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

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

in Complaint

by

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

against

DAVID WILKIE-THORBURN, 12 Harcourt Road, Aberdeen (hereinafter referred to as "the Respondent")

By Video Conference, 20 June 2022. Having heard submissions from both parties in the Complaint by the Council of the Law Society of Scotland against David Wilkie-Thorburn dated 28 March 2022, the Tribunal Grants the motion of the Respondent for hearings in the proceedings relating to the aforesaid Complaint to be held in private; Refuses the motion of the Respondent to fix a preliminary hearing, through lack of insistence; Fixes a virtual Hearing on 16 September 2022 at 10am; and Reserves all questions of publicity and expenses meantime.

[redacted]

Ben Kemp

Vice Chair

NOTE

Following service of the Complaint, the Respondent lodged Answers together with a motion inviting the Tribunal to fix a preliminary hearing in terms of Rules 42 and 43 of the Tribunal Rules 2008 to consider (a) the application of the Rehabilitation of Offenders Act 1974 ("the 1974 Act") to these proceedings and (b) an application to hold proceedings in private. The Complainers confirmed their opposition to both parts of the motion. A virtual procedural hearing was set down for 20 June 2022. It was confirmed to both parties that the Tribunal would consider the motion for proceedings to be in private at the procedural hearing and that there would be discussion thereafter of the necessary following procedure. The Respondent invited the Tribunal to hold the procedural hearing in private. The Complainers confirmed to the Tribunal Office that they had no objection to this application and considered that it might be necessary in order to preserve the grounds of the Respondent's principal motion. This application was dealt with administratively and the Vice Chair due to convene the procedural hearing on 20 June 2022 determined that the procedural hearing would take place in private.

On 20 June 2022, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented himself. The Fiscal confirmed that this was the first calling of this case and invited the Tribunal to hear firstly the Respondent's motion for proceedings to be heard in private and then thereafter the Respondent's motion to fix a preliminary hearing.

The Tribunal proceeded to hear submissions from the Respondent, which he confirmed were directed towards his motion for hearing these proceedings in private.

The Respondent explained that he had three bases for his motion:-

(1) Prejudice to him as a protected person under the 1974 Act if the hearing was to be public;
(2) The impact proceedings held in public would have on his mental health; and
(3) Preservation of the privacy of the three Secondary Complainers.

The Respondent noted that Rule 43 of the Tribunal Rules specified that the Tribunal "shall" hold the hearing in public. However, Rule 43(2) provided for a party making a motion for the Tribunal to hold the hearing in private.

Firstly, the Respondent addressed the issue of the 1974 Act. He took the Tribunal to the provisions of the 1974 Act particularly sections 1, 4 and 7. He accepted that the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 ("2013 Order"), Article 3(a) and paragraph 1 of Schedule 1 excluded proceedings before the Tribunal from the application of section 4(1) of the 1974 Act. The Respondent explained that the Management of Offenders (Scotland) Act 2019 ("2019 Act") had reduced the disclosure period for sentences consisting of a fine to 12 months with effect from 30 November 2020. The effect of this was that the Respondent's conviction was a spent conviction and he was a protected person for the purposes of the 1974 Act. He submitted that the 2013 Order only excluded these proceedings from section 4(1) of the 1974 Act and not from its other provisions, aims and objectives. He submitted that, in particular, section 7(3) of the 1974 Act still applied and the Tribunal should only "disregard" the provisions of section 4(1) "insofar as is necessary" for the limited purposes of leading evidence of the conviction and cross-examining the Respondent. The Respondent drew the Tribunal's attention to guidance published by the Scottish Government in relation to the 2019 Act. It was the Respondent's position that the 1974 Act and his status as a protected person were relevant to the question of whether the hearing should be in public or private.

Furthermore, the Respondent argued that this extended to the question of publicity and he submitted that in order to preserve his status as a protected person under the 1974 Act there should be no publicity in this case. Whilst he accepted the operation of the principles of open justice, the Respondent drew the Tribunal's attention to section 4(1) of the 1974 Act which states that it applies "notwithstanding the provisions of any other enactment or rule of law". The Respondent further argued that publicity should not be considered as "proceedings" for the purposes of section 4(1) and submitted that proceedings should be considered to have come to a conclusion at the expiry of any appeal period.

He concluded that if these proceedings took place in public, he would suffer prejudice inconsistent with the protections intended by the 1974 Act.

He referred the Tribunal to the case of L-v-The Law Society [2008] EWCA Civ 811, produced by the Complainers. He invited the Tribunal to distinguish that case for a number of reasons:-

(a) The test of "exceptional circumstances" used by the English Tribunal for hearings to be held in private is not part of rule 43 of the SSDT Rules and so a lower consideration can be applied;

(b) The case of L relates to section 4(2) of the 1974 Act and not section 4(1);

(c) The case of L deals with a student applying to be a solicitor and not to the Respondent's circumstances; and

(d) The L case is dated 2008 and therefore predates the 2013 Order and the 2019 Act.

Fundamentally, he submitted that this is an English case interesting to demonstrate how the English Courts/Tribunals deal with these issues but not applicable to the current circumstances.

The second basis for his motion was the likely impact on his health if proceedings were to be public. The Respondent described in detail to the Tribunal the effects that the criminal proceedings had had on his mental health and the steps he had had to take since then. He drew the Tribunal's attention to a letter produced by a counsellor on his behalf. He explained that he had seen this counsellor on more than 20 occasions in the space of seven months. The criminal proceedings had concluded more than two years ago. The case had been very public and had impacted seriously on his mental health. He expected the Tribunal proceedings to have the same degree of media interest should the proceedings be public and considered that this would have a devastating impact on his mental health.

Whilst he accepted that the letter from his counsellor was brief in content, he submitted that there was little if any point in attempting to obtain a medical report as such a report would simply repeat what had been said by him to the Tribunal.

In answer to a question from the Tribunal, the Respondent explained that a hearing heard partly in private would not assist.

The third ground for his motion was preservation of the privacy of the three Secondary Complainers. During the criminal proceedings, the Secondary Complainers had been subjected to the same extreme media attention as he had, including their photographs being printed in the local press. The Respondent submitted that the only way of securing some sort of privacy for the Secondary Complainers was to hold the proceedings in private.

The Fiscal invited the Tribunal to consider the Respondent's bases for his motion in reverse order.

The Fiscal conceded that the Complainers had "slight concerns" that identification of the Respondent would lead to identification of the Secondary Complainers. Whilst he conceded that additional stress might occur to the Secondary Complainers, he submitted that the Tribunal would not be protecting in absolute terms the privacy of the Secondary Complainers as that privacy had already been lost during the earlier proceedings. The Secondary Complainers' information was already in the public domain.

The Fiscal recognised that the Tribunal had power to restrict publicity of the Respondent's name which was something he considered the Tribunal might choose to adopt later. However, it had to be said that the Secondary Complainers had indicated that they did not want to participate in these proceedings, had suffered great stress and did not want to relive it again. Even if proceedings were heard partly in private, and by that he was referring to the Respondent's submissions being heard in private, he considered that his own submissions would require to identify the Respondent and thus it would be clear he would be referring to the named person in the criminal complaint. All that being said, it was his fundamental position that the Secondary Complainers' information was already in the public domain.

The Fiscal explained that the potential effects of these proceedings on the mental health of the Respondent was a concern for the Tribunal. He submitted that it would be normal for a Tribunal such as this to require a medical report which would include an objective assessment of the risks to the Respondent's mental health before taking any steps as a consequence. He took no exception to the account of events and description given by the Respondent but submitted that the information in the counsellor's letter was limited and he argued that the Tribunal required a more objective assessment.

In considering the 1974 Act, the Fiscal submitted to the Tribunal that it should have foremost in its mind its obligations in terms of open justice. He referred the Tribunal to Treverton-Jones' "Disciplinary and Regulatory Proceedings" at paragraphs 9.6 to 9.12 and submitted that this demonstrated the importance of hearings in public. He accepted that protecting the identity of the Secondary Complainers might be a consideration falling within one of the exceptions to the rule of open justice described in paragraph 9.13 and, although he was not stating that the Complainers supported this suggestion, he accepted that this was a matter for the Tribunal to consider. He submitted that the policy of open justice was primary and this had not been overcome by the submissions of the Respondent, although he accepted that some restrictions could be applied such as the Respondent's submissions being in private. He directed the Tribunal to the case of L,

referred to by the Respondent. He accepted that the Tribunal Rules do not apply any specific test and that it was a general discretion on the part of the Tribunal whether the hearing was public or private. He emphasised that it was stated in the case of L that the 1974 Act does not render the conviction "confidential". A hearing before this Tribunal would not offend the principle that a person should not be prejudiced by disclosure of a spent conviction. He argued that given the information put before the Tribunal by the Respondent, the test for the whole proceedings being in private was not met. In his submission, the main issue for the Tribunal was whether the Secondary Complainers were entitled to a greater protection. If the Tribunal came to the conclusion that their identities were already public and the Tribunal did not require to do anything to protect them further, then the Respondent's other reservations could be satisfied by hearing the Respondent's submissions in private.

In answer to a question from the Tribunal, the Fiscal confirmed that the three Secondary Complainers had jointly complained to the Scottish Legal Complaints Commission but that they had indicated in correspondence with him that they did not want to be involved with this Complaint, wanted to put the whole matter behind them, and did not want the matter to made public again.

In answer to a question from the Tribunal, the Fiscal indicated that his motion in relation to further procedure was for the Tribunal to fix a substantive hearing, to proceed virtually and to last one day. He hoped to proceed on the basis of the Complaint and Answers and without leading evidence. The Respondent confirmed that he wanted the case disposed of and believed that any outstanding issues between him and the Fiscal could be resolved by agreement. He had no intention of leading any evidence and preferred the hearing to proceed as a virtual hearing.

The Tribunal reminded both parties that the question of professional misconduct was one to be decided by the Tribunal. It also drew both parties' attention to the reference to Rule B1.2 within the Complaint and asked both parties to be clear in any agreement as to the extent of any breach of this rule.

DECISION

The starting point for the Tribunal was the requirement in Rule 43(1) that the Tribunal "shall" hold the hearing in public. Rule 43 recognises the possibility of private hearings, and makes that possible in Rule 43(2). The rule provides no test that requires to be met for the Tribunal to depart

from the normal position that hearings will be held in public. Whilst it is within the discretion of the Tribunal to depart from the norm, that discretion must only be exercised fairly, reasonably and appropriately. The Tribunal aims to protect the public interest and to protect the reputation of the profession. These aims can only be achieved by open and transparent proceedings. Justice requires to be seen to be done.

Both parties had described the criminal proceedings as having a significant impact on the Secondary Complainers. The Complainers accepted that the potential impact on the Secondary Complainers was something that the Tribunal required to consider, whilst inviting the Tribunal to consider that the Secondary Complainers' privacy had already been breached by the criminal proceedings. The Secondary Complainers are entitled to a private life. The criminal case concluded more than two years ago and the Tribunal was extremely concerned that a hearing in public in this case would simply be repeating the harm to them, two years later. Media attention in this case has the risk of impacting not only on their private but also work lives. It was important that Secondary Complainers should feel able to complain if the system is to work effectively.

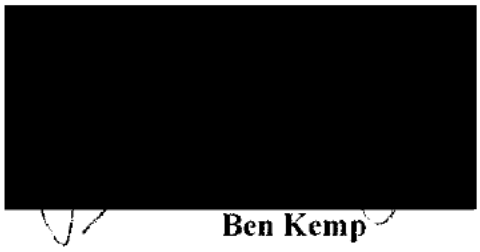
Both parties also expressed concern regarding the impact of public proceedings on the mental health of the Respondent. The Respondent argued for the whole proceedings to be held in private whilst the Complainers argued that it would be sufficient for the Respondent's submissions to be heard in private. The Tribunal agreed with the Fiscal that it would normally expect an independent medical report for there to be full consideration of a motion of this sort. However, the Tribunal had heard from the Respondent in detail and this was supported, albeit with little detail, by the counsellor's letter. Additionally, there was support for the Respondent's submissions contained within some of the references he had produced. The Tribunal also considered it relevant that this was set against a background of a Respondent who was cooperating with the proceedings.

In the unusual circumstances of this case, the Tribunal considered that the proportionate and pragmatic approach, whilst not overlooking the issues of public transparency, was to order that hearings in these proceedings take place in private; the primary reason for this decision being protection of the third parties involved, taken together with concerns for the impact on the mental health of the Respondent.

In these circumstances, the Tribunal did not require to reach a conclusion in respect of the Respondent's submissions in relation to the 1974 Act.

With the agreement of both parties, the Tribunal set the case down for a one day, virtual, full hearing on 16 September 2022 at 10am. Parties were requested, if possible, to lodge any Joint Minute with the Tribunal seven days prior to the hearing.

All issues of publicity and expenses were reserved.



Ben Kemp

Vice Chair