DECISION OF THE DISCIPLINARY TRIBUNAL

in the Complaint

against

GORDON JACKSON K.C.

by

RUTH CRAWFORD K.C. *qua* TREASURER of the FACULTY OF ADVOCATES

Introduction

[1] The Scottish Legal Complaints Commission remitted to the Faculty of Advocates for disposal two conduct complaints made against Mr Gordon Jackson KC. The first was at the instance of Miss Ruth Crawford KC in her capacity as Treasurer of the Faculty and the other at the instance of Rape Crisis Scotland who acted on behalf of the complainers in the trial of *HM Advocate v Alexander Elliot Anderson Salmond* which took place in March 2020. The Complaints Committee (the Committee), constituted under the Faculty of Advocates Disciplinary Rules (the Rules), sat to consider the complaints on the basis of documents presented to them by the respective parties. No oral evidence was heard and no oral hearings took place. The two complaints raised essentially the same issues. We deal with the complaint by the Treasurer of the Faculty in this decision but our reasoning and decision is the same in respect of the complaint by Rape Crisis Scotland.

[2] In respect of the present complaint, that brought by the Treasurer, the Committee found the first head of four heads of complaint proved. It dismissed the other three heads. The first head was in the following terms:

"1. Gordon Jackson QC breached an advocate's duty to the court by publicly naming two of the complainers and discussing details that could identify those complainers during the first week of the trial;"

[3] The complaints were advanced in the wake of publicity generated as a result of a conversation which Mr Jackson had with a fellow passenger on the Edinburgh to Glasgow train on 12 March 2020. Mr Jackson was acting as one of two senior counsel on behalf of Mr Salmond. A member of the public used a mobile phone to create video footage of the conversation, or at least some of it. That footage was sent to the Sunday Times who gave considerable prominence to the story.

[4] The Committee set about its task in May 2021. It remitted certain matters to an investigating committee, giving directions as to the nature of the investigation to be carried out. It appears that the investigating committee had been provided with a copy of a video in which at least parts of the conversation between Mr Jackson and a woman (identified only as FV) had been recorded. It was unclear whether the original and complete recording was available but the investigating committee noted that the recording had been edited. Attempts were made to obtain from the Sunday Times the full unedited version and, if possible, a transcript of the conversation.

[5] No such version or transcript was obtained. It was eventually decided that an expert should be instructed in order to examine that recording which had been provided and to enhance the sound quality. The footage extended to 8 minutes and 51 seconds. A report was produced and is dated 28 September 2021. Appended to it was a transcript of the enhanced video recording.

[6] The Committee narrates in its decision that it gave parties the opportunity to make written representations in relation to the report and:

> "The additional evidence obtained by the investigating Committee, primarily an enhanced version of a longer video, a transcript taken therefrom and the expert report on the make-up of the video".

It had also obtained a statement from FV. In order to produce the transcript the expert had repeatedly listened to the original and the enhanced version of the video using various types of headphones.

[7] The Committee was under the impression that the enhanced version of the video had been provided to all parties together with the transcript and the expert report. However, it was agreed before us that neither Mr Jackson's representatives nor those of the Treasurer of the Faculty of Advocates or Rape Crisis were provided with the enhanced version.

[8] Unaware of that omission, the Committee proceeded to consider the representations of the parties which had been submitted to it, the Investigating Committee's reports and appendices to those reports. In their deliberations it gave careful consideration not only to the expert report and to the terms of the transcript but also listened on repeated occasions to the enhanced version of the video. It proceeded to make certain findings in fact on the strength of that exercise.

[9] In dealing with Head One of the complaint, the Committee observed that there were two parts of that head. The first was that Mr Jackson had uttered the actual names of two complainers in the trial of Alexander Salmond. The second was that he had said things that, though not including naming the complainers in question, would allow the identity of those complainers to be discovered by a listener. That was a correct analysis of the terms of the first head of complaint. It is important to bear in mind these two different parts of this Head of Complaint.

[10] The Committee also noted that during the course of the trial the court had made an order at common law and in terms of section 11 of the Contempt of Court Act of 1981 "preventing the publication of the names and identity and any information likely to disclose the identity of the complainers in the case of *HMA* v *Alexander Elliot Anderson Salmond*".

[11] The Committee considered whether or not it was satisfied that Mr Jackson had publicly named two of the complainers. While it was not seriously disputed by Mr Jackson that he may have mentioned the names of complainers in the conversation, it was disputed that he had done so publicly. The Committee considered that question carefully and came to the view, for the reasons given at paragraphs 16 to 20, that he had.

[12] It then considered the video recording and what could be heard on that video. At paragraph 22 it narrates that it listened both to the original recording and the enhanced version of that recording. It was only with the benefit of the enhanced recording that it was able to make out comments made by Mr Jackson which allowed the identification of a woman through her association with another person. The enhanced recording did not however enable the Committee to identify a second woman nor could it make out the utterance of the name of any woman.

[13] At paragraph 23 it concluded, on the basis of FV's and Mr Jackson's evidence, that he did utter the names of two persons who were in fact complainers at the Salmond trial. These findings are referable to the first part of the first head of complaint. The Committee proceeded to consider the comments which allowed the identification of a woman through association. It was not able to tell whether or not that woman was one of those whom Mr Jackson actually named. It acknowledged at paragraph 25 that it was a necessary element of this part of the Head of Complaint that Mr Jackson had uttered words from which a woman could be identified as being a complainer in the trial. As a result of

listening to the enhanced video and making certain deductions from what it heard being said, it was able to conclude that the woman identifiable by association was in fact a complainer. It was unable to ascertain whether that woman was one of the two women actually named by Mr Jackson.

[14] The Committee then considered whether its findings constituted unsatisfactory professional conduct or professional misconduct in terms of the Rules. It had regard to the fact that a contempt of court order was in force at the time of Mr Jackson's conversation. It concluded that it did not have sufficient evidence to justify the conclusion that the notional listener on the train would have been alerted to the fact that either of the women named by Mr Jackson was a complainer. Accordingly it did not take the view that in relation to those women there had been a breach of the court order.

[15] The position of the woman who could be identified by association was different. That was because what the Committee heard in the enhanced version of the video persuaded it that the notional listener would have been able to understand or infer that that woman was a complainer. Accordingly the Committee found that Mr Jackson had been guilty of a breach of the court order in that respect.

[16] In summary, it concluded that the burden of the two parts of the first head of the complaint had been made out. Two of the complainers had been publicly named and a woman is able to be identified from Mr Jackson's comments as being a complainer. In respect of the woman identifiable by association, the court order was breached.

[17] The Committee considered that Mr Jackson had been guilty of professional misconduct.

[18] In the complaint by Rape Crisis Scotland it came to the same conclusions and for the same reasons. It imposed a penalty in the complaint made by Rape Crisis that Mr Jackson

be suspended from practice at the Scottish Bar for a period of 5 months from the day falling 3 weeks after the latest of four dates. Having done so, it did not impose any additional penalty in the complaint by the Treasurer

[19] This Tribunal asked parties to submit a Note of Argument prior to the hearing. They did so and we are grateful for them. Both Mr Duncan and Mr McBrearty adopted their Notes at the outset of their submissions.

Submissions for Mr. Jackson.

[20] Mr Duncan argued firstly that the Committee had exceeded its jurisdiction by considering the issue of a breach of the contempt of court order pronounced by the Lord Justice Clerk in the case of *HM Advocate v Salmond*. There was nothing in the complaint which permitted the Committee to consider this issue. It found that Mr. Jackson had been in breach of that order and thus added a qualitative element to the seriousness of the complaint. Reference was made to the *Law Society of Scotland v SLCC* 2011 SC 94 at paragraphs 41, 45-46 and 55. Furthermore, Mr. Jackson had not received fair notice that he would require to meet such an allegation. On the morning of the hearing before us, a series of email messages between Mr. Jackson's solicitors and administrative staff acting on behalf of the Committee between 31 March and 11 April 2022 was produced. No objection was taken to the late lodging of this material and we allowed it. Mr. Jackson had been asked by the Committee for representations in relation to the cases of *HMA v Murray* 2021 HCJ 1 and *The Application of the Spectator Magazine* 2021 SLT 271. His solicitors inquired upon what matter the Committee wanted submissions and pointed out that the complaint did not suggest that there had been publication or a contempt of court. The Committee's response to that was to say that it was proceeding on the basis that Mr. Jackson contended that these cases were irrelevant. The Committee had accordingly acted outwith its jurisdiction by

considering the issue of contempt of court and had acted unfairly by failing to give notice of their intention to do so.

[21] Secondly, the Committee acted unfairly by making use of the audio enhanced video recording which had been appended to the expert's report. Mr. Jackson had been given no opportunity to consider that material or to make representations about it. It was apparent from the terms of the decision that the Committee had regard to the enhanced video and had reached conclusions on the basis of it. Mr Duncan explained that he and his agents had interpreted the references in the expert's report to an enhanced version of the footage to be a reference to a version of that footage which had been given to them. That was why there was no request made to the Committee for disclosure. There had been a breach of natural justice which rendered the Committee's decision fundamentally flawed.

[22] Thirdly, the Committee erred in finding that Mr. Jackson had "publicly" named the Complainers. There was no evidence from which it could be concluded that the names of the Complainers could be heard by any member of the public. What might be able to be heard on the various versions of the footage after repeated listening was not necessarily what could be heard by passengers in the carriage. The Committee did not consider this matter. The evidence of the video did not assist nor did the evidence of FV.

[23] Fourthly, the Committee erred in concluding that Mr. Jackson had spoken of details from which a complainer could be identified. The Committee had been unable to ascertain whether that woman was one of the women whose names had been uttered by Mr. Jackson. Accordingly, the Committee had introduced a third woman contrary to the terms of the complaint. Such a finding was not open to the Committee on a proper reading of the complaint, the second part of which referred to the two named complainers mentioned in the first part.

Submissions for Rape Crisis

[24] Mr McBrearty on behalf of Rape Crisis accepted that the non-disclosure of the enhanced video had caused procedural unfairness to Mr. Jackson. He observed that his client and the Treasurer were also denied the opportunity to comment on this material. However, he submitted that the case had been over-complicated and urged upon us a more simple approach. The crucial issue was whether Mr. Jackson had been guilty of professional misconduct. A finding that he had named two complainers or had discussed details from which a complainer could be identified was sufficient to amount to professional misconduct. There was clear evidence that Mr. Jackson had named two complainers.

[25] The complaint should not be read narrowly as referring only to the two named complainers. It was not known which complainers had been named. The complaint was brought by each of the complainers and related to the conduct of Mr. Jackson naming and identifying complainers. It would be unfair and unrealistic to limit the scope of the complaint to only two of those complainers.

[26] Mr McBrearty accepted that the contempt of court order was not specifically mentioned in the complaint. However, that did not mean that it should be ignored. The order was relevant to the issue of whether Mr. Jackson's actions would undermine public confidence in the administration of justice and/or his duty to the court. Although the Committee was entitled to consider whether the order was breached, it was not necessary for the Committee to go as far as it did.

[27] Under reference to paragraph 8 of his Note of Argument, Mr McBrearty submitted that facts a. to k. were not controversial. Mr. Jackson was involved in a high profile trial which had been subjected to considerable media and public interest. He had named two complainers in a public place when members of the public were present. FV was "taken

aback" by this. She had lowered her voice. Mr. Jackson's actions caused someone to make a visual and audio recording. All this plainly indicated that he had been speaking publicly and it would be unrealistic to find otherwise.

[28] Mr McBrearty submitted that if we were to quash the Committee's decision, we should remake the decision ourselves and find that Mr. Jackson was guilty of professional misconduct. Rule 56a was sufficiently wide to allow this Tribunal to do so. He submitted that the process had already been a long one and no-one wanted the matter to be remitted back to a different Complaints Committee.

Submissions on behalf of the Dean of Faculty

[29] Mr MacNeill confined himself to submitting that the Rules did allow for this Tribunal to remake the decision. He pointed out that in the jurisdiction of the statutory Tribunals a First tier Tribunal and an Upper Tribunal remade decisions on the basis of the material available to it. He referred to *Rahman v Bar Standards Board* [2013] EWHC 4202 (QB) at paragraph 5.

Decision and analysis

Non-disclosure

[30] We agree that the failure to disclose the enhanced video created unfairness to Mr. Jackson in the presentation of his defence to both complaints. That was conceded by Mr McBrearty and correctly so. The Committee can be seen from its decision to have viewed that version of the video, probably on repeated occasions, to have made findings and to have reached conclusions as a result of what it heard being said by Mr. Jackson. What the Committee heard was not what was contained in the transcript attached to the expert report which was disclosed. For example, at paragraph 26 of the decision, the word "flaky" is

used in relation to the identifiable woman in order to reach the view that she was a complainer. That word does not appear in the transcript. Mr. Jackson was not afforded an opportunity to comment on that material.

[31] The question then comes to be whether that unfairness can be addressed by this tribunal so that it can be said that the hearing was a fair one, despite the non-disclosure of the enhanced video. It does not necessarily follow because a piece of evidence is not disclosed, that the hearing is unfair so that the decision must be quashed. What this tribunal requires to do, in the light of the non-disclosure, is to ascertain how the enhanced video was used by the Committee and which findings and conclusions were reached as a result of it. If it were to be seen that the enhanced video was crucial to the conclusion that the first head of complaint was proved, then it would be appropriate to quash the decision of the Committee. If, however, findings sufficient to establish the complaint or (a severable) part of it, were not reached through reliance on the non-disclosed material then a different result might follow.

[32] Mr McBrearty argued that, if allowing the appeal, we should remake the decision. We do not accept that the Rules provide power to do so. This tribunal acts as an appellate body. Unlike tribunals operating under the Tribunals legislation, there is no provision in the Rules creating such a power. In addition, the Rules specifically provide for the Disciplinary Tribunal to sit as a tribunal of first instance but only where a Complaints Committee refers the matter for determination under rule 64. However, Rule 56(a) of the Rules provides that a Disciplinary Tribunal, if allowing an appeal, may uphold the complaint in whole or in part. We do not consider that the case of *Rahman v Bar Standards Board* cited to us offers any assistance. That case followed *R. v Visitors to the Inns of Court ex parte Calder* [1993] 3 WLR 287 which turned on how the visitorial jurisdiction of judges should be exercised and the

proper interpretation of certain sections of the Supreme Court of Judicature Act 1873. We conclude that the proper course would be to uphold the first part of the first head of complaint in the event that we are persuaded that some of the grounds of appeal should be allowed.

[33] It is evident from the decision of the Committee that the enhanced video allowed it to make findings which are restricted to certain discrete issues. In paragraph 21 the Committee states that "the central piece of evidence bearing on the two parts of this head (head one) is the video recording." The crucial question is said to be what can be heard on it. It does not state that this is a reference only to the enhanced video which is mentioned for the first time in paragraph 22.

[34] In that paragraph, having listened to the enhanced video, it is able to make the finding that comments were made by Mr. Jackson which "allow the identification of a woman (emphasis added) through her association with another person". It could not "identify a second woman or make out the utterance of the name of any woman". At paragraphs 25 to 26 the Committee turn to the issue of whether the woman, identifiable through association, is shown to be a complainer. It uses the enhanced video and the submissions of Mr. Jackson (including his admission that he discussed tactics with FV) to find that she was in paragraph 27.

[35] Accordingly, the enhanced video allowed the Committee to be satisfied that Mr. Jackson's comments enabled a woman to be identified by association and, at least in part, to find that she was a complainer. These findings are of relevance to the second part of the first head of complaint, namely the allegation that he discussed details "that could identify those

complainers". They are also relevant to the finding of a breach of the Contempt of Court order.

[36] They do not impact on the conclusion that the first part of this head was established. On the contrary, the finding that Mr. Jackson did utter the names of two persons who were in fact complainers is made on the basis of FV's evidence and that of Mr. Jackson (paragraph 23 final sentence).

[37] We have concerns in any event as to the use to which the various versions of the video were put in this case. The video had come from a mobile phone which was situated about 2 rows of seats away from Mr. Jackson. Mr. Jackson was facing the camera. The expert report showed that the footage had been "manipulated". It was not the original recording and was not complete. Some editing and splicing had occurred. There was background noise and parts of the recording were indecipherable, even on expert examination. The expert pointed out that the transcription process is a subjective one and different people "will get different results". The expert repeatedly listened to the recording over a number of days with two different sets of ear phones. The transcript and the versions which the Committee listened to did in fact produce different results. The recording constituted real evidence as the Committee recognised. Ultimately, it was for it to decide what use could be made of it and what was heard on it. However, what it heard does not necessarily accurately reflect what could be heard by passengers on the train listening to the conversation in real time.

[38] We consider that the two parts of this head of complaint are severable and, if this ground of appeal succeeds, the first part involving the naming of two complainers, is not tainted with the admitted unfairness and should remain.

"Publicly"

[39] Mr Duncan argued that what was said by Mr. Jackson was not said publicly and, in particular, when he mentioned the names of the complainers and discussed "tactics" with FV, he was engaging in a private conversation. There was no evidence that what could be heard on the video could be heard by any passengers on the train. That was the crucial question. The video and the evidence of FV did not assist in answering that question.

[40] The Committee took the view that Mr. Jackson was speaking publicly in a railway carriage when talking to FV. At paragraph 20 it is pointed out that he was speaking openly and so afforded the member of the public who recorded the conversation the opportunity to listen to him and to make the recording. The carriage was about one-third full. It concluded that it was "the action of the speaker in speaking in such a place and in such a way that the appropriate member of the public could become so acquainted which is of significance". We do not consider that the Committee's decision contains an error in law and agree with its reasoning. Mr. Jackson was speaking openly in a public place in which other members of the public were present. He made no attempt to lower his voice which was sufficiently loud to cause someone to record it. The fact that someone did that is itself indicative of the public nature of Mr. Jackson's speaking. The reaction of FV is also significant since she lowered her own voice and suspected that she involuntarily signalled to Mr. Jackson to speak in a lower voice. That indicates the open and unrestrained manner of Mr. Jackson's conversation. Mr Duncan argued that Counsel could not discuss confidential matters in the Parliament Hall if the Committee's reasoning was correct. However, as Mr McBrearty said, counsel should and do take precautions to ensure that they are not overheard. That is not what Mr. Jackson did here.

Relevance of a third complainer

[41] We agree with Mr Duncan that the Committee erred in finding that the comments allowing identification of a woman by association were relevant to the second part of the first head of the complaint. That part of the complaint refers to "those complainers" and must be read as a reference to the two named complainers in the first part. Fair notice dictates that the Committee should not have introduced the possible identification of a third complainer, having been unable to determine if that woman was one of the named complainers. However, this is not a live issue standing our decision on the previous ground of appeal.

Contempt of Court Act

[42] Mr Duncan argued that the issue of a breach of the Contempt of Court order was irrelevant to the first head of complaint and the Committee had exceeded its jurisdiction by considering it. We do not agree. The terms of complaint mirror the terms of the order pronounced on 10 March 2020 and are directly related to its prohibitions. The allegation is that Mr. Jackson breached an advocate's duty to the court. It is an advocate's duty to comply with the orders of the court. We consider that in making the finding that it did, the Committee acted *intra vires*. It was a finding which the Committee was entitled to make on the basis of the complaint before it. Furthermore the complaint gave fair notice that such an issue was within its scope.

[43] However, the Committee was unable to conclude that the order had been breached in respect of the first part of the complaint and found the breach proved only in respect of the second. Proof of the breach of the order falls away if the findings of the Committee in

the second part are flawed, as we have determined them to be. Nevertheless, it remains the position that by naming two complainers on this train in the presence of others and in the circumstances described by FV, Mr. Jackson acted with reckless indifference to the order of the court and created a material risk that the protection afforded by the court would be compromised. As the Lord Justice Clerk said in *Application of the Spectator Magazine* 2021 SLT 271 at paragraph 16:

> "To strengthen the protection further, in some cases the court considers it necessary to make a formal order at common law withholding the identity of the complainer from the public, with a s.11 order prohibiting publication of the complainer's identity or material likely to lead to their identification as a complainer in the case."

She continued at paragraph17:

> "In the present case, the prohibition in the order was designed to protect the identity of those who were complainers in the criminal proceedings in which the order was made, and to prevent the publication of information which might identify them as having been complainers in the case."

It was that protection (of the identity of those complainers) which Mr. Jackson endangered. We agree with the Committee that such an act is a serious one.

Disposal

[44] We consider that the Committee's decision that the second part of the first head of complaint was established should be quashed. It was tainted by unfairness and by a breach of the rules of natural justice. However, we find no error of law in the Committee's reasoning in relation to the first part. The evidence on which that part of the decision was

based did not depend on the enhanced video and does not involve a third complainer. We therefore allow the appeal only in respect of the second part of the complaint and uphold the first head of complaint in its first part. We should make it clear that, had we been remaking the decision, as Mr McBrearty urged, we would have found that the first part of this head of complaint was proved to the necessary standard for the reasons given by the Committee.

[45] We will arrange a hearing via Zoom to hear submissions on the question, first, of whether Mr. Jackson's actions amount to unsatisfactory professional conduct or professional misconduct and, secondly, the penalty to be imposed on the remaining part of the complaint.