

**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

ALLAN RICHARD MORISON STEELE, WS, 22 Forres
Avenue, Giffnock, Glasgow (hereinafter referred to as
"the Respondent")

By Video Conference, 23 May 2022. The Tribunal, having considered parties' submissions, Sets the matter down for a two-day hearing in-person on dates to be afterwards fixed; Directs that all Lists of Witnesses, Lists of Productions and affidavits should be lodged at least 28 days before the first day of that hearing; Directs that witness evidence will be received by way of affidavit; and Finds no expenses due to or by either party in respect of preparation for and attendance at the hearings on 12 October 2021, 4 November 2021, 7 December 2021 and 1 February 2022.



Ben Kemp
Vice Chair

NOTE

This case called for a virtual procedural hearing on 23 May 2022. The Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Stuart Munro, Solicitor, Glasgow. The Chair summarised the Tribunal's decision following the preliminary hearing on 1 February 2022 for the benefit of observers and invited the parties to address the Tribunal on further procedure.

SUBMISSIONS FOR THE COMPLAINERS ON FURTHER PROCEDURE

The Fiscal moved the Tribunal to fix a substantive two-day hearing. The Complainers were content with a virtual or in-person hearing. The Fiscal indicated that although there had been a suggestion that the Respondent might lead at the hearing, parties were now agreed that the Complainers would do so. The Complainers will lead evidence from the complainer in the criminal case. Parties were content that her evidence, and that of her son, can be led by way of affidavit. Both these witnesses gave evidence at the criminal trial. Neither party wants them to have to give evidence again. Parties were content that evidence was presented by way of affidavit but there was no agreement on the content of those affidavits. Parties will lodge Lists of Witnesses and Lists of Productions 28 days before the hearing.

SUBMISSIONS FOR THE RESPONDENT ON FURTHER PROCEDURE

The Respondent suggested that a virtual hearing was set. It would be more cost-effective, and a fair hearing could be achieved by video conference. Mr Munro said it would be prudent to reserve two days, but the hearing might be concluded in one day. The only oral evidence is likely to come from the Respondent. It was possible that the Respondent might lodge an affidavit from another child before the hearing. Mr Munro clarified that the witnesses giving evidence by way of affidavit would not be cited to attend and would therefore not be subject to cross-examination. There was a possibility that one party might object to extraneous or collateral material in the affidavits and the Tribunal would have to make decisions on this in the normal way.

Both parties confirmed to the Tribunal that they were content that the same panel which sat on the preliminary hearing, also sat on the substantive hearing.

SUBMISSIONS FOR THE RESPONDENT ON THE MOTION FOR EXPENSES

Prior to the procedural hearing, the Respondent lodged a motion asking the Tribunal to find the Complainers liable in expenses in respect of preparation for and conduct of the hearings on 12 October 2021, 4 November 2021, 7 December 2021 and 1 February 2022.

Mr Munro noted that although the principal basis of the prosecution has yet to be determined, this is a discrete part of the process, and it was appropriate to deal with it now. If the Tribunal reserves the question of expenses, the detail and context will be lost as the Tribunal shifts its focus to evidential matters. Mr Munro referred to MacPhail's "Sheriff Court Practice" (paragraphs 19.11 and 19.16) which noted that the practice of reserving expenses is strongly discouraged and that a motion for expenses should not be refused on the ground it arose in a test case. In his submission there was no advantage in delaying the decision. It would be normal civil practice to consider expenses at this stage.

In Mr Munro's submission, a significant matter of law and procedure was dealt with at those four hearings. The Respondent's position remained clear and consistent. The Tribunal's decision is a vindication of that position. By contrast, the Complainers' position varied during that period. Ultimately, the Respondent was successful and expenses should follow success. He was successful on a "macro level" because the Tribunal's decision was in line with the Respondent's consistent position. The position ultimately taken by the Complainers was not supported by the Tribunal. Leaving aside the consideration that the Respondent was successful, Mr Munro also asked the Tribunal to consider the evolving nature of the Complainers' submissions. The Tribunal can have regard to the conduct of a hearing. The Complainers' variable positions created expense. However, Mr Munro's primary argument was based on the Respondent's degree of success.

SUBMISSIONS FOR THE COMPLAINERS ON THE MOTION FOR EXPENSES

The Fiscal said that both parties should be treated in the same way. At a previous preliminary hearing, the Respondent suggested the Complaint was insufficient to allow investigation. Expenses were reserved in relation to that discrete part of the case although the Respondent lost his argument.

The Fiscal submitted that the Respondent had not been totally successful in relation to the present issue. He accepted that the Complainers were unsuccessful in relation to the exceptional circumstances test.

However, this test is present in the regulatory regime for lawyers in England and Wales. It was reasonable to ask the Tribunal to use this. The Complainers' position evolved but this was in response to the questions posed by the Tribunal. Ultimately, the Tribunal made no finding in relation to its own question about the strict rules of evidence. The Complainers were not wholly unsuccessful. The decision is exactly the same as the 1968 Act sets out. The Tribunal can award expenses as an expression of dissatisfaction but there is no basis for making such an expression in this case. This is not a case where the Complainers got it plainly and clearly wrong. It was a relatively novel piece of law involving significant investigation and a lot of Tribunal time.

In the Fiscal's submission, the Tribunal should reserve expenses or make them expenses in the cause. He did not think it would be best practice to argue the matter again at the conclusion of the case. Therefore, it would be preferable to follow the latter course of action. On this point, Mr Munro said that it would be manifestly inequitable for the expenses to be regarded as in the cause. The alternative would be to reserve the question to the conclusion of proceedings but there was no advantage to that and it was contrary to the sharp rejoinder in MacPhail. There was no motion for expenses after the first preliminary hearing and it was not for this Tribunal to speculate why expenses were not dealt with at that stage. If the Complainers had moved for expenses, the motion would have been opposed.

DECISION

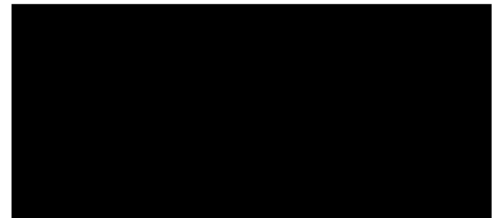
After careful consideration, the Tribunal set the matter down for a two-day hearing in-person on dates to be afterwards fixed. The Tribunal considered fixing a virtual hearing but decided a hearing in person was more appropriate due to the complexity of the issues, the potential for some live witness evidence, and the potential length of the hearing. The panel members who sat on the preliminary hearing on 1 February 2022 will also sit on the substantive hearing. Lists of Witnesses, Lists of Productions and any affidavits should be lodged at least 28 days before the first day of the hearing.

The Tribunal noted that it was likely that the Respondent would give evidence in person. In the unusual circumstances of this case where witnesses have already given evidence in a sensitive matter in a criminal trial, and parties are agreed that the appropriate way to proceed is to lodge affidavits, the Tribunal is prepared on joint motion to receive that witness evidence by way of affidavit. The Tribunal was sympathetic to this approach although it may make assessment of credibility and reliability more difficult. The weight to be attached to the evidence in the affidavits will be a matter for the Tribunal, in the usual way. It is for

the Complainers to prove their case beyond reasonable doubt, and in presenting his case the Respondent may seek to rebut the presumption arising from the conviction.

The Tribunal went on to consider the matter of expenses. The Tribunal considered that not having awarded expenses at an earlier stage in proceedings was irrelevant, when no motion for expenses was made at that stage. These hearings represented a discrete stage in proceedings, and as such the Tribunal agreed that it was appropriate to deal with the matter now rather than hearing submissions at the conclusion of the case. The Tribunal did not consider that it would be fair to direct that the expenses for this part of the proceedings were expenses in the cause. It therefore decided that it would deal with the matter of expenses for these hearings, as a discrete chapter in the case procedure, at this stage.

The Tribunal had asked for various matters to be addressed. The time it took to reach a conclusion on this part of the case was not clearly attributable to one party over another. The issues were complex and novel and the Tribunal was satisfied that both parties had sought to address them fully, and properly, even if at times sharp clarity had proven elusive. Although the Respondent had obtained the result he sought, overall, the Tribunal's decision was not entirely aligned with the submissions made on his behalf. In all of those circumstances the Tribunal was of the view that it was appropriate to find no expenses due to or by either party in respect of preparation for and attendance at the hearings on 12 October 2021, 4 November 2021, 7 December 2021 and 1 February 2022.



Ben Kemp
Vice Chair