. The issue with regard to electronic files had already been considered and dealt with by the Law Society's Sub Committee.

Ms Irvine drew the Tribunal's attention to issue 4 before the Conduct Sub Committee which was as follows:-

"Mr Fraser has failed to provide information relating to CCL clients, including phone numbers which were contained on CCL property such as an iPhone, iPad and laptop. This information was removed from devices, including by the use of software designed for that purpose, on and around 30 April 2014."

Ms Irvine drew the Tribunal's attention to the Sub Committee's report at pages 6 and 7. This complaint had resulted in the Sub Committee upholding a finding of unsatisfactory professional conduct and so therefore this matter was Res Judicata. The report was therefore irrelevant to the present Complaint before the Tribunal and should not be admitted.

Ms Irvine referred the Tribunal to the case of Regina (Coke-Wallis)-v-Institute of Chartered Accountants in England & Wales [2011] UKSC 1. She submitted that this was authority for the proposition that the principles of Res Judicata applied to proceedings such as the proceedings before the Tribunal. She invited the Tribunal to uphold her plea of Res Judicata as applying to the evidence of Mr Butler and the Production of his report. She invited the Tribunal, if it was in agreement with her, to rule that no evidence could be led from this witness and that his evidence should be held as inadmissible.

Ms Irvine then addressed the Tribunal in relation to her objection to the adjusted paragraph 4.4. She indicated to the Tribunal that she opposed the adjustments to the original paragraph on the basis that they contained information that was not relevant to the issue of removal of files from the office. Additionally, these averments include, amongst other matters, a specific averment that the Respondent has been dishonest. She drew the Tribunal's attention to the averment that indicated the Respondent had been interviewed by the police on 25 May 2017 and had admitted to completing false time entries for submission to the Scottish Legal Aid Board. She submitted that the Respondent was not charged with this offence of dishonesty in the current proceedings and any attempt to introduce this information into the pleadings must be considered as prejudicial. She referred the Tribunal to the case of Chantanya Chauhan-v-General Medical Council [2010] EWHC 2093 (Admin). She invited the Tribunal to follow that case and to exclude from probation any evidence regarding the police investigation.

Ms Irvine further submitted that evidence regarding the police investigation was also objectionable on the basis that the Tribunal was being asked to consider an extensive lengthy police investigation only in connection with the evidence as it relates to the Respondent. She submitted that a number of people had been interviewed in connection with this issue including one of the Secondary Complainers and the wife of the other Secondary Complainer. The Respondent has not been able to obtain witness statements in connection with the investigation and this put him at a disadvantage compared to the Complainers. She submitted that there might be material supportive of the Respondent's position and that there may be matters that the Respondent would want to put to the Secondary Complainers but he did not have that information and could not reasonably obtain it. For this reason, she argued, that to allow the evidence to be led would be prejudicial to the Respondent.

Ms Irvine explained to the Tribunal that, as a practical matter, two witnesses on the List of Witnesses for the Respondent were now no longer prepared to give evidence on the basis that the police investigation was a live issue for the Complainers in this case.

She emphasised that none of the issues she disputed had any relevance to the issue of the removal of files, the subject matter of this Complaint, and so they fell to be excluded.

SUBMISSIONS FOR THE COMPLAINERS

Mr Marshall noted that no notice had been given prior to the hearing of the objections to his averment at paragraph 3.2. However, he took no formal objection to this matter being raised and indicated that he would answer the Respondent's submissions in the course of his.

With regard to the two issues previously intimated, he submitted that with regard to the adjusted paragraph 4.4, and the evidence of the witness Butler and his report, it was the Complainers' position that these were relevant to the current Complaint. His primary submission was to invite the Tribunal to hold that these matters were relevant and admissible. If however the Tribunal had a concern with regard to the relevancy of these matters, his secondary position was that the Tribunal should allow the matters to be heard under reservation.

He addressed the issues with regard to paragraph 4.4. He submitted that the adjustments to the averment were relevant for two reasons: (1) they relate to a material issue in the case, namely the Respondent's reason for leaving the firm in the manner that he did; (2) they have a direct bearing on the credibility of the Respondent as they indicate that he has changed his position which suggests that his first position was not true.

In considering whether the averments were relevant, Mr Marshall invited the Tribunal to take into account the developments in the background to the Complaint. The Respondent's reason for leaving the firm in the way he did is a material issue. In his original Answers, he offered a reason for what he did. Two points could be drawn from that Answer – (1) that he became aware of the police investigation in or around March 2014 and (2) that he did not want to be associated with colleagues who had committed a fraud. It was the Respondent who raised the potential fraud on the Legal Aid Board as a reason for leaving the firm. Following that, it was agreed between the parties that the Complainers would not proceed with the matter until the outcome of the fraud investigation was known. On 3 May 2018, Crown Office confirmed that, as matters stood, there were no plans for a prosecution. The disciplinary proceedings before the Tribunal were then put back on track. A hearing that had been assigned for 13 September 2018 was adjourned due to the ill-health of the Respondent's mother. A further hearing was set down for January 2019. The Complainers commenced investigations into the Respondent's proposed reasons for leaving in

the way he did. The Law Society sought to obtain statements given by him to the police. In order to do that, the Complainers required to raise proceedings. Crown Office were content to produce the statements but the Respondent objected. In October 2018, the Complainers intimated a Petition to recover the documents and on 7 November 2018 a Petition was lodged with the Court of Session and then served. The Respondent lodged answers objecting to the Petition. The Crown had no objection. At a hearing in January 2019, the Court granted recovery of the statements. These statements were released by the Crown and lodged by the Law Society. In one of those statements, the Respondent admitted that he had completed false time entries for submission to SLAB. This statement was made in September 2013. In his Answers, he says he learned of the fraud in March 2014. Following the lodging of these Productions by the Complainers, on 29 January 2019, the Respondent enrolled a motion to discharge the hearing that had been fixed for 31 January 2019 and sought a period of adjustment. That motion was granted and the Respondent was given 14 days to adjust his Answers and the Complainers were given 14 days to respond. The Law Society was to lodge a Record by 8 March 2019. A full hearing was fixed for 9 April 2019. The Respondent adjusted his Answers deleting the previous Answer at 4.4 referring to the fraud and substituted a new reason for his actions in Answer 3.2. In summary, the new reason is that he was poorly treated by his partners. On 27 February 2019, the Law Society adjusted their averments in response to these adjustments. The Respondent lodged the motion which is before the Tribunal today.

Mr Marshall submitted that the Respondent's reason for leaving the firm in the way he did is a relevant issue of fact for the Tribunal to consider. The Inner House in granting the Petition for Recovery of Documents had stated that the Respondent's reason for leaving was a material issue and that the statements sought by the Complainers might disclose if the Respondent had any knowledge of the fraud prior to March 2014.

Mr Marshall invited the Tribunal to hold that these averments were relevant for the reasons previously stated. He referred the Tribunal to the case of Jamieson-v-Jamieson [1952] SC (HL) 44 which he indicated confirmed that the test of relevancy was that even if these matters were proved, the case on that issue must necessarily fail. In other words, even if what the Law Society avers is correct, the Complaint must fail or fail.

Mr Marshall went on to argue that even if the Tribunal came to the view that these averments were not admissible, the Complainers could not be prevented from cross-examining the Respondent in relation to these issues under Section 3 of the Civil Evidence (Scotland) Act 1998.

Moving on to the issue of the evidence and report of the witness Butler, Mr Marshall invited the Tribunal to hold that the evidence was relevant and admissible and would assist the Tribunal in determining the issues before it. He submitted that it appeared that the Respondent had two legs to the objection to this evidence – (a) that the Sub Committee had already considered the content of the report and (b) that as the Sub Committee had made a determination regarding the content of the report, this became subject to the principle of Res Judicata. He argued that in answer to point (a), just because evidence is led in one forum does not prevent it from being led in another. With regard to (b), he submitted that the Respondent's submission of Res Judicata was not well-founded. He submitted that this was an error in approach by the Respondent and referred to the case of Chauhan. What the Tribunal was being asked to do in this Complaint was not precisely the same as the Sub Committee was asked to do in issue 4. The Complainers did seek to lead evidence that had been previously considered but they were not asking the Tribunal to find any misconduct in relation to the same matters.

Additionally, the witness Butler's report would assist the Tribunal in assessing the degree of planning on the part of the Respondent prior to his departure from the firm which would help the Tribunal assess his truthfulness and honesty with the Secondary Complainers. Mr Marshall submitted that it was his primary submission that this evidence was relevant and admissible. His secondary position was that if the Tribunal had any doubts regarding that matter, the evidence should be left for the Tribunal at the full hearing to hear under reservation. In this regard, he referred the Tribunal to the case of McDonald-v-Duncan [1933] SC737. This being a specialist Tribunal, there would be no danger of prejudice to the Respondent if the evidence was heard under reservation.

With regard to paragraph 3.2, Mr Marshall submitted that the plea of Res Judicata was not well-founded. The Complainers were not seeking any finding of misconduct regarding the averment objected to by the Respondent. The Respondent had adjusted Answer 3.2 to suggest that his reason for leaving the firm was a difficult or poor working environment. The Respondent states

that he had a lack of support. The Complainers' averment indicates that the email exchange was an example of the support offered by the Secondary Complainers. The plea of Res Judicata was not well-founded and the averment is directly relevant to matters raised by the Respondent in his adjusted Answer.

SUBMISSIONS IN RESPONSE

Ms Irvine submitted to the Tribunal that the question of hearing evidence subject to reservation arises as a result of the reality of the situation that most objections to evidence are taken during the currency of a proof or trial. That was not the position here and so it was appropriate for the Tribunal to decide the issue. The plea taken by the Respondent, if upheld, might materially affect the scope of the enquiry.

With regard to paragraph 4.4, she argued that Mr Marshall was misinterpreting the original Answer. Mr Marshall suggested that the previous Answer stated that the Respondent had no knowledge of any fraud until 2014. In fact, the Answer had stated that he had no knowledge of the SLAB investigation. She also indicated that there may be objection taken to cross-examination of the Respondent on the basis of the adjustment to paragraph 4.4 and the scope of that cross-examination. It appeared that the Complainers were seeking to prove dishonesty on the part of the Respondent in connection with the fraud and this went far beyond anything stated within the original Answers.

With regard to paragraph 3.2, the Complainers had listed substantial material to counter the Respondent's position and explanation with regard to his leaving the firm without that particular averment being necessary. The averment was prejudicial to the Respondent and had already been dealt with by the Sub Committee.

She sought to distinguish the case of Jamieson. In that case she stated that the defender was seeking to have the whole action dismissed. That was not what she was seeking to do here. She accepted that there was something to be tried, namely the two issues referred to the Tribunal by the Law Society. The issues in the Jamieson case are quite different to those before the Tribunal today.

With regard to Production 36, she emphasised that the Tribunal was not being asked within the Complaint to make any finding of misconduct with regard to the removal of electronic files. It was her submission therefore that the evidence of Mr Butler regarding the removal of electronic files was not relevant.

She expressed concern that the Complainers had only sought to recover the police statements for the Respondent. This brought about an unfairness to the Respondent, particularly as one of the Secondary Complainers was a suspect in the fraud.

Ms Irvine was asked by a member of the Tribunal if the plea of Res Judicata was relevant in a situation where there was no averment of misconduct relating to the matters objected to. Ms Irvine conceded that there was no charge before the Tribunal regarding these two matters namely the evidence of Mr Butler and the averment in 3.2. She accepted that emphasis might be better placed on the issue of the relevance of the evidence sought to be led.

In answer to a question from a member of the Tribunal regarding the relevance of the reasons for the Respondent leaving the firm, Mr Marshall explained that this was relevant to the manner in which the files were removed. The Complainers had averred in the averments of duty an obligation of integrity and honesty and of mutual trust with others. In that context, the reason for the Respondent removing the files suddenly and without warning becomes relevant. The Tribunal will be asked to make a judgment on the severity of the Respondent's conduct in the removal of the files.

In answer to a question from a member of the Tribunal regarding the putting of the police interviews to the Respondent in cross-examination, Mr Marshall accepted that he could do that without them being included in averments in the Record. He explained however that he would only be able to do that if the Respondent gave evidence and it was his position that it was in the Tribunal's interest to have the benefit of all the facts and circumstances before it, whether or not the Respondent gave evidence. Mr Marshall explained that the relevance of Mr Butler's report was in connection with the duty of the Respondent to act honestly and with mutual trust. This report indicates a period of planning on the part of the Respondent before his departure from the

firm. To understand the removal of the files, the Tribunal required to understand the background to the situation. Whilst he accepted that the averments made no reference to the removal of electronic files, they did make reference to the removal of paper files in a sudden manner and the content of the report could be relevant to that.

DECISION

The Tribunal gave careful consideration to the submissions for the parties and the authorities referred to.

The Tribunal began by considering the plea of Res Judicata which was directed by the Respondent towards paragraph 3.2 and the admissibility of the evidence of Mr Butler and his report at Production 36. It seemed to the Tribunal that this was an error in approach by the Respondent and not well-founded. For a plea of Res Judicata to succeed, the subject matter of the previous action where a determination was made must be the same as the subject matter of the action before the Tribunal. The Complainers were not seeking any finding of misconduct before the Tribunal in relation to either of the issues referred to. In paragraph 3.2, the Complainers made averments of fact regarding an email exchange. There was no averment inviting the Tribunal to make any assessment of the propriety of the Respondent's conduct in relation to this email exchange. With regard to the evidence of the witness Butler and his report, there was no averment of misconduct directed to the content of the report. Accordingly, the Tribunal repelled the plea of Res Judicata.

The Respondent made a plea to the relevancy which was directed solely to the adjustments of paragraphs 3.2 and 4.4.

Looking firstly at paragraph 3.2, the Respondent had adjusted his Answer to include an explanation for his departure that he was treated poorly by the Secondary Complainers. In response to this, the Complainers averred that the Secondary Complainers were supportive of the Respondent and the email exchange, objected to by the Respondent, was "the most recent example of that support". That appears to be the full extent of the Complainers' reference to these emails.

The Tribunal concluded that these averments were directly relevant to the Answers lodged by the Respondent and were not, as averred, prejudicial to the Respondent. Accordingly, the Tribunal repelled the plea to the relevancy to paragraph 3.2.

The Respondent's plea to the relevancy related also to the adjustment of paragraph 4.4. The Complainers' adjustment goes into considerable detail in relation to the Respondent having been interviewed by the police in connection with a legal aid fraud and a suggested admission by him.

The Tribunal had difficulty in seeing the relevance of these issues to the averments of misconduct made by the Complainers. Mr Marshall had argued that they were relevant in connection with the Respondent's reasons for departing the firm which required to be considered by the Tribunal when assessing the manner of his departure. The Tribunal considered that these averments had little probative value to the averments of misconduct made by the Complainers and that their only relevance was in a challenge to the credibility of the Respondent should he give evidence to explain his method of departure. The averments were prejudicial to the Respondent.

Mr Marshall had referred the Tribunal to the test for the plea to the relevancy set out within the case of Jamieson. The Tribunal understood his submission to be that any plea to the relevancy could only be upheld if the result would be that the whole Complaint fell. Ms Irvine invited the Tribunal to distinguish that case on the basis that her plea was directed solely to elements of the adjusted averments. The Tribunal preferred the submissions of Ms Irvine in this regard. Having concluded that the averments objected to in paragraph 4.4 were irrelevant and prejudicial to the Respondent, the Tribunal excluded from probation all of adjusted averment 4.4 following the words "coinciding herewith." where they appear in line 3.

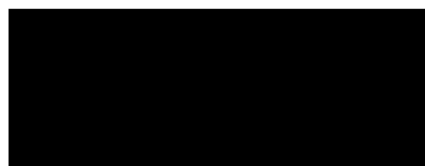
Whilst the Tribunal has excluded these averments from probation, this does not prevent the matters being raised, if appropriate, in the course of the hearing in cross-examination of the Respondent in order to challenge his credibility. That however is a matter to be dealt with by the Tribunal hearing the evidence.

The Respondent also raised issues of relevancy in relation to the averments in paragraph 3.2 for the Complainers, referring to an email exchange on 5 May 2014. The Tribunal considered that these averments were directly relevant to the Answer as adjusted by the Respondent and repelled the Respondent's plea in this connection.

The Respondent raised issues of the admissibility of the evidence of the witness Butler and his report, Production 36. The Complainers averred at paragraph 5.1.1 that the Respondent removed files from the office without prior notice or discussion with the Secondary Complainers and that was in breach of Practice Rules B1, 1.2 and B1 1.14.1. Mr Marshall submitted that the method of removal of the files was relevant to the question of the honesty and integrity of the Respondent and his duty to act in a manner consistent with mutual trust and confidence. It appeared to the Tribunal that the evidence of the witness Butler might, depending on how the evidence unfolds, be relevant to the issues of any preparatory steps taken by the Respondent before removing the files. The Tribunal concluded that it was impossible at this stage to determine whether this evidence would be relevant and the exact extent to which it would be. In these circumstances, the Tribunal considered it appropriate to refuse the plea to the relevancy *in hoc statu*. The Tribunal hearing the evidence will be in a better position to assess the question of relevancy and admissibility.

The Respondent sought an award of expenses for today's proceedings and this was opposed by the Complainers. In all the circumstances, the Tribunal considered it appropriate to reserve the question of expenses to the conclusion of the case.

Mr Marshall undertook to lodge an appropriately adjusted Record by 5pm on Wednesday 3 April 2019. The Complaint was continued to the previously assigned hearing of 9 April 2019.



Eric Lamsden
Vice Chairman