OUTER HOUSE, COURT OF SESSION

[2019] CSOH 104

P342/19

OPINION OF LORD ERICHT

In the cause

TASMINA AHMED-SHEIKH

Petitioner

Against

SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL

First Respondent

And

COUNCIL OF THE LAW SOCIETY OF SCOTLAND

Second Respondent

for Judicial Review

of a decision of the Scottish Solicitors' Discipline Tribunal dated 15 January 2019

Petitioner: A Sutherland; Kennedys Scotland
Respondents: (First) Upton; Wright, Johnston & MacKenzie LLP and (Second) Donnelly; TC Young LLP

13 December 2019

Introduction

[1] The petitioner, a solicitor, was found guilty of professional misconduct by the Scottish Solicitors' Discipline Tribunal (the "Tribunal"). A motion made on behalf of the solicitor for no expenses to or by was rejected by the Tribunal. There was no motion nor

discussion about the scale of expenses. The Tribunal awarded expenses against the solicitor on the agent and client scale. The solicitor took issue with the award of expenses but not with the finding of professional misconduct. The solicitor did not appeal to the Court of Session under the statutory appeal procedure. Instead, she brought a petition for judicial review of the Tribunal's decision to award expenses on the agent and client scale. The judicial review called before me for a substantive hearing at which the main issues were (1) whether the judicial review was competent given that the solicitor had not appealed, which in turn gave rise to the question of whether an appeal by the solicitor on the issue of expenses alone would have been competent, and (2) if the answer on the first issue was that this judicial review was competent, whether the Tribunal's decision on scale of expenses should be quashed on the judicial review grounds of error of law, unreasonableness, failure to provide adequate reasons and fettering of discretion.

The powers of the Scottish Solicitors' Discipline Tribunal

[2] The Tribunal's constitution and powers are set out in Part IV of and Schedule 4 to the Solicitors (Scotland) Act 1980 (the "Act").

[3] Section 53 provides:

> "53 - Powers of Tribunal.
>
> (1) Subject to the other provisions of this Part, the powers exercisable by the Tribunal under subsection (2) shall be exercisable if—
>
> (a) after holding an inquiry into a complaint against a solicitor the Tribunal is satisfied that he has been guilty of professional misconduct, or
>
> (b) a solicitor has (whether before or after enrolment as a solicitor), been convicted by any court of an act involving dishonesty or has been fined an amount equivalent to level 4 on the standard scale or more (whether on summary or solemn conviction) or sentenced to imprisonment for a term of 12 months or more, or

(c) an incorporated practice has been convicted by any court of an offence, which conviction the Tribunal is satisfied renders it unsuitable to continue to be recognised…; or

(d) after holding an inquiry into a complaint, the Tribunal is satisfied that an incorporated practice has failed to comply with any provision of this Act or of rules made under this Act applicable to it.

(2) Subject to subsection (1), the Tribunal may—

(a) order that the name of the solicitor be struck off the roll; ...

(aa) if the solicitor's name has been removed from the roll…, by order prohibit the restoration of the solicitor's name to the roll;

(b) order that the solicitor be suspended from practice as a solicitor for such time as it may determine; ...

(ba) order that any right of audience held by the solicitor… be suspended or revoked;

(bb) where the solicitor has been guilty of professional misconduct, and where the Tribunal consider that the complainer has been directly affected by the misconduct, direct the solicitor to pay compensation of such amount, not exceeding £5,000, as the Tribunal may specify to the complainer for loss, inconvenience or distress resulting from the misconduct;]

(bc) where—
(i) an incorporated practice has been convicted, or has been found to have failed, as referred to in subsection (1)(c) or (d), and
(ii) the Tribunal consider that the complainer has been directly affected by any misconduct by the practice to which the conviction or failure is (to any extent) attributable,
direct the practice to pay to the complainer compensation (for loss, inconvenience or distress resulting from the misconduct) of such amount not exceeding £5,000 as the Tribunal may specify;]

(c) …., impose on the solicitor or, as the case may be, the incorporated practice] a fine not exceeding £10,000; ...

(d) censure the solicitor or, as the case may be, the incorporated practice

(e) impose such fine and censure him or, as the case may be, it

(f) order that the recognition… of the incorporated practice be revoked: [or]

(g) order that an investment business certificate issued to a solicitor, a firm of solicitors or an incorporated practice be—
(i) suspended for such time as they may determine; or
(ii) subject to such terms and conditions as it may direct; or
(iii) revoked."

[4] Schedule 4 is headed "CONSTITUTION, PROCEDURE AND POWERS OF TRIBUNAL" and includes the following.

"*Decisions*

13. The Tribunal shall set out in their decision—

(a) in the case of a complaint, the facts proved, and

(b) in the case of a conviction, particulars of the conviction and sentence.

and shall in the case of a complaint add to their decision a note stating the grounds on which the decision has been arrived at.

14. Every decision on the Tribunal shall be signed by the chairman or other person presiding and shall…. be published in full.
…….
15. A copy of every decision by the Tribunal certified by the clerk shall be sent forthwith by the clerk to the respondent the complainer and, as the case may be, the person who made the complaint as respects which the appeal was made to the Tribunal intimating the right of appeal available from that decision under this Act.

…..

Expenses

19. Subject to the provisions of Part IV, the Tribunal may make in relation to any complaint against a solicitor such order as it thinks fit as to the payment by the complainer or by the respondent of the expenses incurred by the other party and by the Tribunal or a reasonable contribution towards those expenses.

20. On the application of the person in whose favour an order for expenses under paragraph 19 is made and on production of a certificate by the clerk of the Tribunal that the days of appeal against the order have expired without an appeal being lodged or, where such an appeal has been

> lodged, that the appeal has been dismissed or withdrawn, the Court may grant warrant authorising that person to recover those expenses from the person against whom the order was made.
>
> 21. Such warrant shall have effect for execution and all other purposes as if it were an extracted decree of court awarded against the person against whom the order of the tribunal was made.
>
> 22. The expenses of the Tribunal so far as not otherwise defrayed shall be paid by the Society as part of the expenses of the Society."

The decision of the Scottish Solicitors' Discipline Tribunal

[5] On 15 January 2019, the petitioner (along with another solicitor) was found guilty of professional misconduct in respect of breach of certain of the Law Society of Scotland Practice Rules 2011 and was censured and fined £3,000. In accordance with its normal practice, the Tribunal produced three documents. The first was a short formal interlocutor. The second was a document headed "Findings" which made findings in fact and narrated the procedure before the Tribunal and the formal interlocutor and also narrated that a copy of the interlocutor and the findings were duly sent to the respondents by recorded delivery. The third was a document headed "Note" which was attached to the Findings and set out the submissions of the parties and reasoning of the Tribunal.

[6] The Note recorded that the parties had made submissions about expenses as follows:

> "SUBMISSIONS FOR THE SECOND RESPONDENT ON SANCTION, PUBLICITY AND EXPENSES
>
> …..
> [Counsel for the petitioner] made a motion that no expenses should be due to or by either party. She noted the significant alteration of the Complaint before the eventual Joint Minute. She was not advised of any plea negotiation between the First Respondent and the Fiscal. She was only advised a day or so before the Tribunal that any agreement had been reached between the First Respondent and the Complainers. However, their dealings are not relevant to the Tribunal. What is significant is the change in terms of the Complaint and the way matters resolved. She had no objection to the decision being given publicity.

FURTHER SUBMISSION BY THE COMPLAINERS ON EXPENSES

The Fiscal said he was content to leave the matter of expenses in the hands of the Tribunal. He said that there was a difference in approach by the Respondents after 21 November 2018. However, extra-judicial discussions continued with both parties up until Friday 11 January 2019. There was an agreement with the First Respondent before that but both Joint Minutes were signed on Friday. The prosecution was ultimately successful. There had been a fourth averment of professional misconduct regarding a lack of integrity. There were also averments regarding the Accounts Certificates. These remained on the Record until finalised in the week prior to the Hearing." (P52-3)

[7] The Note went on to say:

"DECISION ON SANCTION, PUBLICITY AND EXPENSES
…….
The appropriate award of expenses was one in favour of the Complainers. Although there had been extensive plea negotiation, the Complainers were the successful party and there was no reason why the usual rule should not apply, namely that expenses should follow success and both Respondents should be jointly and severally liable for those expenses." (P54)

[8] As can be seen from the above, neither the submissions, nor the Note, made any reference to the scale of expenses. However, the interlocutor was in the following terms:

"Find the Respondents jointly and severally liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00"

First Issue: whether this judicial review is competent given that the petitioner did not make a motion before the Tribunal for party and party expenses nor appeal to the court against the Tribunal's decision on scale of expenses

Statutory appeal

[9] The Act provides for a statutory appeal to the Court of Session as follows:

"**54. – Appeals from decisions of Tribunal.**

(1A) A solicitor or an incorporated practice may, before the expiry of the period of 21 days beginning with the day on which any decision by

the Tribunal mentioned in subsection (1B) is intimated to him or, as the case may be, it appeal to the Court against the decision.

(1B) The decision is –

(a) where the Tribunal was satisfied as mentioned in section 53(1)(a), the finding that the solicitor has been guilty of professional misconduct;

(b) where the Tribunal was satisfied as mentioned in section 53(1)(d), the finding that the incorporated practice has failed to comply with any provision of this Act or of any rule made under this Act applicable to the practice;

(c) in any case falling within paragraph (a) or (b), or where the decision was made because of the circumstances mentioned in section 53(1)(b) or (c), any decision under section 53(2) or (5).

(1C) The Council may, before the expiry of the period of 21 days beginning with the day on which a decision by the Tribunal under section 53(2) or (5) is intimated to them, appeal to the Court against the decision; but the Council may not appeal to the Court against a decision of the Tribunal under section 53(2)(bb) or (bc).

(1D) Where the Tribunal has found that a solicitor has been guilty of professional misconduct but has not directed him under section 53(2)(bb) or (bc) to pay compensation, the complainer may, before the expiry of the period of 21 days beginning with the day on which the Tribunal's finding is intimated to him, appeal to the Court against the decision of the Tribunal not to make a direction under that subsection.

(1E) A complainer to whom the Tribunal has directed a solicitor under section 53(2)(bb) or (bc) to pay compensation may, before the expiry of the period of 21 days beginning with the day on which the direction under that subsection is intimated to him, appeal to the Court against the amount of the compensation directed to be paid.

(1F) On an appeal under any of subsections (1A) to (1E), the Court may give such directions in the matter as it thinks fit, including directions as to the expenses of the proceedings before the Court and as to any order by the Tribunal relating to expenses.

(1G) A decision of the Court under subsection (1A), (1B), (1C), (1D), (1E) or (1F) shall be final."

Submissions for the petitioner

[10] Counsel for the petitioner submitted that an appeal against a decision on expenses alone was not competent. Section 54(1A) provided that a solicitor might appeal against any decision mentioned in subsection (1B): a decision on expenses was not a decision mentioned in subsection (1B). Were an appeal against a decision on expenses alone competent, section 54(1F) would serve no purpose. The scheme of the current Act was no different from that enforced until 30 September 2008 which provided only for an appeal "relating to discipline" (*Thomas* v *Council of the Law Society of Scotland* [2006] SLT 183 at paras 14 – 15). Section 54 specified in detail which decisions may be appealed: it would be peculiar if parliament had left to implication the fact that a decision on expenses could be appealed. The petitioner's interpretation accorded with the general rule that appeals solely on a question of expenses are severely discouraged (*Lord Advocate* v *Mackie* 2006 SLT 118 at para [11]). At the hearing, counsel for the petitioner moved for no expenses to or by. That was a request for it to depart from its usual practice. A petition for judicial review which has a real prospect of success should not be refused due to a failure to make a secondary motion.

Submissions for the first respondent

[11] Counsel for the first respondent submitted that the petition was incompetent as the petitioner sought to invoke the supervisory jurisdiction without having first invoked two primary remedies:

(1) she could have moved the Tribunal to award expenses on a party and party basis and

(2) she could have appealed against the award of expenses to the Inner House.

The award of expenses was an integral part of the finding in terms of section 54(1B)(a). An appeal lies against an award of expenses where there is an appeal on the merits (subsection 54(1F)). There was no good reason why an expenses only challenge should be competent only in a judicial review, and therefore subjected to the permission to proceed test and the more restrictive judicial review grounds, whereas an expenses and merits challenge would be entitled to a full appeal without need for permission. If an appeal was taken to both merits and expenses and the merits element was later abandoned the expenses element would still be a competent appeal.

Submissions for the second respondent

[12] Counsel for the second respondent submitted that this judicial review was incompetent as the petitioner had not exhausted her remedies because (1) she failed to pursue her obvious primary recourse of inviting the Tribunal to award expenses on a scale other than an agent-client scale and (2) she could have appealed the decision under section 54 of The Solicitors (Scotland) Act 1980. This was clear from section 54(1B)(a) and section 54(1F) and paragraph 20 of schedule 4. No conceivable statutory purpose could have been served by requiring challenges on merits and expenses to proceed by way of appeal but challenges limited to expenses to proceed by way of judicial review. The equivalent English provision permitted an appeal against costs alone (Solicitors Act 1974, section 49; *Baxendale-Walker* v *Law Society* [2008] 1 WLR 426). It was clear from the history of section 54 that the distinction it drew was between final and interim determination, which was a response to *Thomas* v *Council of the Law Society of Scotland*.

Discussion and decision

[13] It is well recognised in law that a decision cannot be challenged by way of judicial review proceedings if other remedies are available. The opportunity to make submissions before a decision is made cannot be such a remedy barring judicial review of a decision. Judicial review proceedings and appeal proceedings challenge a decision. The opportunity to make submissions before a decision is made is not a challenge to the decision itself. A decision can be challenged only after it is made.

[14] The question which arises in this appeal therefore is whether there is a statutory appeal from decisions of the Tribunal in relation to expenses alone. If there is, then the appeal route should have been followed and this judicial review is incompetent. If there is not, then the petitioner has no other remedy and so is entitled to bring this judicial review.

[15] Section 54(1A) of the Act gives a right to appeal against a "decision." In respect of a professional misconduct case such as the case which is the subject of this petition, a decision is defined in section (1B) as follows:

> "The decision is –
>
> (a) where the Tribunal was satisfied as mentioned in section 53(1)(a), the finding that the solicitor has been guilty of professional misconduct;"

[16] The reference to section 53(1)(a) is a reference to the words "after holding an inquiry into a complaint against a solicitor the Tribunal is satisfied that he has been guilty of professional misconduct".

[17] The issue of whether an appeal on expenses alone is competent turns on the meaning of the word "decision" in section 54(1)A. Does it have a narrow meaning restricted to the finding of guilt? Or does it have a broader meaning encompassing the order for expenses made alongside the finding of guilt?

[18] In my opinion "decision" has the broader meaning and it is competent to appeal under section 54(1A) on expenses alone. In coming to that conclusion, I have applied the principles of statutory construction that the provisions of a statute should be construed so as to make a consistent enactment, and to avoid an absurd result.

[19] Section 35 of the Act sets out the powers of the Tribunal to make orders on the merits of the disciplinary proceedings before them. Schedule 4 of the Act sets out the powers of the Tribunal to make orders as to expenses. Although these powers are to be found in different places in the Act, they form part of a scheme for the constitution of the Tribunal. In my opinion that scheme should be construed as a whole and the separate provisions of the Act should be construed so as to give consistent effect to the scheme as a whole.

[20] The powers of the Tribunal in relation to the merits are to be found in section 53. The Tribunal is given the power to make certain orders as to sanctions. These powers can only be exercised if the prerequisites set out in subsection (1) are met. One of these prerequisites is that after holding an inquiry the Tribunal is satisfied of the solicitor's guilt.

[21] The powers of the Tribunal to make an order in relation to expenses are not found in the body of the Act but are instead to be found in Schedule 4 under the heading "Expenses". The power to make an order in relation to expenses is to be found in Paragraph 19. The power is not limited to the situation where the Tribunal has made an order against the solicitor under section 53. It is wider than that. It can be made "in relation to any complaint". It can be made against the complainer. Paragraph 19 provides:

> "19. … the Tribunal may make in relation to any complaint against a solicitor such order as it thinks fit as to the payment by the complainer or by the respondent of the expenses incurred by the other party and by the Tribunal or a reasonable contribution towards those expenses."

[22] Paragraph 20 deals with appeals against orders of expenses. It expressly contemplates that such appeals are competent. It does not draw a distinction between

appeals against only the expenses order and appeals against both the expenses order and the merits. It states:

> "**On the application of the person in whose favour an order for expenses under paragraph 19 is made** and on production of a certificate by the clerk of the Tribunal that **the days of appeal against the order** have expired without an appeal being lodged or, **where such an appeal has been lodged**, that the appeal has been dismissed or withdrawn, the Court may grant warrant authorising that person to recover those expenses from the person against whom the order was made." (emphasis added)

[23] Section 54(1) F provides that on appeal the court may make a direction "as to any order by the Tribunal relating to expenses." Accordingly, the scheme of the Tribunal expressly contemplates that on an appeal the court may deal with expenses.

[24] Appeals are governed by section 54. Section 54 gives the solicitor a right of appeal to the Court. The right of appeal is not expressed to be an appeal against an order. It is an appeal against a "decision."

[25] Section 54 as originally enacted did not give specification of what was meant by a "decision". In its original form it read:

> "(1) Any person aggrieved by a decision of the Tribunal relating to discipline under this Act may within 21 days of the date on which the decision of the Tribunal is intimated to him, appeal against the decision to the Court, and on any such appeal the Court may give such directions in the matter as it thinks fit, including directions as to the expenses of the proceedings before the Court and as to any order by the Tribunal relating to expenses; and the order of the Court shall be final."

[26] The original wording of the section was considered by the Second Division in *Thomas* v *Council of the Law Society of Scotland*. The court held that there were some decisions of the Tribunal which were not appealable:

> "[15] In our view, the kind of decision that S 54(1) contemplates is a decision on the guilt or innocence of the respondent in a disciplinary complaint, or a decision on the sentence to be imposed in respect of a finding of guilt; or a decision after a hearing on a preliminary plea that may have the effect of discharging the complaint, such as a plea to the relevancy or competency or a plea in bar. On the other hand, those decisions that are of a purely procedural or administrative nature; for example orders postponing or adjourning a hearing, or granting extensions of time, or

> ordering production of documents or the like, do not, in our view, fall within section 54(1)."…

[27] The section was amended by the Legal Profession and Legal Aid (Scotland) Act 2007. In its current form, as section 54(1)A, it provides greater specification of "decision", and identifies that a decision is the finding that the solicitor has been guilty of professional misconduct or that the incorporated practice has failed to comply, or any decision as to sanction.

[28] Section 54(1)A does not specifically state that there can be an appeal against expenses. So on a narrow interpretation there can be no appeal against an order for expenses. However, it is clear from the schedule that there can be an appeal against expenses. Accordingly section 54(1)A must not be construed in that narrow way but instead must be construed so as to give effect to the schedule and permit a right of appeal against an order for expenses. As the schedule does not differentiate between a right of appeal against an expenses order alone and a right of appeal against an expenses order together with a merits order, there is no good reason to construe section 54(1)A in such a way as to create such a differentiation.

[29] Further, the petitioner's construction of the statute has absurd results. It is well recognised that appeals on expenses alone are to be discouraged. This is because they are incidental to a cause and are within the discretion of the judge hearing the case, subject to the discretion being exercised along conventional lines as settled by precedent or principle (*Lord Advocate* v *Mackie* para [11]). There is an important difference between allowing appeals as competent but discouraging competent appeals and preventing appeals by making them incompetent in the first place. There will be occasions when important issues relating to expenses require to be determined by a higher court, such as issues of general public importance. One example of such an occasion is the decision of the English Court of

Appeal on the powers of the English Solicitors Disciplinary Tribunal in relation to costs in *Baxendale-Walker* v *Law Society* [2008] 1 WLR 426. Another example of such an occasion might be to consider whether the default position in the Scottish Tribunal, absent any motion to the contrary, should be to apply the agent and client scale. It would be completely arbitrary and absurd if the competency of appeals on such important issues on expenses depended entirely on whether or not there happened to be an additional appeal point in relation to the merits. It would also be absurd if the court dealing with the same expenses point required to apply a different legal test depending on whether there happened to be such an additional appeal point, in which case the court would apply appeal grounds, or there was an expenses point alone, in which case the more restrictive judicial review grounds would apply.

[30] Further, my finding that the word "decision" has a broad meaning is consistent with previous case law. In *Council of the Law Society* v *Docherty* 1968 SC 104 an argument that the word "decision" in a similar section of an earlier statute applicable to the Tribunal's predecessor Committee (Solicitors (Scotland) Act 1949 sec 7) should bear a narrow meaning was rejected by the Inner House:

> "It was argued to us that the word 'decision' in that section applies only to the Committee's conclusion as to whether the charge in the complaint is proved or not, ,and that the 'decision' within the meaning of that section does not cover the sentence pronounced by the Committee. If this is sound, then, as the charge of a breach of the Rules was admitted, no appeal would be competent in this case.
>
> In our opinion there is no warrant in the statutory provisions for this distinction. A finding that a breach of the Rules has taken place is no doubt a prerequisite to the ultimate decision of the Committee, but in our view the sentence pronounced by the Committee, which after all is an operative part of their deliberations, is an essential part of their decision" (p108)

By the same reasoning, the order on expenses, which is part of the deliberations of the Tribunal, is an essential part of the Tribunal's "decision" under section 54 of the Act.

[31] Accordingly, the petitioner has failed to exhaust her statutory remedy and this judicial review is incompetent. That is sufficient to dispose of this judicial review and it is not necessary for me to decide the second issue in the case. However, for sake of completeness I set out the parties' submissions and my views on them.

Second Issue: if the answer on the first issue was that this judicial review was competent, whether the Tribunal's decision on the scale of expenses should be quashed on the judicial review grounds of error of law, unreasonableness, failure to provide adequate reasons and fettering of discretion.

Submissions for the petitioner

[32] Counsel for the petitioner submitted that the usual practice of the first respondent to award agent and client expenses, and the decision to do so in this case, were both unlawful and unreasonable.

[33] In respect of unlawfulness, the petitioner submitted that the discretion to award expenses under paragraph 19 of schedule 4 must be exercised in accordance with recognised principles and conventional lines (*Scottish Power Generation Limited* v B*ritish Energy Generation UK Limited* 2002 SC 517 at para 21; *Lord Advocate* v *Mackie* at para 11). The first principle was that expenses follows success. The second principle was that an award of expenses is designed to achieve substantial justice (*Howatt* v *W Alexander and Sons Limited* 1948 SC 154 at 157). The general principle is that in the absence of specification to the contrary, taxation is on a party and party basis (McLaren, *Expenses in the Supreme and Sheriff Courts of Scotland* (1912) page 431). Thirdly, agent and client expenses may be awarded in exceptional circumstances, as a sanction. (*Plasticisers Ltd* v *William R Stewart & Sons (Hacklemakers) Ltd* 1972 SC 268 at 282; *McKie* v *Scottish Ministers* 2006 SC 528 at para 3.)

Neither the respondents' usual practice nor the decision accorded with the recognised principles that agent and client expenses may be awarded only in exceptional circumstances and as a sanction.

[34] Counsel further submitted that the award was unreasonable. An award of party and party expenses entitled a party to recover reasonable expenses incurred in a proper manner and functioned as an incentive to conduct litigation with reasonable expedition and at reasonable costs. *Baxendale-Walker* v *Law Society* was authority only for the proposition that, in normal circumstances, the Law Society should not have to pay successful solicitor's expenses. This was because a regulator should not be dissuaded from carrying out its tasks fearlessly because of concern about costs being awarded against it (*Broomhead* v *Solicitors Regulation Authority* [2014] EWHC 2772 at para 41). The Law Society should not be entitled to more expenses than were reasonable. The Law Society might conduct itself without due regard to economy if it knows that it will be awarded agent and client expenses. In England, any order imposed must never exceed the costs actually and reasonably incurred (*Solicitors Disciplinary Tribunal in England and Wales Guidance Note on Sanctions* 6th Edition December 2018, *R* v *Northallerton Magistrates Court ex p Dove* 2000 1 Cr App R(S) 136). Agent and client expenses may be wholly disproportionate to the nature of proceedings and sanctions imposed. The argument is that where an award of agent and client expenses is not made, the shortfall would have to be met by members of the profession was misconceived as there was no shortfall, merely reasonable expenses for bringing in prosecuting a complaint. It was a consequence of the right to self-regulation. Further the justification of an award of agents and client expenses was that the party had caused the other unnecessary expense (*McKie* v *Scottish Ministers* at para 3). This was not the case here: the petitioner had accepted her guilt and co-operated and expressed remorse and demonstrated insights. It was not the

purpose of an order for cost to serve as an additional punishment, but to compensate the applicant for costs incurred (*Solicitors Disciplinary Tribunal for England and Wales Guidance Note on Sanctions* page 21 at para 65).

[35] Counsel further argued that the first respondent had failed to provide adequate reasons which would have justified an award of agent and client expenses.

[36] Finally, counsel submitted that in published cases, agent and client expenses had been awarded where the solicitor had been found guilty: the first respondent had fettered its discretion. He referred to the cases of *Donaldson* (24 June 2019), *Anderson* (18 June 2019), *Thornton* (18 June 2019) *Frame* (6 March 2019) and *Thomson* (5 October 2016).

Submissions for the first respondent

[37] Counsel for the first respondent submitted that the Tribunal's usual practice was to award expenses on an agent and client basis. This had been stated in the report of the Scottish Solicitors' Discipline Tribunal for the years 1979 and 1989. The practice was expressed in the Tribunal's public judgments.

[38] Counsel further submitted that expenses were a matter for the discretion of the first respondent. Discretion does not preclude the adoption of a usual practice. There was no inconsistency between having a discretion and having a default basis. This could be seen in respect of expenses in the civil courts (*Fletcher's Trustees* v *Fletcher* (1888) 15R 862 at 862-3).

[39] Counsel further submitted the petitioner's premise of equating the proceedings with ordinary civil proceedings was false. The Law Society was acting as a disciplinary body (*Baxendale-Walker* v *Law Society* para 29, 34). To the extent not met by an award of expense, the expenses of the Law Society and the Tribunal were met by the solicitors profession as a whole. The Tribunal had exercised its discretion in terms of a settled and wholly justifiable

practice dating back to its constitution. In any event, members of the legal professions are to be held to higher standards of conduct than that required of general litigants: agent and client basis marks disapproval of conduct (*McKie* para 3). Counsel further submitted that it was reasonable of the first respondent to have a longstanding, public and justified usual practice and apply it to the petitioner where not moved to do otherwise.

[40] He further submitted, in respect of adequacy of reasons, that an adjudicating body may reasonably omit a detailed explanation when applying its usual practice and in any case, a tribunal may reasonably express itself briefly on the matter of expenses (*Baxendale-Walker* para 29).

[41] He submitted that the first respondent did not fetter its discretion but applied the usual basis in the absence of a motion to do otherwise.

Submissions for the second respondent

[42] Counsel for the second respondent submitted that the principle of awarding expenses on a party party basis did not apply to solicitor's disciplinary proceedings. (*Baxendale-Walker*, para [36].) Even in the civil courts, the party and party principle has no application in certain categories of case, such as agency, trust and creditors winding up (eg *MacGregor* v *Ballachulish Slate Quarries Co Limited* 1908 SC1, 3). No doubt as to the use of the agent and client basis was expressed in *Council of the Law Society of Scotland* v *Docherty*. The practice of awarding agent client expenses as a sanction in civil litigation was a recent one (*Grant and Sons Ltd* v *Dufftown* 1924 SC 952 at 960, *Plasticisers Ltd* v *William R Stewart & Sons (Hacklemakers) Ltd*). The petitioner was accordingly wrong as a matter of analysis and history to submit that "established principle" required the first respondent to award expenses on the party and party scale.

[43] Counsel further submitted that there were in any event good reasons of policy for the Tribunal's practice. Any expenses not met by the petitioner would ultimately have to be met by the membership. An award of agent and client expenses minimises the burden on the rest of Scotland's solicitors.

[44] Counsel further argued that the first respondent's application of its practice in this case was not irrational or unlawful. It did not fetter its discretion. Its decisions on expenses in past cases show that it does depart from its established practice in appropriate circumstances.

Discussion and decision

[45] Expenses fall within the discretion of the judge or tribunal hearing the case. As the Lord Justice Clerk (Carloway) said in *Lord Advocate* v *Mackie* at paragraph [11]:

> "Since expenses are incidental to a cause, the terms of the award lie in the discretion of the judge before whom the case has been heard.. subject to the discretion being exercised along conventional lines as settled by precedent or principle"

[46] The settled conventional line may vary between different judicial bodies.

[47] The conventional line in the Scottish courts is that expenses are generally awarded on a party and party basis, and this applies unless an interlocutor specifies otherwise. However, where one of the parties has conducted the litigation incompetently or unreasonably, and thereby caused unnecessary expense, the court can impose the sanction of expenses on the solicitor and client scale (*McKie* v *Scottish Ministers* at para [3]). There are exceptions to the general position. For example, if an interlocutor in a winding up petition does not specify the scale of expenses, the agent and client scale is applied (*MacGregor* v *Ballachulish Slate Quarries Co Limited*). Also, if Parliament so provides public authorities may

recover on the agent and client scale in circumstances where the courts would normally only allow party and party (*Grant and Sons Ltd* v *Dufftown* at 960).

[48] The system of costs in the English courts is sufficiently different from the Scottish system as to make it difficult to draw useful analogies from the conventional line in England. The English court system does not have scales of party and party, and agent and client. Instead, there is a distinction between the standard basis and the indemnity basis. On both bases, only reasonable costs are allowed, but on the indemnity basis the onus for showing the costs are unreasonable falls on the paying party. A test of proportionality is applied on the standard basis but not on the indemnity basis (*The White Book 2019* 44.3.5). If the court makes an order for costs without indicating the basis, the standard basis applies (*Civil Procedure Rules* 1998 2 44.3(14)).

[49] The conventional line on costs in the English Solicitors Disciplinary Tribunal (the "English Tribunal") is significantly different from that followed in the Tribunal. I was referred to *Baxendale-Walker* v *Law Society* and the English Tribunal's Guidance Note on Sanctions. These do not address the question of the scale of costs, ie whether costs should be on a standard or indemnity basis, but instead they address the prior question of whether costs should be awarded at all. It would appear from these authorities that the solicitor appearing before the Scottish Tribunal is in a more favourable position than his counterpart south of the border. The conventional line applied in the English Tribunal is different from that applied in the English courts, which apply the general rule that costs follow the event. The conventional line in the English Tribunal is that costs do not follow the event where a solicitor has successfully defended disciplinary proceedings. This is because the Law Society has a regulatory function in the public interest (*Baxendale-Walker* v *Law Society*

paras 34, 39). The English outlook on such matters was expressed by the Court of Appeal in *Baxendale-Walker* at para 40:

> "For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations".

[50] In Scotland things are looked at differently. The Scottish Tribunal does make awards against the Law Society of Scotland, and does so on an agent and client basis.

[51] The conventional line in the Tribunal is that expenses are awarded on an agent and client basis. This is a practice of long standing in the Tribunal and its predecessors. I was referred to an interlocutor of the Discipline Committee dated 14 April 1961 which found a solicitor guilty of professional misconduct, censured and fined him, and found him liable in the expenses "as the same maybe taxed on a solicitor and client basis" (*Law Society* v *Gordon,* unreported). On 17 May 1967 the Discipline Committee found another solicitor guilty of professional misconduct, censured and fined him, and found him liable for the expenses on the solicitor and client basis: the finding of expenses was affirmed in an appeal on the merits (*Council of the Law Society* v *Docherty)*. The *Report of the Scottish Solicitors Discipline Tribunal for the Year to 31 October 1979* stated at p6:

> "Where a solicitor is found guilty of professional misconduct, expenses are usually awarded against him on an agent and client basis".

The Report for the year to 31 October 1989 stated at p11:

> "Expenses are usually awarded on an agent and client basis"

I was not referred to any more recent report. By way of illustration of the usual practice, counsel for the Tribunal referred me to 20 cases dating from 1999 to 2017. In four of these, expenses were awarded against the Law Society. In all cases where expenses were awarded against either the solicitor or the Law Society, expenses were awarded on an agent and client

basis. Where expenses were awarded against members of the public, this was on a party and party basis.

[52] In my opinion the Tribunal is under no obligation to adopt the same conventional line on expenses as the Scottish civil courts. Indeed, the principle that a disciplinary tribunal may follow a different conventional line on expenses from the civil court was endorsed by the English Court of Appeal in *Baxendale-Walker* v *Law Society*. In applying a different conventional line from the courts, the Tribunal did not err in law. The question of what particular conventional line a disciplinary tribunal will take on expenses is a matter of the discretion of the Tribunal. The Tribunal differs from a civil court in that it is performing a regulatory function. The Tribunal differs from a civil court in that both the Tribunal and the Law Society in its role as prosecutor are funded by members of a profession. In view of these differences, it is not *Wednesbury* unreasonable for the Tribunal to follow a different conventional line on expenses than the Scottish civil courts, nor is it *Wednesbury* unreasonable for the Tribunal to follow the particular conventional line which it does. The party against whom expenses are awarded is protected from having to pay unnecessary or unreasonable expenses through the process of taxation by the Auditor of the Court of Session.

[53] In following its conventional line when no motion has been made to depart from it the Tribunal has not fettered its discretion. I was referred to various other cases in which the Tribunal had departed from its conventional line when a motion had been made to do so. A civil court does not fetter its discretion when it applies its conventional line of party and party expenses, and nor does the Tribunal when it applies its conventional line of agent and client expenses. In each case the conventional line can be departed from in appropriate circumstances.

[54] The Tribunal cannot be faulted for failing to give reasons for applying its conventional line on expenses. Where there is an established principle, and there is no motion before the Tribunal to depart from the principle and grant expenses on another basis, there is no need for the Tribunal to give reasons as to why it is applying the principle. The matter would be different if the Tribunal was departing from its principle, or if a motion had been made and refused, but even in these circumstances brief reasons would suffice. Accordingly the Tribunal did not fail to give adequate reasons for its decision in the current case.

Order

[55] I shall sustain the first plea in law of each of the respondents and dismiss the petition as incompetent. I reserve all questions of expenses in the meantime.

Postscript

[56] Although the established principle in relation to expenses is apparent from decided cases of the Tribunal, and the now somewhat elderly Annual Reports, that information may not be easily accessible to users of the Tribunal who are considering what motion to make to the Tribunal on expenses. The Respondents may wish to consider providing a guidance note or otherwise publicising the principle, so that the unfortunate circumstances which have resulted in this judicial review do not recur.