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

INTERLOCUTOR

in Complaint to the Scottish Solicitors' Discipline Tribunal

by

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

and

BENJAMIN NEPHI HANN, Hann & Co. Solicitors, 83 Princes Street, Edinburgh (hereinafter referred to as "the Respondent")

By Video Conference, 25 May 2021. The Tribunal having heard submissions in relation to the Complaint at the instance of the Council of the Law Society of Scotland against Benjamin Nephi Hann, Hann & Co. Solicitors, 83 Princes Street, Edinburgh; Repels the Complainers' preliminary plea to the relevancy and specification of the Respondent's Answers; Allows both parties a proof of their respective averments; Reserves all questions of expenses to the conclusion of the case; and Continues the case to a procedural hearing on a date to be fixed.

[redacted]

Catherine Hart
Acting Vice Chair

NOTE

A Complaint dated 23 October 2021 was lodged with the Tribunal. It was served upon the Respondent. Answers were lodged by the Respondent. The Complainers lodged a Minute of Amendment containing a preliminary plea to the relevancy and specification of the Answers. The case called for a remote procedural hearing on 14 January 2021. The Tribunal allowed the Complaint to be amended in terms of the Minute and fixed another remote procedural hearing. At the virtual procedural hearing on 23 March 2021, the Tribunal fixed a remote preliminary hearing to deal with the Complainers' preliminary plea.

At the remote preliminary hearing on 25 May 2021, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented himself. The following papers lodged by parties were before the Tribunal: the Complaint as amended; Answers; a Note of the preliminary plea; a copy of the Answers upon which the Fiscal had highlighted the sections he said should be excluded from probation; a List and Supplementary List of Authorities for the Complainers; and written submissions for the Complainers.

Both parties made submissions in relation to the preliminary plea which was,

"The Respondent's Answers being lacking in specification, et separatum irrelevant, they should be rejected or alternatively, not be admitted to probation."

SUBMISSIONS FOR THE COMPLAINERS

With reference to paragraphs 9.03 and 9.13 of Macphail's "Sheriff Court Practice" (3rd Edition) the Fiscal said that the function of written pleadings is to ascertain and demonstrate with precision the matters which are agreed and in dispute and to identify the clear issues on which parties require a judicial decision. Pleadings should state facts only, each statement of fact should be answered by the other party, pleadings should be specific, relevant and concise. The Fiscal submitted that the Answers did not meet these basic principles. At 32 pages long they were by no means concise. However, the Complainers mainly attacked the pleadings based on relevancy. The Fiscal submitted that even if the Respondent can prove everything in his Answers, they do not lead to the application of a legal principle allowing him to defend the Complaint. The Fiscal noted that the Complainers did not usually take pleading points but if the highlighted sections

of the Answers were not struck out, the Respondent would attempt to lead irrelevant evidence at the hearing and the Complainers would have to precognosce unnecessary witnesses.

The background to this case was the Respondent's conviction for an offence under Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act"). By pleading guilty, the Respondent had admitted that between May 2017 and January 2018, he acted in a threatening and abusive manner. The Fiscal claimed that the Respondent was not entitled to challenge this criminal conviction in subsequent disciplinary proceedings. The conviction followed a guilty plea and the Respondent was represented by Counsel. In the Fiscal's submission, most matters in Answer 3.5 were irrelevant, although he accepted the Respondent was entitled to lead some evidence about the circumstances surrounding the conviction.

With reference to Section 38 of the 2010 Act, the Fiscal noted that a person behaves in a threatening and abusive manner if the behaviour is likely to cause fear and alarm. There is a defence available to an accused person under Section 38(2) if they can show the behaviour was, in the particular circumstances, reasonable. In the Fiscal's submission, it was implied by the plea of guilty that the Respondent had no defence. A guilty plea constitutes a full admission of the libel (Reedie v HMA 2005 SCCR 407). The plea was not tendered by mistake or without authority. It was tendered on advice. There was no attempt to withdraw the plea or appeal the conviction.

The Fiscal said that a disciplinary body can rely on a criminal conviction. It is an admission that the behaviour was criminal. The Respondent cannot go behind it, although the underlying facts can be adduced by the Respondent provided they are not inconsistent with a finding of guilt. The Respondent cannot say his behaviour was reasonable or that there were legitimate reasons for it. The Fiscal said the Tribunal should delete any averment which seeks to deny the conviction or attempts to explain the Respondent's behaviour as reasonable.

The Fiscal referred to various authorities. The first of these was Kirk v The Royal College of Veterinary Surgeons 2004 UKPC 4. Mr Kirk had a number of criminal convictions which led in due course to disciplinary proceedings against him. Lord Hoffman said that parties could adduce evidence about the underlying facts upon which the conviction is based, provided the facts are not inconsistent with the finding that the Respondent was guilty of the offence. The practitioner cannot re-litigate the conviction in a disciplinary setting. The Fiscal said that the difficulty for the Respondent in the present case is the existence of the statutory defence because many of his averments effectively say he was acting reasonably.

The Royal College of Veterinary Surgeons v Samuel [2014] UKPC 13 involved disciplinary proceedings against a veterinary surgeon who claimed he was racially abused prior to his criminal conduct. The court said the disciplinary body ought to have considered the evidence of racial abuse although the Respondent was not entitled to go behind the guilty plea.

The Fiscal said it would be against public policy and "absurd" in the present case if a Respondent could admit before a Sheriff that his conduct over eight months amounted to threatening or abusive behaviour and was likely to cause a reasonable person fear and alarm and then argue to the contrary in disciplinary proceedings. The Tribunal cannot retry the offence for which he was convicted. The Fiscal said it would seem odd that the Complainers must prove everything which was admitted in court. It is inherent in the plea of guilty that the behaviour is established. The plea is a judicial admission, and the Complainers rely on the conduct behind the conviction to substantiate the misconduct case.

The Fiscal referred to Section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 ("the 1968 Act") and the equivalent English statutory provision. In those sections, it is stated that in any civil proceedings the fact that a person has been convicted of an offence shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence. The person shall be taken to have committed the offence unless the contrary is proved. In the Fiscal's submission, the 1968 Act does not apply to disciplinary proceedings following the rationale of Kirk and Samuels. He said this was a "big jump" because the courts in those cases were not addressed on this point. However, in his submission, paragraphs 21 and 26 of Kirk supported his argument.

The Fiscal also referred to Friel v Brown 2020 SC 273, a Scottish civil case which refers to the 1968 Act. A person convicted of death by dangerous driving tried to raise a negligence action against his GP which related to prescription of certain drugs, although the jury in the criminal case had rejected his automatism defence. The court considered the action to be a "collateral attack" on the criminal conviction. For the public policy reasons described at paragraphs 21 and 23 of the judgment, it was said that Section 10 of the 1968 Act is not a vehicle for mounting a collateral challenge to a subsisting criminal conviction.

The Fiscal noted that at the last procedural hearing, the Tribunal had referred parties to Wray v The General Osteopathic Council [2020] EWHC 3409. In his submission, it was key that the conviction in that case had

expired. He referred the Tribunal in particular to paragraphs 29, 32 and 33 of the judgement. He also noted the statutory background in this case which he said was different to the present case.

In conclusion, the Fiscal said it would be absurd for a Respondent to plead guilty and accept that he had no defence to the criminal charge and yet challenge the conviction in disciplinary proceedings. He cannot now say the conviction is not correct. He must be excluded from being able to lead evidence about the highlighted sections of the Answers.

The Chair noted that the Kirk and Samuels cases were based on criminal convictions but that in a professional misconduct complaint, the Tribunal must be satisfied that the facts which led to the conviction amount to professional misconduct. She asked the Fiscal to address the differences in approach regarding Complaints brought under Section 53(1)(a) and Section 53(1)(b) of the Solicitors (Scotland) Act 1980. The Fiscal noted that the relevant statutory provision in Kirk and Samuels was Section 16(1)(a) of the Veterinary Surgeons Act 1966. This refers to a two-stage test which is similar to a professional misconduct case. If a vet is convicted of a criminal offence which renders him unfit to practise his name can be removed from the register or he can be suspended. In his submission, this is like a professional misconduct case. The libel may be sufficient to satisfy misconduct. The Fiscal said he intended to lead evidence about the Respondent's conduct beyond the libel at the substantive hearing. However, even in a misconduct case, the Respondent cannot go behind the libel.

The Chair noted that in a Section 53(1)(b) there is no reference to holding an inquiry into the facts as there is in a Section 53(1)(a) Complaint. She asked whether it was the Fiscal's position that a less serious conviction than that which would satisfy Section 53(1)(b) would preclude the Tribunal from looking at the facts and circumstances of the case behind the conviction. The Fiscal said the Tribunal can look at evidence which does not challenge the conviction and could do that in either type of case.

In answer to a question from another member of the Tribunal, the Fiscal agreed that his position was that because the conviction infers the absence of a "reasonableness" defence for the Respondent, to lead evidence that his behaviour was reasonable would now be a challenge to the conviction.

SUBMISSIONS FOR THE RESPONDENT

The Respondent noted that this is an academic discussion with real life consequences for himself, his family and his firm. He submitted it was pointless for him to proceed if the only thing that matters was the conviction. He described the background to the offence. He said he was under pressure to plead guilty. Counsel had threatened to withdraw from acting. The Respondent said he made a difficult decision and lied to a judge. He was reassured by others that the conviction would not affect his career. He wants the process to end. He wants someone to tell him what he did wrong. He is frustrated with his experience of the criminal justice system. His former wife threatened to destroy his legal career and is carrying out that threat.

The Respondent said he admitted he pleaded guilty to the criminal charge and did not appeal the conviction. He told the Tribunal he was not trying to attack the conviction. The disciplinary charges allege he has been unprofessional or his conduct reflected badly on the profession. If the mere conviction is enough to damage the reputation of the profession, he need do nothing more. He has to live with the fact he pleaded guilty. However, in his submission, he must be able to explain the seriousness of the conduct and if found guilty of misconduct, suggest the appropriate sanction. If the Fiscal is correct, the Respondent need not be part of the proceedings at all. That might be easier, but it would not be right. The matter is very traumatic for him. He described the conviction as a "legal fiction" but said he admitted it and wished to give an explanation for his conduct. He said the Tribunal had to determine whether it was the conviction or the behaviour that damages the profession. If it is the latter, he needs to be able to talk about that behaviour. In his submission, either all the Answers should be deleted, or none of them.

In response, the Fiscal said the question posed by the Respondent was not unreasonable. He accepted that behaviour is important. However, part of what the Respondent seeks to do is to discuss a defence to the crime. This would be a collateral attack on the conviction. The Respondent cannot say his behaviour was not criminal.

DECISION

Section 51 of the Solicitors (Scotland) Act 1980 ("the 1980 Act") provides that a complaint may be made to the Tribunal by the Council of the Law Society of Scotland. Under Section 53(1)(a), the Tribunal's powers are exercisable if *"after holding an inquiry into a complaint against a solicitor the Tribunal is satisfied that he has been guilty of professional misconduct"*. Under Section 53(1)(b), the Tribunal's powers

are exercisable if *"a solicitor has ... been convicted by any court of an act involving dishonesty or has been fined an amounted equivalent to level 4 on the standard scale or more ... or sentenced to imprisonment for a term of 12 months or more."*

There is a difference in approach between Section 53(1)(a) cases on the one hand and Section 53(1)(b) cases on the other. In Section 53(1)(a) cases, the Tribunal must, after holding an inquiry, be satisfied that the Respondent is guilty of professional misconduct. In Section 53(1)(b) cases, the conviction itself is sufficient to allow the Tribunal to exercise its powers. The statute created a different approach for convictions of a more serious nature while allowing the facts which led to less serious convictions to be adduced in professional misconduct cases.

The present case is brought under Section 53(1)(a) of the 1980 Act. It could not be brought under Section 53(1)(b). Although the Complaint refers to a criminal conviction, it does not involve dishonesty; the fine imposed was £400; and there was no sentence of imprisonment. The case is therefore one where the Tribunal must hold an inquiry into the Complaint.

The Tribunal considered it was important to bear the distinction between "conviction" and "misconduct" cases in mind, given the problems that can arise if a "hybrid" approach is adopted, such as the one criticised in Wray v The General Osteopathic Council [2020] EWHC 3409. The Fiscal submitted that a major issue in that case was that the conviction in question was spent, and Mr Wray was no longer a convicted person by the time disciplinary proceedings commenced. However, the Tribunal considered that the case has wider application. The Court in Wray noted that the processes for "conviction" and "misconduct" cases were mutually exclusive but the professional conduct committee had muddled them up resulting in an unfairness to Mr Wray. The committee accepted the plea as conclusive, as it would have done in a conviction case, but in circumstances which left ambiguity as to the precise matrix of facts leading to the conclusion.

When considering a Complaint brought under Section 53(1)(a) of the 1980 Act, the Tribunal shall exercise its powers only if satisfied that the Respondent is guilty of professional misconduct. The test for professional misconduct is contained in Sharp v The Law Society of Scotland 1984 SLT 313. In that case it was said that,

"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."

In the present Section 53(1)(a) Complaint, the Complainers claim that the Respondent is guilty of professional misconduct as a consequence of his conviction at Edinburgh Sheriff Court on 18 September 2018. He pleaded guilty to a contravention of Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act"). The Respondent has provided lengthy Answers in response to that Complaint. The Complainers challenge the relevancy and specification of large parts of the Respondent's Answers. They wish to exclude from probation averments relating to the conduct which was the basis of the criminal conviction. Although they accept that the Respondent is entitled to lead some evidence about the circumstances surrounding the conviction, they say that the Respondent cannot challenge or deny the conviction. The Complainers wish in particular to prevent the Respondent leading evidence which tended to show his behaviour "reasonable" in terms of the statutory offence contained at Section 38(2) of the 2010 Act. This, the Fiscal said, would amount to a collateral challenge to the conviction. The Respondent cannot be allowed to raise a relevant "defence" to the charge and therefore, the sections of the Answers highlighted by the Fiscal ought to be struck out. Although the plea was to relevancy and specification, the Fiscal indicated that the main thrust of his argument related to relevancy.

The Tribunal bore in mind some basic principles when considering the plea to the relevancy. According to Jamieson v Jamieson 1952 SLT 257, an action will not be dismissed as irrelevant unless it must necessarily fail even if all averments are proved. The pleadings must be read as if they are completely true and interpreted broadly and in favour of the pleader.

The Tribunal carefully considered the Complainers' authorities. Kirk v The Royal College of Veterinary Surgeons 2004 UKPC 4 and The Royal College of Veterinary Surgeons v Samuel [2014] UKPC 13 were both cases brought under the Veterinary Surgeons Act 1966 ("the 1966 Act"). Section 16(1)(a) of that Act provides for "convictions" cases while Section 16(1)(b) refers to complaints of "disgraceful conduct in any professional respect". Both these particular cases were brought under section 16(1)(a) which entitles a disciplinary committee to find that a conviction for criminal offence renders a registered veterinary surgeon unfit to practise. Both these cases were based on relatively serious convictions. The Tribunal treated these

cases with care since they were brought under section 16(1)(a) of the 1966 Act. These cases are authorities on the relevance of the criminal conviction to fitness to practise but neither is an authority on unacceptable professional conduct.

Section 10(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 provides that in any civil proceedings the fact that a person has been convicted of an offence shall be admissible in evidence for the purpose of proving that he committed that offence where it is relevant to do so. According to Section 10(2), in any civil proceedings in which the section applies, a person shall be taken to have committed that offence unless the contrary is proved. This legislative provision therefore creates a rebuttable presumption in civil proceedings that the offence was committed and the named person behaved in the manner described. The Fiscal argued that the 1968 Act had no application to disciplinary proceedings and the Respondent was not free to adduce evidence to prove he did not commit the offence. The Fiscal suggested the Tribunal should follow the reasoning contained in Kirk and Samuel instead. The Tribunal treated these cases with caution as they were brought under a statutory provision which related to convictions rather than misconduct.

The Tribunal noted the strong public policy reasons for prohibiting a person from challenging the correctness of a criminal conviction. The same issue should not be litigated repeatedly between the same parties on substantially the same basis. This is based on public policy, equity and common sense considerations. These issues are discussed in relation to negligence actions in Friel v Brown [2020] SC 273 which was contained on the Complainers' List of Authorities. They are also discussed in the disciplinary context in Shepherd v The Law Society [1996] EWCA Civ 977 and Shrimpton v Bar Standards Board [2019] EWHC 677 (Admin) although the Rules of those Tribunals are different to those applicable in these proceedings.

However, not every criminal conviction will constitute professional misconduct. Misconduct cases therefore require a sufficient factual basis for the conviction to allow the Tribunal to be satisfied regarding professional misconduct in terms of the Sharp test. Whether a particular conviction constitutes a serious and reprehensible departure from the standards of competent and reputable solicitors depends on the nature of the offence and its frequency (Re a Solicitor [1960] 2 QB 212). A solicitor can be guilty of a criminal offence but not guilty of misconduct. The Fiscal indicated that it would be absurd if the Complainers had to prove everything admitted in Court. However, as is noted in Wray, it is never necessary to establish all the elements of a criminal offence in a misconduct case. The Complainers are free to bring and prove whatever facts it considers may amount to misconduct.

The Tribunal considered its approach in previous cases. The case of Law Society v Kevin Davidson (SSDT 2018) concerned a solicitor found guilty after trial of an assault to injury. The jury rejected his defence of self-defence. Despite this, he was allowed to describe to the Tribunal in later disciplinary proceedings the circumstances leading to the conviction so it could determine whether they satisfied the Sharp test. A similar approach was taken in Law Society v John Corrigan (SSDT 1985). In that case it is noted that the Tribunal accepted the Fiscal's submission that it was appropriate to look at the whole circumstances of each incident. The Tribunal noted that in the event of professional misconduct being established, it had a duty to enquire into the circumstances before determining the appropriate penalty. In that case, the Tribunal heard the Respondent's explanations but did not consider it minimised the gravity of his conduct. Even in a Section 53(1)(b) case, the Tribunal will generally need information as to the precise circumstances of the offence. In Law Society v McIntyre [1999] Scot CS 109, the Court criticised the Complainers for asking the Tribunal to determine a Section 53(1)(b) complaint relating to a firearms offence upon an insufficient and unsatisfactory basis of fact.

The Tribunal noted that the Respondent stated in his submissions that he accepts the conviction and does not seek to challenge it. He wishes to lead evidence regarding the behaviour which led to the conviction as it is this conduct which the Tribunal must consider when deciding whether he is guilty of professional misconduct. It may also be relevant to sanction. The Tribunal considers that the Respondent ought to be able to lead evidence regarding the surrounding circumstances of the offence. This should not be carried out for the purpose of challenging the conviction, but to put that offending in context, so the Tribunal can assess whether it constitutes misconduct. If a finding of misconduct is eventually made, the Tribunal will also be informed regarding the appropriate sanction.

The Complainers wish to prevent the Respondent from leading any evidence which tends to show his behaviour was "reasonable" as this is the defence provided in Section 38(2) of the 2010 Act. The Fiscal says this would be a collateral challenge to the conviction. However, the Tribunal considered that the Respondent must be able to lead evidence of the facts and circumstances surrounding the behaviour which led to the conviction so that it can in due course decide whether that conduct meets the Sharp test. There may be evidence or explanation which falls short of satisfying a defence under Section 38(2) but nonetheless provides context in disciplinary proceedings. The Respondent ought to be able to adduce evidence to persuade the Tribunal that the conduct is not a serious and reprehensible departure from the

standards of competent and reputable solicitors, or, if a finding of misconduct is made, to mitigate the sentence.

The Tribunal noted that the Answers are extremely long and unfocussed. They are difficult to follow. The Tribunal can well appreciate why the Complainers wish to limit the amount of evidence likely to be adduced by the Respondent. However, it was not persuaded that it was appropriate to exclude from probation the sections of the Answers highlighted by the Fiscal on the basis of the arguments made at the preliminary hearing. Exclusion of some of the highlighted material might prevent the Respondent from re-litigating the criminal conviction. However, the Respondent's stated purpose in leading evidence relating to the matters in the Answers is to seek to persuade the Tribunal on the question of misconduct, and if necessary, sanction, and it is not to challenge the conviction. Excluding the highlighted sections of the Answers might prevent him from being able to do this. It might also have the effect of preventing the Tribunal from being made aware of all the circumstances of the offence. This would be undesirable in a process in which the Tribunal has a duty to hold an inquiry into the Complaint.

For all these reasons, the Tribunal repelled the Complainers' plea to the relevancy and specification of the Answers. A procedural hearing will be fixed. Parties are to liaise with the Clerk regarding potential dates. The Tribunal will wish to be addressed at the procedural hearing on the number of days required for the hearing. All questions of expenses were reserved meantime. Issues of publicity did not arise at this stage.

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Catherine Hart
Acting Vice Chair