SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11606-2017

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

JRT Respondent

Before:

Mr A Ghosh (in the chair)
Mr A N Spooner
Mr S Marquez

Date of Hearing: 3 December 2020

Appearances

Andrew Tabachnik QC, Counsel, of 39 Essex Chambers, 81 Chancery Lane, London, WC2A 1DD, Instructed by the Solicitors Regulation Authority, The Cube, 199 Wharfside Street, Birmingham, B1 1RN, for the Applicant

Guy Vassall-Adams QC, Counsel, of Matrix Chambers, Griffin Building, Gray's Inn, London, WC1R 5LN, Instructed by Kitsons Solicitors LLP, The Forum, Barnfield Road, Exeter, Devon, EX1 1QR, for the Respondent

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MEMORANDUM OF APPLICATION TO DISMISS PROCEEDINGS

Procedural Background

1. The allegations against the Respondent brought by the Applicant were set out in the Rule 5 Statement dated 6 February 2017.

2. The original substantive hearing dates of 7 to 10 August 2017 were vacated to enable medical evidence to be obtained. Further substantive hearings listed on 19 to 22 March 2018, 23 to 26 September 2019 and 22 to 26 June 2020 were adjourned as a consequence of medical evidence filed and served.

3. Additionally, the Respondent had previously made three applications for the proceedings to be dismissed on 23 September 2019, 7 February 2020 and 17 August 2020. This was on the grounds that (a) it was not in the public interest for proceedings to continue and (b) continuance of proceedings constituted a breach of the Respondent's right to a fair trial. The first two such applications to dismiss were refused.

4. At a Case Management Hearing ("CMH") on 21 August 2020, at which the third application for the proceedings to be dismissed was due to be determined, the Tribunal indicated to the parties that, in addition to the grounds upon which the Respondent's application was made, it would be assisted by submissions in relation to Article 2 of the European Convention on Human Rights ("ECHR") and its potential relevance to the application. Directions were made for the Respondent to file further medical evidence, if so advised, for the parties to file and serve skeleton arguments and for a CMH to be listed for 3 December 2020 for consideration of the Respondent's application for the dismissal of the proceedings.

5. Skeleton arguments were duly filed by both parties. Permission was given for the Applicant to rely on a replacement skeleton argument, no objection having been raised by the Respondent's representative.

The CMH

<u>Documents</u>

6. The Tribunal considered all of the documents in the case which comprised an electronic trial bundle containing:

- the originating Application and Rule 12 Statement dated 6 February 2017
- the Respondent's Answer dated 19 April 2017
- three witness statements of David Turner dated 2 August 2019, 7 February 2020 and 26 May 2020
- two witness statements of the Respondent dated 8 February 2020 and 7 October 2020
- witness statement of Lorraine Trench dated 12 June 2020 with exhibits
- previous applications and directions, memoranda and orders
- four schedules for costs for the Applicant and one for the Respondent
- eight skeleton arguments including two relied upon at the CMH
- copies of authorities relied upon

- eighty seven pages of medical evidence including five reports by Dr Bickerton instructed by the Respondent (including the most recent dated 27 November 2020 prepared for the CMH) and one report by Dr Jenkins instructed by the Applicant
- a "relevant correspondence" section containing 69 pages

Overview

7. Mr Vassall-Adams provided an overview of the scope of the Respondent's application. On the basis of medical evidence set out in more detail below, the impact of these proceedings upon the Respondent was said to be such that there was a real and immediate risk to his life. The discontinuance of the Tribunal proceedings was submitted to be a reasonable step which must be taken by the Tribunal in order to safeguard the Respondent's life in accordance with the Tribunal's positive obligations under Article 2 of the ECHR. It was further submitted that to continue in these circumstances would amount to an unlawful interference with the Respondent's rights under Articles 6 and 8 ECHR. In these circumstances, it was submitted that any public interest in proceeding with the charges against the Respondent was significantly outweighed by the need to safeguard his Convention rights.

8. The Respondent's application was opposed. In his skeleton argument Mr Tabachnik accepted that Article 2 was capable of being engaged by a decision of the Tribunal on whether and how to proceed with a substantive hearing. However, it was not accepted that the available evidence demonstrated the "real and immediate" risk to life which would engage the Tribunal's operational duty. The Applicant invited the Tribunal to consider proceeding by way of a "middle ground" of determining the allegations on the facts, but not imposing a sanction. It was submitted that this would not engage Article 6 of the ECHR and would contribute to the protection of the public/future clients and uphold the reputation of the profession.

The Tribunal's approach and the structure of this Memorandum

9. The parties' submissions on Article 2 and its relevance to the Respondent's application, and the Tribunal's decision on this issue, are set out below. The Tribunal carefully reviewed all of the documentation and cases to which it was referred and considered all of the helpful submissions from both parties in full, however, as the decision reached turned on the Article 2 issues, it is these which are recorded in this Memorandum.

The Respondent's application for the proceedings to be dismissed on Article 2 grounds

Legal Principles

10. As the potential applicability of Article 2 to Tribunal proceedings had been accepted by the Applicant, Mr Vassall-Adams' overview of the legal principles is set out in summary form only. Article 2(1) provides that:

> *"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."*

11. Mr Vassall-Adams referred the Tribunal to Osman v UK (1998) 29 EHRR 245 as authority for the proposition that Article 2 may in certain circumstances require the state to "take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual." He referred the Tribunal to Daniel v St George's NHS Trust [2016] 4 WLR 32 in which this "operational duty" was held to apply beyond threats by third parties. Mr Vassall-Adams submitted that the duty was also engaged in the context of professional disciplinary proceedings by reference to GMC v X [2019] 169 BMLR 177.

12. In Re Officer L [2007] 1 WLR 2135, a case about whether former and serving police officers in Northern Ireland should be required to give evidence without anonymity, the key elements of the test for when the positive obligation identified in Osman arose were set out. Mr Vassall-Adams summarised these key elements as follows.

    (1) The positive obligation only arises when the risk is "real and immediate", where a real risk is one that is objectively verified and an immediate risk is one that is present and continuing.

    (2) This standard is constant and not variable with the type of act in contemplation and is not easily reached. It makes no difference whether or not the act in contemplation is the act of a third party or an act that the public authority has in contemplation.

    (3) In assessing the existence of a real and immediate risk for the purposes of Article 2 the issue does not depend on the subjective concerns of the applicant, but on the reality of the existence of the risk.

    (4) The principle of proportionality, striking a fair balance between the general rights of the community and the personal rights of the individual, is to be found in the degree of stringency imposed upon the state authorities in the level of precautions which they have to take to avoid being in breach of Article 2.

    (5) The correct starting point was to ask whether the risk to the applicant's life will be created or materially increased if they were required to give evidence without anonymity. If the risk to life is created or materially increased by giving evidence publicly, the Tribunal should decide whether that increased risk would amount to a real and immediate risk to life.

13. Mr Vassall-Adams referred the Tribunal to Rabone v Pennine Care NHS Trust [2012] 2 AC 72 in which the Supreme Court held that in allowing the victim to leave hospital the Trust had failed in its operational duty to do all that it could reasonably have been expected to do to prevent the real and immediate risk that she would commit suicide. The Supreme Court held:

    (1) A "real" risk to life is a substantial or significant risk, as opposed to a remote or fanciful risk. In this case a risk of 10-20% was considered sufficient to meet this condition.

(2) "Immediate risk" means that the risk must be present and continuing. There is no need for the risk to life to be imminent.

14. Mr Vassall-Adams submitted that the operational duty is not merely retrospective in its application and that it must also apply prospectively, where a public authority has the opportunity, having been put on notice of a real and immediate risk to life, to take all reasonable steps to prevent that risk from materialising. He relied on cases such as Re Officer L and GMC v X involving consideration of special measures for witnesses in support of this submission that the duty arises prospectively.

15. In GMC v X, Mr Vassall-Adams stated that the Administrative Court found that the public interest in publishing a decision finding serious misconduct and impairment on the part of a doctor was "overwhelmed" by the real and immediate risk that X would take his own life if his anonymity was not maintained. In that case that risk could not be adequately managed by care or treatment from mental health professionals.

16. The Respondent relied on paragraph [116] of Osman in which it was held that the operational duty requires the authorities "to do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge". As to what may be reasonably expected, Mr Vassall-Adams submitted this would depend on all the circumstances of the case. Relying on Simor & Emmerson, Human Rights Practice (2015) at paragraph [2.050] he submitted that relevant factors are the level of the risk – the greater the risk, the lower the threshold for "reasonableness" is likely to be, how onerous is the step and how likely it is to prevent the risk.

Real and immediate risk to life

17. In light of the authorities cited by Mr Vassall-Adams, he submitted that the first question for the Tribunal was whether there was a real and immediate risk to the Respondent's life, which was materially increased by the continuation of the proceedings. Mr Vassall-Adams summarised the medical position as set out below.

18. The Respondent had submitted himself to examination by an independent psychiatric expert, Dr Bickerton who had provided a number of reports, including most recently one prepared in July 2020 ("the July Report") and one in prepared in November 2020 ("the November Report").[REDACTED].

19. [REDACTED].

20. The July Report stated that "standard treatment" would include minimising "perpetuating factors, namely the current SRA process". [REDACTED].

21. [REDACTED].

22. It was submitted that the best and most recent medical evidence emphasised the significance of the disciplinary proceedings as an external stressor, which should be removed as a first step in minimising the real and immediate risk to the Respondent's life.

23. It was noted that the expert instructed by the Applicant, Dr Jenkins, last examined the Respondent in January 2018. He agreed that at that stage, the Respondent was not fit to participate in the proceedings [REDACTED]. It was submitted that the Respondent's wish not to subject himself to further examination by Dr Jenkins, given that he and his former wife found the nature of the questions asked of both of them to be hostile and aggressive and to have had an adverse effect on his already poor mental health, was entirely reasonable. It was submitted that the Tribunal should prefer the more recent, independent expert evidence of Dr Bickerton when assessing the Respondent's [REDACTED] and the impact of these proceedings upon that risk.

Reasonable steps to be taken

24. It was submitted that in light of what was described as clear and cogent medical evidence as to the impact of these proceedings [REDACTED], it was reasonable for the Tribunal to dismiss the proceedings. It was submitted to be evident that a further adjournment was unlikely to improve the situation. The [REDACTED] risk had increased since the institution of proceedings and again since he last saw Dr Jenkins in 2018. There were said to be no special measures which could be enacted which would materially reduce the risk to the Respondent's life, as it was the proceedings themselves which were the significant external factor exacerbating his risk [REDACTED].

25. It was acknowledged that there was a public interest in ensuring that professionals are held to account for any regulatory breaches, but it was submitted that that public interest was significantly outweighed in the Respondent's case by his Article 2 rights.

26. It was submitted that it was relevant that the nature of the charges in this case did not include dishonesty. The allegations were described as serious but not at the most serious end of the scale. As the Respondent was no longer practising as a solicitor it was submitted that the risk to the public was low. His case was submitted to be in direct contrast to GMC v X in which there had been serious findings of dishonesty and of sexual misconduct with a minor. Notwithstanding the gravity of the findings, the Court found in that case that the risk to the respondent's life which arose as a result of publishing a judgment of the GMC's findings "overwhelmed" the public interest in making those findings public.

The Applicant's response to the application for the proceedings to be dismissed on Article 2 grounds

27. The Applicant accepted that the Article 2 operational duty applies in principle to the Tribunal's case management of proceedings before it. By reference to Rabone it was accepted that the duty would require the Tribunal to stay the proceedings for so long as there were a real ("substantial or significant" as opposed to "remote or fanciful") and immediate ("present and continuing") risk to life which would be created or materially increased by their further prosecution. Mr Tabachnik relied upon many of the same cases cited above: GMC v X, Rabone v Pennine Care NHS Trust and Re Officer L.

28. It was submitted that on the available evidence, no real and immediate risk to life would be created or materially increased by the Applicant's proposed way forward.

The proposed way forward was by way of a "middle ground" process drawing on obiter observations of Green LJ in Maitland-Hudson v SRA [2019] EWHC 67 at paragraph [130]:

> *"Fourth, an issue arose during the hearing which in the final analysis we have not had to grapple with to determine this appeal. The Appellant has argued by reference to the evidence that (i) he would not recover from his mental disability until the ordeal presented by the Tribunal proceedings was at an end but also (ii) that his mental state was such that an adjournment of the proceedings was the only lawful course that the Tribunal could take. These two positions raise the spectre of a classic Catch 22: the proceedings should, in all fairness, have been adjourned pending the appellant's recovery but (once adjourned) those proceedings could not be resumed for the very reason that being in abeyance he would remain prone to the disability. It seemed to me that this Catch 22 was part of the Appellant's forensic end game. As observed, we have not needed to grapple with this as a discrete issue of law. I would however add that even if the Catch 22 had been a justifiable position on the evidence this would not necessarily have meant that the Tribunal became powerless. Once again, the analogy with criminal proceedings is instructive. There, if a defendant is unfit to plead, the charges are not dismissed, or the trial adjourned into an uncertain future without limit. On the contrary, if the court considers that the defendant is unfit to plead then the hearing continues with the jury being instructed not to find guilt or innocence, but only to decide whether the defendant did the acts charged. The court then disposes of the case by making appropriate non-punitive orders, for instance under mental health legislation. The relevance of this is that even when a defendant faces very serious charges an inability to defend himself, because of unfitness, does not automatically mean that the important public interest in the pursuit of the proceedings is set aside. In such a case the court adopts a modified approach which balances that public interest in pursuing proceedings with the right of the defendant to a fair trial. We have not in the present case had to address how such a balance might have been struck. The only point I would make is that I would have been loath to accept the argument that the unfitness of a solicitor to face disciplinary proceedings inevitably meant that such proceedings had to be abandoned, or placed in more or less permanent stasis."*

29. In outline, the proposed "middle ground" would involve:

(1) The Tribunal determining the allegations, namely whether the Respondent engaged in the conduct alleged and if so whether such conduct breached the SRA Principles and other pleaded rules and outcomes.

(2) This determination was not envisaged to involve participation or evidence from the Respondent given his present medical condition and avowed intention not to attend any substantive hearing. Both the Tribunal and Applicant would be duty-bound to ensure that the hearing was as fair as the circumstances permitted which would include full consideration of the arguments put forward by the Respondent.

(3) If the Allegations were found proven, the Tribunal would impose no sanction (in light of the medical position).

(4) The Respondent would be entitled to ask for a re-hearing under Rule 19 (assuming non-participation in the original hearing).

30. This approach was submitted to be in the public interest for various reasons including upholding the reputation of the profession. It was submitted, in this regard, that the Tribunal should demonstrate that it would not encourage a scenario in which a respondent escapes serious charges by reference to a medical condition from which he subsequently recovers and then contends that it is too late or otherwise unfair to have any sort of trial (with the result that subsequent regulation of him must ignore those matters). It was submitted that such a scenario would bring the profession into disrepute.

Real and immediate risk to life

31. As stated above, it was submitted by the Applicant that on the available evidence, no real and immediate risk to life would be created or materially increased by the Applicant's proposed way forward.

32. This was said to be on the basis, firstly, that the July and November Reports from Dr Bickerton were not a reliable basis for concluding that there was a real and immediate suicide risk, either at all, or that would be materially increased by the "middle ground" procedure. Specifically:

(1) the July Report was apparently drafted without sight of the Respondent's medical records for the period after 17 June 2019. The November Report involved no face to face assessment.

(2) Both reports were largely based on self-reporting from the Respondent. It was submitted that caution was required. For example, reference in the July Report to the Respondent describing "great difficulty with concentration" was said to be inconsistent with his ability shortly thereafter to prepare a witness statement, and personally engage in detailed correspondence (and legal submissions) with the Applicant. It was submitted that further caution was required in light of the Respondent's allegedly unreasonable refusal to see Dr Jenkins, the medical expert instructed by the Applicant.

(3) [REDACTED]. It was submitted that together, these counted against any conclusion of a real and immediate risk.

(4) It was submitted there was no reason why the "middle ground" procedure would materially increase [REDACTED] risk. The Respondent would not participate in the exercise (his solicitor stated in an email of 9 September 2019 that "there is absolutely no chance of [the Respondent] attending or taking part in the substantive hearing").

33. It was submitted, secondly, that the Respondent's witness statement (and that of his former wife) offered no good reason for refusing to be seen by Dr Jenkins (or another

psychiatrist appointed by the Applicant). In the absence of a good reason, the proper inference was submitted to be that the Respondent was seeking to control what information was before the Tribunal, which was described by Mr Tabachnik as fundamentally undermining the invitation to conclude that a real and immediate risk existed.

34. Mr Tabachnik reminded the Tribunal that it had previously stated that "it would be assisted by a more recent report from Dr Jenkins which could also comment on Dr Bickerton's conclusions". He submitted that there must be a robust and credible explanation why the Tribunal had been denied this assistance.

35. The main reason why the Respondent had refused to see Dr Jenkins again (or another psychiatrist appointed by the Applicant) was he considered that Dr Jenkins was "very rude, aggressive and hostile", "partisan" in favour of the Applicant, and caused him to be [REDACTED]. The Applicant's response was as follows:

    (1) The complaint about Dr Jenkins' conduct at a January 2018 consultation was not made until the Respondent's October 2020 witness statement, notwithstanding the volume of correspondence between the parties and the numerous Tribunal hearings in the interim. It was not mentioned in the Respondent's 8 February 2020 witness statement, nor in his email of 19 May 2020. Without objection from the Respondent: (a) directions were made (with all parties' agreement) in January 2019 for a further medical report "preferably" by Dr Jenkins and (b) this direction was extended in June 2019. The Respondent subsequently said in correspondence dated 25 July 2019 that he was not prepared to see Dr Jenkins again, but this was not because of Dr Jenkins' allegedly biased and bullying conduct, but because it "would serve no useful purpose and in fact could have some significant serious side effects".

    (2) The complaint was not credible, and at most reflected a misunderstanding on the Respondent's part, in circumstances where Dr Jenkins found his behaviour [REDACTED]

    (3) If Dr Jenkins were "partisan" in favour of the Applicant, he would have found the Respondent fit for trial. This objection was described as being without substance.

    (4) [REDACTED]. There was said to be no medical evidence that Dr Jenkins caused the alleged reaction.

    (5) The statement of the Respondent's former wife was submitted not to assist. [REDACTED] at the relevant time it was submitted to be unclear how reliable her recollection of a brief episode over 2 ½ years ago was.

36. The Applicant's position was that the Respondent was wrong on both counts when he alleged in his witness statement of 7 October 2020 that the Applicant had been made aware that he would decline to be seen again by Dr Jenkins "for the reasons stated above", and that he had proposed assessment by a different psychiatrist. The Applicant's case was:

(1) As mentioned above, the first mention of the Respondent's allegations against Dr Jenkins was in his 7 October 2020 witness statement.

(2) It was the Applicant (not the Respondent) that raised the possibility of the Respondent being seen by an alternative psychiatrist (in an email of 27 August 2020 from Ms Trench, the Applicant's solicitor). No response was received to this suggestion. It was ignored in the reply of 8 September 2020 reply declining to attend Dr Jenkins.

(3) The Respondent did not purport to indicate that he may consider this route until paragraph [9] of his 7 October 2020 statement which was after the date for provision of a medical report stated in the Tribunal's latest Memorandum.

(4) In any event, paragraph [9] of the Respondent's witness statement was inconsistent with paragraph [4] of the same statement in which he stated "I have declined to be re-assessed, including by Dr Jenkins, and submit to a seventh and further psychiatric assessment and report".

37. The Applicant considered that the Respondent's evidence was inaccurate, disingenuous and inconsistent. There was said to be no proper medical evidence explaining to what extent the Respondent had pursued appropriate treatment options.

38. For these reasons, the Tribunal was invited to reject the application for the proceedings to be dismissed on Article 2 grounds and to consider proceeding with the Applicant's proposed "middle ground". Alternatively, the Tribunal was invited to stay these proceedings pending the Respondent's recovery.

The Tribunal's decision on the application for the proceedings to be dismissed on Article 2 grounds

39. The Tribunal had due regard to its statutory duty, under section 6 of the Human Rights Act 1998, to act in a manner which was compatible with the Respondent's rights under the ECHR. The application to be determined was based on Article 2, the right to life, and this was firmly in the Tribunal's mind.

40. The Tribunal gave due weight to the Applicant's contention that a respondent escaping serious charges by reference to a medical condition from which he then recovered and sought to practice again had the potential to do harm to the reputation of the profession had clear and obvious force.

41. However, the Tribunal considered that the essential, question for determination in a case such as this was whether there was a real and immediate risk to life. Both parties had agreed this was the necessary threshold for Article 2 to be engaged. The Tribunal accepted the submissions of both Mr Vassall-Adams and Mr Tabachnik, based on the decision in Rabone, that "real" meant substantial or significant. The Tribunal had regard to the fact that in Rabone, a risk of 10-20% was considered sufficient to meet this condition. The Tribunal also accepted, based on the same case, that "immediate" meant present and continuing.

42. The Tribunal had indicated previously that it would be assisted by a further report from Dr Jenkins and this had not been provided. Whilst this was unhelpful, the Tribunal recognised that the nature of the Respondent's illness may have contributed to him perceiving Dr Jenkins as unsympathetic. Having submitted to six psychiatric assessments over three years, and given the nature and progress of his condition, the Tribunal had some appreciation as to why he might be reluctant to do so again. The Tribunal noted that the previous order had not required the Respondent to submit to an examination by an expert instructed by the Applicant, but had directed that it would be assisted by this. The Tribunal resolved to consider the application in the light of the available medical evidence.

43. The most recent expert evidence available was the November Report from Dr Bickerton, dated 27 November 2020. Dr Bickerton's opinion from this report included:

[REDACTED]

44. Dr Bickerton is an experienced consultant psychiatrist and it was not suggested by the Applicant that he was not qualified or experienced to provide his report and give expert evidence to assist the Tribunal. Both the July and November Reports had limitations in that it appeared Dr Bickerton had not had access to the Respondent's medical records after June 2019. However, Dr Bickerton had first assessed the Respondent in 2015 and had produced reports in 2015, 2017, 2019 and two in 2020. In his July Report, from 2020, Dr Bickerton stated that he had four meetings with the Respondent. He was well placed to provide his opinion on the progress and extent of the Respondent's illness. The Tribunal considered the opinions recounted in paragraph [43] above to be stark and unambiguous. [REDACTED]. The Tribunal concluded that this was cogent evidence of a real and immediate risk to life.

45. The Tribunal recognised that in his report of January 2018 Dr Jenkins had disagreed with Dr Bickerton on various issues, including the risk to the Respondent's life. As stated above, the absence of more recent evidence from Dr Jenkins was less than helpful. The Tribunal noted Mr Tabachnik's submission that the most recent medical reports were based to some extent on self-reporting. . However, viewing the totality of the medical evidence available, including the marked deterioration in the Respondent's condition to the position described in Dr Bickerton's report from November 2020, the Tribunal did not consider it had grounds to reject the clear conclusions put forward by Dr Bickerton. The Tribunal were of the opinion that the risk to the Respondent's life, [REDACTED] was both real and immediate. Given the evidence from Dr Bickerton, the risk could not be described as remote or fanciful. Article 2 was therefore engaged.

46. Having found that Article 2 was engaged, the Tribunal turned to what steps it may be obliged to take and that it would be reasonable for it to take. The Tribunal accepted that applying Rabone and Osman the Tribunal's operational duty was to do all that it could reasonably be expected to do to prevent the real and immediate risk [REDACTED].

47. The Applicant's position was that even if engaged, Article 2 did not require the dismissal of the proceedings. Mr Tabachnik had urged a "middle way" on the Tribunal, seeking to give effect to the comments of Green LJ in paragraph [130] of Maitland-Hudson. It was proposed that the proceedings should continue without the Respondent's involvement (with the safeguard that he may become involved in the future if fit to do so). The Applicant's fall-back position was that the proceedings should be stayed until the Respondent was fit to participate.

48. The Tribunal was not persuaded that the "middle ground" or an open ended stay of proceedings satisfactorily addressed the risk. The Tribunal was required to take such steps as were reasonable to do so. In his report from November 2020 Dr Bickerton had stated:

(1) "External stressors are likely to influence his risk and the SRA proceedings are a very significant, aberrant risk factor to him although other factors are also important, for example, his employment and [REDACTED]." [8.3]

[REDACTED]

(5) "Not until the proceedings are completed or cease can there be any clinical improvement." [11.1]

[REDACTED]

In his July Report Dr Bickerton had given the opinion:

(7) "Standard treatment would include minimisation of perpetuating factors, namely the current SRA process…" [12.5]

(8) "Cessation of the aggravating factor of the SRA process would be a valid treatment strategy and a possible essential first step, but by itself is unlikely to induce a full recovery." [16.6]

49. The Tribunal considered that, again, this expert evidence was stark and unambiguous. The continuance of the proceedings themselves was said to very significantly increase the risk [REDACTED] and Dr Bickerton gave the opinion that there were no steps that could be taken to ameliorate the risk other than cessation of the proceedings. Proceeding by way of the "middle ground" or a stay was not enough. The proceedings would remain in those scenarios when their removal was described as a "standard treatment" and "possible essential first step" towards recovery. Dr Bickerton's opinion was that until the proceedings were completed or ceased there would be no clinical improvement. The real and immediate risk to life [REDACTED] would remain. Again, the Tribunal was cognisant of the lack of an updated report from Dr Jenkins, but did not consider that it had any basis to reject the conclusions drawn by Dr Bickerton.

50. The Tribunal was reluctant to dismiss allegations of serious misconduct. The submissions concerning the public interest and the reputation of the profession put forward on behalf of the Applicant carried great weight with the Tribunal. However, for the reasons set out above, the Tribunal had determined that the Respondent's

Article 2 right was engaged. The Tribunal had found that the alternatives to the dismissal of the case would not be effective in reducing to a meaningful extent the real and immediate risk to the Respondent's life. In the light of the specific facts of this exceptional case, informed by medical evidence accumulated over 5 years, the Tribunal found that the public and professional interest in the allegations being determined by some species of "middle ground" hearing, or the case being stayed to allow for future determination, was overwhelmed by the Respondent's Article 2 rights. The Tribunal considered that in the circumstances it was reasonable and in the interests of justice for the proceedings to be dismissed and it so ordered.

Costs

51. Both parties had produced schedules of costs and made brief submissions on costs.

52. Mr Vassall-Adams reminded the Tribunal that it had been the Tribunal itself which had raised the Article 2 issue and invited the parties to address it. He stated that both he and his junior barrister had acted pro-bono but there were nevertheless some limited costs accrued which the Respondent sought to recover. The Statement of costs dated 1 December 2020 was in the sum of £7,592. Mr Vassall-Adams submitted that for this successful application costs should follow the event and he invited the Tribunal to consider costs when the Tribunal's judgment was handed down.

53. Mr Tabachnik opposed the application for the Respondent's costs. He submitted that costs do not automatically follow the event in regulatory proceedings. He referred the Tribunal to the cases of Baxendale-Walker v The Law Society [2007] EWCA Civ 233 and CMA v Flynn Pharma [2020] EWCA Civ 617 in support of this submission.

54. The Tribunal assessed the costs for the hearing and for the proceedings to date. The Tribunal had heard the successful application and had reviewed the procedural history of the case. The Respondent's application for the case to be dismissed had succeeded. However, this was not a case where the allegations brought by the Applicant had failed. The case against the Respondent had been certified, and involved serious allegations. The proceedings had been properly brought and pursued. The Applicant had been entitled to resist the application for dismissal of the proceedings and did so reasonably. The Respondent sought the costs of his successful application. With reference to CMA v Flynn Pharma, and the principles set out in paragraph [79], the Tribunal did not consider there was any reason based on the conduct of either party to depart from the default position that no order for costs should be made against the Applicant who has brought proceedings in the Tribunal in its regulatory capacity and responded to the Respondent's applications. There was no basis on which to award costs against the Respondent, and Mr Tabachnik had not made any such application. Accordingly the Tribunal made no order as to costs.

Sitting in Private

55. The Respondent's application for dismissal of the proceedings was made principally on the ground of ill-health. Mr Vassall-Adams submitted that the parts of the hearing dealing with legal submission could be heard in public session. At the invitation of the parties, and to avoid exceptional hardship for the Respondent, the Tribunal directed that those elements of the hearing containing detailed references to the Respondent's

health and medical matters would be heard in private under Rule 12(4) of the Solicitors (Disciplinary Proceedings) Rules 2007. The recording of those sections of the hearing would not be released other than to the parties and the Tribunal. The remainder of the hearing and the recording of it would were in public and would be publicly available in the usual way.

56. On the same basis, to avoid exceptional hardship for the Respondent, the Tribunal also directed that the detailed references to the Respondent's health and medical matters in this Memorandum should be redacted from the version to be published.

Statement of Full Order

57. The Tribunal ORDERED that the allegations made in the Rule 5 Statement dated 6 February 2017 against the Respondent JRT, solicitor, be DISMISSED.

58. The Tribunal further made NO ORDER as to costs.

Dated this 18th day of February 2021
On behalf of the Tribunal

A Ghosh
Chair