**IN THE COURT OF ARCHES**

**ON APPEAL FROM THE BISHOP'S DISCIPLINARY TRIBUNAL FOR THE DIOCESE OF ROCHESTER**

**RE THE REVEREND ROBERT LLOYD RYAN A CLERK IN HOLY ORDERS**

**The Rev'd Robert Lloyd Ryan A CLERK IN HOLY ORDERS**

Appellant

**and**

**The Venerable Andrew Wooding-Jones, Archdeacon of Rochester An Archdeacon**

Respondent

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**RELIEF HEARING**

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PREAMBLE

This Judgment is in two parts. The first deals with the question of relief and Directions for redetermination and is the Judgment of the whole Court. The second deals with procedural applications relating to publication and is the decision of the Dean alone. Both parts of the Judgment adopt agreed redacted means of identifying persons and places.

1. INTRODUCTION

1.1. The Appellant is a clerk in Holy Orders. A Complaint was made against him, elements of which the Deputy President of Tribunals decided ought to be referred to a Bishop's Disciplinary Tribunal, pursuant to s.17 Clergy Discipline Measure 2003 ("the Measure"). The Complaint was reduced into the following allegations of misconduct (redacted for reasons of confidentiality):

*"1. The conduct of the respondent, [the Appellant], was unbecoming or inappropriate to the office and work of a Clerk in Holy Orders within Section 8(12)(d) of the Clergy Discipline Measure 2003 in that he, knowing that [Person A] was a married woman, had sexual intercourse with her –*
*(a) on an occasion on – [a third party]'s boat;*
*(b) on a further and separate occasion on [a third party]'s boat;*
*(c) on a further and separate occasion at the Premier Inn hotel in Brighton.*

*2. The conduct of the respondent, [Appellant] was unbecoming or inappropriate to the office and work of a clerk in Holy Orders within Section 8(1)(d) of the Clergy Discipline Measure 2003 in that he, knowing that [Person A] was a married woman, and being aware of mutual feelings of affection between himself and [Person A]–*
*(a) accepted small gifts from her;*
*(b) in or around December 2014 kissed her and*
*(c) accordingly failed to observe or maintain appropriate professional boundaries."*

1.2. In their Determination dated 29th December 2021, the Tribunal found that the Appellant had been guilty of the conduct charged under Paragraph 1(b) in that, on 5th June 2015, he had consensual sexual intercourse with [Person A]. Both the Appellant and [Person A] were married to other people at the time. The Tribunal also found that the facts forming the basis of Paragraph 2, which were admitted, amounted to conduct unbecoming or inappropriate to the office and work of a clerk in Holy Orders within s.8(1)(d) Clergy Discipline Measure 2003. The matters in Paragraphs 1(a) and (c) were found not to have been proved.

1.3. The Appellant appealed against the Tribunal's decision on Paragraph 1(b). The Court of Arches allowed the appeal for the reasons set out in its Judgment dated 12th December 2022. Essentially, we held that the Tribunal had erred in ignoring a letter from a medical practitioner which was submitted on the second day of the hearing. The letter dealt with the appearance of an intimate part of the Appellant's anatomy, Person A having made particular claims in this regard. We said:

> "3.6 Whether or not the letter is properly described as equivocal, as to which we make no finding, we unanimously hold that the Panel fell into legal error in deciding to 'ignore entirely' an issue which was material to the central question of whom to believe in relation to the allegations of sexual intercourse. Similarly, having admitted the doctor's evidence (presumably on the basis that it was of relevance), to exclude it from their minds when deciding which of the two main witnesses was telling the truth was irrational, perverse and/or constitutes a failure to take account of material evidence. These failings led to a breach of natural justice. They were also contrary to the overriding objective enshrined within Rule 1 of the Clergy Discipline Rules 2005 because a relevant – potentially highly relevant – matter which had been put in issue by

Person A and addressed (albeit late in the day) by the doctor's evidence was simply *"ignored"*; in this regard, the Panel did not *"enable formal disciplinary proceedings brought under the Measure to be dealt with justly, in a way that is both fair to all relevant interested persons and proportionate to the nature and seriousness of the issues raised"*. The allegations grouped under allegation 1 were extremely *"serious in nature"* for the Appellant, his wife and family, Person A and her husband and the Church."

The question of relief was adjourned. The Court sat remotely on 9th May 2023 to consider relief and a procedural application, assisted by the written and oral submissions of the Parties' advocates.

1.4. We concluded, by a majority, that the issue of the finding that the Appellant was guilty of conduct unbecoming under Paragraph 1(b) should be referred back to the Tribunal with our directions for its redetermination.

## 2. LEGISLATIVE FRAMEWORK

2.1. We explained, at paragraph 4.3 of our Judgment of 12th December 2022, the unique nature of the Church's clergy discipline system. At the hearing to consider the question of relief, this observation was not disputed and both advocates invited us to treat caselaw from other jurisdictions as persuasive rather than binding. We have done this, having regard to the authorities cited, where relevant. Two authorities, in particular, were placed at the forefront of Ms Apps KC's submissions on behalf of the Appellant and we address them specifically below.

2.2. The Court's powers are prescribed in Rule 27 of the Clergy Discipline (Appeal) Rules 2005 ("the Appeal Rules"), which provides as follows:

> *"On any appeal the appellate court may—*
> *(a) confirm, reverse or vary any finding of the tribunal,*
> *(b) refer a particular issue back to the tribunal for hearing and determination in accordance*
> *with any direction that may be given by the appellate court,*
> *(c) order the complaint to be reheard by the same or a differently constituted tribunal,*
> *(d) confirm or set aside a penalty imposed by the tribunal, or substitute a greater or lesser*
> *penalty,*
> *(e) impose one or more of the penalties under section 24 of the Measure where the tribunal*
> *has not imposed any penalty or when upholding an appeal on a question of law by the Designated Officer."*

2.3. The relevant paragraphs are (a) to (c) of Rule 27. There is no caselaw on these provisions. Two questions of interpretation arose.

2.4. The first was whether the words *"the tribunal"* in paragraph (b) of Rule 27 refer to the tribunal whose decision has been successfully appealed. Mr Dobson, the Designated Officer, submitted that the language clearly carries that meaning. Ms Apps KC, for the Appellant, accepted that she would be *"in difficulties"* in arguing the contrary. We agree. The words clearly refer to the tribunal below and any doubt about that is removed by the use of the same words in paragraph (a) where they must refer to the tribunal whose decision is appealed. As Ms Apps KC said, the different phrase in paragraph (c), *"the same or a differently constituted tribunal",* also makes it impossible to argue otherwise.

2.5. The second question of interpretation is the meaning of *"the complaint"* in paragraph (c) of Rule 27. The word is not defined in the Appeal Rules or the Measure, but Mr Dobson drew the Court's attention to a recent amendment of the Clergy Discipline Rules 2005 which provides that *"allegation of misconduct"* has the same meaning as *"complaint"* has in the Measure. The amendment postdates the Tribunal's hearing and determination and no such provision has been inserted into the Appeal Rules. Ms Apps KC submitted that the amendment supported her argument that *"complaint"* in Rule 27 refers to each allegation of misconduct before the Tribunal. This argument, in turn, supported her alternative main submission on the exercise of the Court's discretion under Rule 27, which we address below. She also relied on s.17(3) and s.19 of the Measure in support of her interpretation. S.17 provides as follows:

> ***"Formal investigation***
> *(1) Where the bishop directs that the complaint is to be formally investigated, he shall refer the matter to the designated officer and it shall then be the duty of that officer to cause inquiries to be made into the complaint.*
>
> *(2) After due inquiries have been made into the complaint the designated officer shall refer the matter to the president of tribunals for the purpose of deciding whether there is a case to answer in respect of which a disciplinary tribunal or the Vicar-General's court, as the case may be, should be requested to adjudicate.*
>
> *(3) If the president of tribunals decides that there is a case for the respondent to answer he shall declare that as his decision and refer the complaint to a disciplinary tribunal or the Vicar-General's court, as the case may be, for adjudication.*
>
> *(4) If the president of tribunals decides that there is no case for the respondent to answer he shall declare his decision, and thereafter no further steps shall be taken in regard thereto.*
>
> *(5) The president of tribunals shall reduce his decision to writing and shall give a copy of it to the complainant, the respondent, the bishop and the designated officer."*

S.19(1) provides as follows:

> ***"Imposition of penalty***
> *(1) Upon a finding by a disciplinary tribunal or the Vicar-General's court in disciplinary proceedings that the respondent committed the misconduct complained of, the tribunal or court may –*
> *(a) impose on the respondent any one or more of the penalties mentioned in section 24 below; or*
> *(b) defer consideration of the penalty, and for that purpose may adjourn the proceedings; or*
> *(c) impose no penalty."*

2.6. Mr Dobson, on the other hand, submitted that the wording of Rule 27 only permits the *"whole complaint"* to be remitted to a differently constituted tribunal and not a particular issue as in this case. He pointed to s.17 which obliges the Designated Officer to *"cause inquiries to be made into the complaint"* and s.17(3), providing for the President to refer *"the complaint"* to a disciplinary tribunal. Similarly, he referred to Rule 5(2)(c) of the Appeal Rules, specifying that *"the tribunal which heard the complaint"* and *"the complaint reference number"* are to be set out in a notice of appeal. We would add that s.2 of the Measure – reference of a complaint and constitution of a tribunal to deal with it, s.11, preliminary scrutiny by the registrar, ss.12-14, concerning the bishop's role and s.18, conduct of proceedings ((2)(a) withdrawal of complaint) and the contrasting (3)(b) (determination of 'any matter') - further supports the interpretation urged by the Designated Officer.

2.7. Mr Dobson also contrasted the language of the Civil Procedure Rules 52.20(2)(b) providing for reference by an appeal court of *"any claim or issue"*.

2.8. Ms Apps KC, understandably, entered the caveat that, if the Court were considering remitting the Complaint to a fresh tribunal under paragraph (c), in this case, where there have been acquittals on two elements of the Complaint, issues of fairness or res judicata might arise. We did not hear detailed submissions on these points, but, in practice, the Designated Officer's duties of fairness under Rules 1 and 2 of the Appeal Rules and the Clergy Discipline Rules 2005 would meet them, with the availability of an abuse of process submission to the new tribunal as a fall-back. However, Ms Apps KC did not seek remission of the entire Complaint. Instead, her secondary submission was that we should remit the particular issue to a freshly constituted tribunal.

2.9. On the plain language of Rule 27 itself and considering the provision in its wider statutory context, we conclude that we have no power to accede to Ms Apps KC's secondary submission asking us to refer to a differently constituted tribunal the particular issue in this case, namely, treatment of the medical evidence and its relationship to the allegation under Paragraph 1(b) of the Complaint.

2.10. Accordingly, the competing choices for this Court are either to accede to Ms Apps KC's primary submission and reverse the Tribunal's finding of guilt under Paragraph 1(b) of the Complaint or to refer the issue back to the (original) Tribunal for hearing and redetermination in accordance with such directions as we might give. The preamble to Rule 27, by use of the word *"may"*, confers a discretion on us.

## 3. DISCUSSION

3.1. Ms Apps KC submitted that the decision of Burton J, the President of the Employment Appeal Tribunal, in *Sinclair Roche & Temperley v Heard* [2004] IRLR 763 and, in particular, the principles set out at [45] – [47] of his judgment, whilst not binding, provide useful guidance. Mr Dobson did not disagree. We have used the factors in those paragraphs (italicised below) to assist us in our deliberations, although we note that the circumstances of that case were, necessarily, different from ours.

3.2. *Proportionality*

The allegation in paragraph 1(b) is a serious one. In ecclesiastical safeguarding, though not in secular (Care Act 2014) terms, Person A is regarded as a vulnerable adult. The allegation, if true, would reflect very poorly on the Appellant's moral character and ministerial maturity and undermine the trust which members of the public are entitled to place in the Church of England and its clergy. Conversely, the allegation, if not true, is one which the Appellant and other people, including his family and parishioners, have an interest in seeing rejected. It is therefore of the greatest importance that this allegation is properly determined. At this stage, any solution will be sub-optimal, as is usually inevitable when a material error occurs in legal process. In exercising our discretion, we must reach a judgment which best reflects the interests of justice, having regard to the overriding objective.

**Appellant's Primary Submission**

3.3. Ms Apps KC's primary submission was that this Court should reverse the Tribunal's finding on allegation 1(b), pursuant to Rule 27(a). She said that the Court has sufficient material to determine that it was not logically open to the Tribunal to find that Person A was 'entirely credible' in relation to the allegation and should, exercising its discretion, so decide.

3.4. Ms Apps KC relied on *Webberley v GMC* [2023] EWHC 734 (Admin) in support of her primary submission. She also relied on the witness statements of the Appellant and his wife, as well as the doctor's letter and the matters summarised in her skeleton argument for the substantive appeal hearing, in which she contended that the evidence found by the Tribunal to support a finding of guilt on Paragraph 1(b) of the Complaint was inadequate. In her oral reply, she characterised her primary submission as the same as

an abuse of process submission, pointing to the delay in this case, which she said constituted a breach of the Appellant's rights under Article 6 of the European Convention on Human Rights, and was contrary to the overriding objective.

3.5. Taking these submissions in turn:

(i) *Webberley* was a case in a different jurisdiction, on very different facts. On appeal, Jay J concluded:

> *"…The MPT's analysis of the issue of serious misconduct was wrong. The MPT's thinking was confused, clearly wrong in places, and it omitted reference to important evidence. Having conducted my own analysis of the relevant material, I am entirely unable to conclude that this appeal should be dismissed because the Appellant was guilty of serious misconduct. Although I have concerns about certain aspects of the Appellant's practice in relation to Patient C including a failure to have a face-to-face consultation on the issue of fertility, it is far from clear to me that what did take place should be strongly criticised. In addition, it would be clearly unfair and unprincipled to uphold the MPT's determination on the basis of rather different reasoning which has not been fully addressed in expert evidence and tested by cross-examination of the Appellant."*

(ii) In deciding about disposal, the Judge stressed that both he and the parties' advocates regarded the case as *"exceptional",* calling for an exceptional *"case"* (perhaps a typographical error for *'solution'* or *'remedy'*, but the Judge's sense is clear): paragraph 160. He held, in the same paragraph, that he could not determine the *'relevant issue'* itself, because *"this remains a complex case where the evidence does not all point one way".* Nevertheless, the factual and judgment issues as to what had or had not happened and the implications for professional conduct were, to some extent, contained in contemporaneous documents and expert evidence as to clinical practice. This material placed him in a better position to consider matters in the round than the position in which we find ourselves, considering an allegation which, fundamentally, turns on the credibility of witnesses. The medical evidence in this case does not involve professional judgment in the same way as in *Webberley* - a medical examination and short report were simply decently practicable means of putting independent evidence as to appearance before the Tribunal. Jay J's decision neither to dismiss the appeal nor to re-determine the matter himself nor to send it for determination by a medical tribunal took account of the significance (or otherwise) of the particular charge in the context of the overall disciplinary proceedings (the hearing before the tribunal had taken 85 days), the fact that re-determination would necessitate several more days' hearing and what the Judge considered was the low likelihood of any substantive penalty being imposed, even if the appellant were to be found guilty.

(iii) Clearly, a decision not to exercise the statutory powers of remedy on a successful appeal is not a normal course for an appellate court to adopt. There is no express power to make no order under Rule 27, although the Rule is expressed in discretionary terms, as was the relevant provision in the medical disciplinary scheme. In our judgment, the facts and circumstances of this case are distinguishable from *Webberley*, not merely because of the different professional contexts. Relevant distinguishing elements relate to complexity, the nature of the issues and proportionality. We do not consider that we can determine that the allegation is not, or could not, be made out, nor do we consider that it is right, as an exceptional exercise of discretion, to decline to exercise any of our powers under Rule 27.

(iv) The issue under Paragraph 1(b) of the Complaint and the scope of the Tribunal's error are both much simpler in this case than they were in *Webberley*, albeit revolving around matters which it is inherently impossible for us to redetermine for ourselves, not having heard the oral evidence. We have set out above the importance which the Court attaches to achieving resolution of the Paragraph 1(b) issue and our view of proportionality. In terms of evidential complexity, the doctor's letter, as we found in our earlier Judgment, is an important element which the Tribunal should have taken into account along with the other evidence relevant to deciding whether or not the alleged incident occurred on 5th June 2015, including the evidence of the Appellant, his wife and Person A on appearance. Dealing properly with the question of appearance, however, would not require further evidence from those who gave oral evidence at the last hearing and we take Ms Apps KC's point that the risk of 'second bite' oral evidence must be avoided. In our judgment, it is possible to mitigate that risk. Our Directions are intended to ensure that the Tribunal properly engages with the medical evidence so that they can relate it to the questions of credibility, without creating opportunities for other aspects of the evidence to be re-opened. The weight to attach to the different elements of what Mr Dobson called *"the sea of evidence"* will be a matter for them, subject to their duty to reach conclusions in a legally adequate way, taking account of the evidence on appearance.

(v) Abuse of process was not pleaded in the Notice of Appeal and was raised by Ms Apps KC for the first time in her reply. She alleged that it would be unlawful to remit the issue to the same Tribunal and claimed, in her oral reply, that there would be a breach of Article 6. We reject these submissions. Rule 27 sets out the 'menu' of potential means of disposal. We have held that there is no power to remit an issue (as opposed to a whole complaint) to a newly constituted Tribunal. For reasons which we have set out in the preceding sub-paragraph and shall amplify by reference to the *Sinclair Roche* principles, we are satisfied that a fair and proportionate redetermination can be achieved pursuant to Rule 27(b), consistent

with the overriding objective set out in Rule 1 and respect for the Appellant's human rights.

3.6. Drawing together all these considerations, we do not accept Ms Apps KC's primary submission. The submission seeks to press our finding that the doctor's evidence should have been taken into account too far. It is true that we decided that the letter was *"material to the central question of whom to believe"* and rejected the submission of Mr Dobson that it was such a small element in the *"sea of evidence"* as to be immaterial to the outcome. Our finding as to the legal soundness of the decision does not mean, however, that it is inevitable that, taking the letter into account, the Tribunal would or should have concluded that allegation 1(b) was not made out on the balance of probabilities.

3.7. The *"sea of evidence"* contained other relevant matters – most particularly, the oral evidence of the Appellant and Person A, along with the oral evidence of other witnesses, which this Court has not heard and seen. Accordingly, we reject the primary submission on behalf of the Appellant and decline to make an order under Rule 27(a).

3.8. We have already addressed the first of the *Sinclair Roche* factors, proportionality. We now consider the others.

*Passage of Time*

The Tribunal hearing occurred in December 2021. We explored at the hearing the question of the Panel's notes of the hearing and were assured by the Registrar that he advises panels not to dispose of their notes, and did so on this occasion. There is no reason for supposing that such notes will not be available. The facts pertaining to Issue 1(b) are not so complex as to give rise to a real risk of the panel's not being able to deal conscientiously with the issue, aided by notes. The Tribunal Chair is a very experienced secular, as well as clergy discipline, judge. We are acutely aware of the length of time which these proceedings have already taken and the toll which this is taking on the Appellant and, we assume, everyone else who is intimately involved with this case. This is hugely regrettable. However, for the reasons set out above under *proportionality*, we do not consider that we should reverse the Tribunal's decision on the basis of timescale or distress; there is a common interest, as we have said, in the issue being properly determined and we consider that it will be possible for the Tribunal to do that. There is an agreed Direction on timing of the further hearing.

*Bias or partiality*

Bias has not been alleged against the Tribunal. As we have said, the Chair is an experienced judge and we have confidence that all who serve on bishops' disciplinary panels understand the importance of doing their work conscientiously and responsibly, guided by legally qualified chairs. In this

particular case, two other serious allegations against the Appellant were dismissed by the Tribunal.

*Totally flawed decision*

Our reasons for allowing the appeal have been confined to one issue: the approach to the medical evidence. We found that this was material and that disregarding it meant that the Tribunal's conclusion on the Paragraph 1(b) allegation could not stand, but we did not find that the entire process was flawed. As we have noted, there were acquittals on two other serious allegations, about which no complaint is made.

*Second bite and Tribunal Professionalism*

Our guidance to the Tribunal, we believe, is clear in our substantive Judgment. The medical evidence went in to the hearing on the second morning and the Tribunal had less time to consider it than it would, ideally, have had in normal circumstances. Our ruling and Directions give them the opportunity to consider the doctor's evidence fully and then conscientiously to deliberate on its significance for the case. The temptation to say *"we told you so*", adverted to by Burton J under the *second bite* heading is closely related to his next question of *professionalism*, hence our grouping these two *Sinclair Roche* factors. We have confidence in the Tribunal, guided by our Judgments and Directions, and under the chairmanship of such an experienced judge, fairly to reconsider the implications of the medical evidence. They will be obliged to issue a reasoned decision which, as well as being required for the benefit of the Parties, is an important intellectual discipline and safeguard against temptations to "*strain"* towards a particular verdict, to adopt Burton J's phrase.

3.9. The question of timescale was raised in Ms Apps KC's submissions on this matter. For reasons we have set out, remission to a newly constituted tribunal is not possible but we should record that we do not accept that such a course, had it been open to us, would have been quicker or less distressing. The witnesses would have had to undergo the ordeal of giving oral evidence again and the relative availabilities of 'old' and 'new' panel members are unknown, so we cannot draw comparative conclusions. We have reflected in our Directions the agreement of the Parties' advocates that the matter shall be heard before 3rd August 2023 and the Dean expressed her strong encouragement to find a date well before then.

3.10. Accordingly, we have concluded that, in accordance with our powers under Rule 27 and the overriding objective in Rule 1, we should remit the issue to the Tribunal with the Directions which the Dean pronounced at the remote hearing on 9th May 2023 and which are set out again here for convenience:

3.11. Pursuant to Rule 27(b) of the Clergy Discipline Appeal Rules 2005 we decide and order that there should be referred back to the Tribunal the issue of the finding that the Appellant was guilty of conduct unbecoming in that he had

sexual intercourse with Person A knowing that she was a married woman on 5th June 2015 with the following directions:

1) That the Tribunal shall take into account the report of Dr Hartmann dated 13 December 2021
2) That the Tribunal shall require Dr Hartmann to attend to give oral evidence pursuant to Rule 46 of the Clergy Discipline Rules 2005
3) That none of the witnesses who gave evidence before the Tribunal shall give or be required to give further evidence
4) That there shall be no further witnesses called by either party
5) That any consequential matters arising out of directions 1 – 4 shall be dealt with on application under the Clergy Discipline Rules to the Registrar or to the Tribunal Chair.

3.12. If the Appellant, on making reasonable enquiries, is not able to call Dr Hartmann to attend an oral hearing to be listed on a date on which the Parties are available and the doctor is available before 3 August 2023, the Appellant has permission to call evidence from another medical practitioner orally and to produce a report in writing in advance.

4. PUBLICATION / DISCLOSURE – Determination by the Dean

4.1. Counsel addressed the Dean on the Appellant's procedural application concerning what the Appellant might communicate to third parties (other than his Bishop, legal representatives and family). Mr Dobson remained neutral on the application, whilst stressing the importance of the Appellant's communicating with his diocesan Bishop any plans to undertake voluntary work, to ensure that they would not be inconsistent with his suspension.

4.2. The Dean's Direction that there should be publication on the Church of England website of this Judgment and the Court's Judgment of 12th December 2022 as soon as possible (suitably amended/redacted[1] so as to avoid any risk of identification of those involved in this case), effectively dealt with much of the application.

4.3. Ms Apps KC, however, pursued her application for a 'gist' which might be shared with third parties, notwithstanding the decision to publish the Judgments themselves. She said that third parties for whom the Appellant might wish to undertake voluntary work would need to be assured that the proceedings do not involve (and never have involved) allegations of misconduct related to children or persons regarded as vulnerable under the Care Act 2014. The opening paragraph of this Judgment makes it abundantly clear that no such allegations were before the tribunal and this paragraph affirms the same. In these circumstances, there is no need for a 'gist' and none of the Appellant's rights are infringed. The public interest in open justice and the Church's duties towards third parties are also met by this course.

[1] As discussed on the hearing of the application.

**17 May 2023**

MORAG ELLIS KC
Dean of the Arches
The Venerable Steven Betts
The Revd Pamela Ogilvie
Dr Judith Dale
Mr Michael Elsom