



Neutral Citation Number: [2021] EWCA Civ 1940

Case No: C1/2021/0268

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE QUEEN’S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

**Mrs Justice Collins Rice**  
**[2020] EWHC 3409 (QB)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 17 December 2021

**Before:**

**LORD JUSTICE UNDERHILL**  
**(Vice-President of the Court of Appeal (Civil Division))**  
**LORD JUSTICE STUART-SMITH**  
and  
**LORD JUSTICE NUGEE**

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**Between :**

**ELSWORTH WRAY**

**Appellant/**  
**Respondent**

**- and -**

**THE GENERAL OSTEOPATHIC COUNCIL**

**Respondent**  
**/Appellant**

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**Paul Ozin QC (instructed by The Reflective Practice) for the Appellant**  
**Mary O’Rourke QC (instructed by BSG Solicitors) for the Respondent**

Hearing date: 14 October 2021

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties’ representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:00 am on 17 December 2021

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**Approved Judgment**

## **Stuart-Smith LJ:**

### **Introduction**

1. The Respondent is a registered osteopath [“the Registrant”]. I outline the facts that have given rise to these proceedings in a little detail at [69] below. In briefest outline, on 10 March 2018 the Registrant was involved in an altercation when he was set upon by a group of assailants as he got out of his car holding a softball bat. He was charged with possession of an offensive weapon in a public place, contrary to s. 1(1) of the Prevention of Crime Act 1953. In due course, on the advice of his then solicitor, he pleaded guilty to that offence before Highbury Corner Magistrates’ Court and was conditionally discharged.
2. The Appellant Council is the body that regulates the osteopathic profession pursuant to the Osteopaths Act 1993 [“the Act”] and associated rules. The Council’s overarching objective is public protection, including promoting and maintaining public confidence in the profession through practice and conduct standards. It issues a statutory code setting out those standards.
3. The relevant rules for the purposes of this appeal are the General Osteopathic Council (Professional Conduct Committee) (Procedure) Rules 2000 [“the Rules”]. The Rules are made by the Council in exercise of their powers under the Act. As their name suggests, the Rules govern the proceedings of the Council’s Professional Conduct Committee [“the PCC”].
4. On 30 July 2020 the PCC found the Registrant guilty of unacceptable professional conduct [“UPC”] and administered an admonishment. UPC is defined by s. 20(2) of the Act as “conduct which falls short of the standard required of an osteopath.” The Registrant appealed to the High Court pursuant to s. 31 of the Act. Such an appeal is by way of re-hearing: see PD 52D at [19(2)].
5. On 15 December 2020 Collins Rice J allowed the appeal. She quashed the finding of UPC and the admonishment that had been imposed by the PCC. It is against that decision of Collins Rice J that the Council now appeals.
6. It is convenient to describe the legal framework created by the Act, the Rules and related authorities before turning to the allegations that the Registrant faced and describing the procedural route that has brought the case to this court.

### **The Legal Framework**

#### *Standards*

7. The statutory Osteopathic Professional Standards Guidance provides, at D17 under the general heading of ‘professionalism’:
  - “1. The public’s trust and confidence in the profession, and the reputation of the profession generally, can be undermined by an osteopath’s professional or personal conduct. You should have regard to your professional standing, even when you are not acting as an osteopath.

2. Upholding the reputation of the profession may include:
  - 2.1 Acting within the law at all times (criminal convictions may be evidence that an osteopath is unfit to practise)
  - ...
  - 2.3 Not behaving in an aggressive or violent way in your personal or professional life..."

*The Act*

8. Section 20 of the Act sets out the bare bones of the procedure where allegations are made against an osteopath. Section 20(1) provides:

- “(1) This section applies where any allegation is made against a registered osteopath to the effect that—
- (a) he has been guilty of conduct which falls short of the standard required of a registered osteopath;
  - (b) he has been guilty of professional incompetence;
  - (c) he has been convicted (at any time) in the United Kingdom of a criminal offence; or
  - (d) his ability to practise as an osteopath is seriously impaired because of his physical or mental condition.”

This appeal directly concerns s. 20(1)(a) and (c), which may conveniently be referred to as “cases relating to conduct” and “cases relating to conviction”, reflecting their definition under the Rules.

9. Sections 20(3)-(9) of the Act outline the interim and investigative procedure to be followed where an allegation under s. 20(1) has been made against a registered osteopath. Section 20(10) provides that, in a case relating to conviction, the Investigating Committee may conclude that there is no case to answer if it considers that the criminal offence in question has no material relevance to the fitness of the osteopath concerned to practise osteopathy. Where the Investigating Committee concludes that there is a case to answer, it is required to notify the osteopath and the person making the allegation and to refer the allegation, as formulated by the Investigating Committee, to the relevant committee, which is the PCC both in cases relating to conduct and in cases relating to conviction: see s. 20(12).
10. Section 22 lays down the framework of what is to happen when an allegation has been referred to the PCC under s. 20:

“(1) Where an allegation has been referred to the Professional Conduct Committee under section 20 ..., it shall be the duty of the Committee to consider the allegation.

- (2) If, having considered it, the Committee is satisfied that the allegation is well founded it shall proceed as follows.
  - (3) If the allegation is of a kind mentioned in section 20(1)(c), the Committee may take no further action if it considers that the criminal offence in question has no material relevance to the fitness of the osteopath concerned to practise osteopathy.
  - (4) Otherwise, the Committee shall take one of the following steps—
    - (a) admonish the osteopath;
    - (b) make an order imposing conditions with which he must comply while practising as an osteopath (a “conditions of practice order”);
    - (c) order the Registrar to suspend the osteopath’s registration for such period as may be specified in the order (a “suspension order”); or
    - (d) order the Registrar to remove the osteopath’s name from the register.”
11. It can therefore be seen that, unless in a case relating to conviction it considers that the criminal offence in question has no material relevance to the fitness of the osteopath concerned to practise osteopathy, once the PCC finds a referred allegation in either a case relating to conduct or a case relating to conviction to be well founded, it is required by s. 22(4) to take one of the steps there listed, of which an admonishment is the least severe.
12. Paragraph 21(1) of the Schedule to the Act provides that the General Council may make rules regulating the procedure of the statutory committees including provision as to rules of evidence to be observed in proceedings before any such committee. Subject to the power of the General Council to regulate their procedure, paragraph 21(2) gives to each statutory committee a residual power to regulate their own procedure. The Rules are therefore the primary source of the procedure to be adopted by the PCC; but there is a degree of flexibility allowed to the committee to be exercised where necessary or desirable. This flexibility is also recognised by Rule 34, which provides that any member of the Committee or the legal assessor may with the Chairman’s permission question those presenting evidence or any witness called at any stage during the proceedings before the PCC.
13. In *ICAEW v Hill* [2013] EWCA Civ 555, [2014] 1 WLR 86 at [13], Longmore LJ (with whom Beatson and Underhill LJJ agreed) said, in the analogous context of the professional committees of the Institute of Chartered Accountants:

“... that when one is dealing with byelaws and regulations of professional disciplinary bodies one cannot expect every contingency to be foreseen and provided for. The right question to ask of any procedure adopted should therefore be not whether it is

permitted but whether it is prohibited. ... It must, of course, still be fair and that to my mind is the critical issue in this appeal.”

*The Rules*

14. The first outward-facing step that has to be taken by the PCC following a referral is that it is required to serve on the osteopath concerned a copy of the complaint that has been formulated by the Solicitor to the Council, a copy of the Rules, and “any document or statement on which the Committee will be asked to rely”: see Rule 7(a). The complaint therefore becomes the central document identifying what is alleged against the osteopath. The centrality of the complaint emerges clearly from the terms of Rule 8, which provides:

“Without prejudice to rule 7, after referral of a case and after reviewing the evidence assembled by the referring committee and any material submitted by the osteopath concerned, the Committee, in any case where it considers it appropriate to do so, shall--

- (a) invite the osteopath to indicate whether he accepts the facts set out in the complaint and, if so, whether he accepts that those facts amount to either unacceptable professional conduct or professional incompetence or that he has been convicted of the criminal offence or offences referred to in the complaint as the case may be;
  - (b) indicate to him that in that event the Committee would be minded to conclude that the complaint should be dealt with by way of an admonishment without any need for a hearing unless the osteopath otherwise requests; and
  - (c) advise the osteopath that if he does not accept the facts set out in the complaint, or he accepts some or all of these facts but denies that the facts which are so accepted amount to either unacceptable professional conduct or professional incompetence, he has the right (in accordance with rule 7(b)(i)) to appear before the Committee to argue his case and to be legally represented at such a hearing.”
15. Two points may be noted. First, Rule 8(a) demonstrates that “the facts set out in the complaint” define the scope of the allegation that the osteopath has to meet, whether in a case relating to conduct or a case relating to conviction. Second, the Rule 8 procedure offers a shortcut where the osteopath accepts the facts set out in the complaint and that those facts amount to UPC (or that he has been convicted of the criminal offence or offences alleged in the complaint, as the case may be) and the Council has formed the view that an admonishment would be a sufficient sanction. The rule draws a distinction between a case relating to conduct, where there is a separate requirement that the osteopath accepts that the conduct alleged in the complaint amounts to UPC, and a case relating to conviction, where there is none.

16. If the case comes to a hearing, the procedural start and end points are the same for a case relating to conduct or a case relating to conviction. The start point is that the hearing in every case opens with the Registrar reading the complaint against the osteopath: see Rule 22. The complaint will be the allegation formulated by the Solicitor to the Council and notified to the osteopath: see [11] above. The fact that it is read out at the commencement of the hearing emphasises the centrality of the complaint and that it defines the allegation that the osteopath has to meet. The end point, if the case gets that far, is the PCC’s consideration and announcement of sanction as set out at Rules 35 and 36:

“35. In any case where the Committee has found a conviction proved or has made a finding of unacceptable professional conduct ... either in whole or in part, and has heard any plea in mitigation, the Committee shall consider in private what sanction, if any, it shall apply to the osteopath.

36. When all parties to the case have reassembled, the Chairman shall announce the Committee’s decision with regard to sanctions.”

17. However, once the hearing has opened, the procedural route to the point of consideration and announcement of sanctions differs depending on whether the case is one relating to conduct or relating to conviction.

18. Under the heading “Cases relating to conviction”, Rule 26 sets out the procedure to be followed in such cases:

“26. (1) In cases relating to conviction the order of proceedings shall be as follows—

- (a) the Solicitor shall be requested to adduce evidence of any conviction and its circumstances;
- (b) evidence of a conviction may be adduced by the production of a certified copy of a certificate of conviction relating to a criminal offence;
- (c) if in respect of any conviction, no evidence is so adduced, the Chairman shall announce that the conviction has not been proved;
- (d) the Chairman shall ask the osteopath whether he accepts each conviction of which evidence is adduced and in respect of such accepted conviction the Chairman shall announce the conviction to have been proved;
- (e) in respect of convictions not so accepted, the osteopath or his representative may address the Committee and adduce both oral and documentary evidence to show that he was not the person convicted;

- (f) thereafter the Solicitor may, with the Committee's leave, seek to rebut any evidence of the osteopath by adducing evidence to that effect;
    - (g) the Solicitor and then the osteopath or his representative may address the Committee.
  - (2) On conclusion of the proceedings in paragraph (1) above, the Committee shall consider each conviction alleged in the complaint other than those admitted or announced to be not proved and shall determine whether or not each such conviction is proved and the Committee shall then announce its determination.
  - (3) Where the Committee have found that a conviction has been proved or a conviction has been admitted, the Chairman shall—
    - (a) invite the Solicitor to address the Committee and to adduce any further evidence as to the circumstances leading up to the conviction, and as to the character and previous history of the osteopath;
    - and
    - (b) invite the osteopath or his representative to address the Committee by way of mitigation and adduce any further such evidence.
  - (4) The Solicitor and the osteopath, or his representative, shall, if appropriate, be invited to address the Committee on whether the criminal offence in question has any material relevance to the fitness of the osteopath concerned to practise osteopathy.
  - (5) The Committee shall then proceed in accordance with rules 35 to 39.”
- 19. Various points may be noted at this stage. First, it is a necessary first step that the Solicitor to the Council shall adduce evidence of the conviction: if none is adduced, the case fails: see Rule 26(1)(a)-(c). Second, where evidence is adduced, the osteopath shall be asked by the Chairman whether he accepts each conviction of which evidence has been adduced and, where the osteopath accepts a conviction, it shall be announced that the conviction has been proved: see Rule 26(1)(d). Third, in respect of convictions for which evidence has been adduced but which have not been accepted by the osteopath, Rule 26(1)(e)-(g) lays down the procedure to be followed, at the end of which the Committee considers each conviction that remains in issue and determines whether it is proved: see Rule 26(2). The concentration on the fact of the conviction is emphasised by the provision in Rule 26(2)(e) that the osteopath's submissions and evidence are “to show that he was not the person convicted.” Thus, the two questions at this stage for the PCC are, first, whether the fact of the conviction is proved and,

second, whether the osteopath was or was not the person convicted. The procedure laid down by Rule 26(1) and (2) “fixes” what alleged conviction or convictions (if any) remain for further consideration by the Committee and may be seen as the first stage of the procedure to be followed in cases relating to conviction. Fourth, and only if a conviction has been admitted or proved, the Solicitor shall be invited to address the committee, and to adduce any further evidence “as to the circumstances leading up to the conviction and as to the character and previous history of the osteopath”; and the osteopath shall be invited to mitigate and to adduce any further such evidence (about the circumstances leading up to the conviction and his character and previous history): see Rule 26(3). Fifth, at this stage the parties may, if appropriate, be invited to address the Committee on whether the proved or admitted convictions have any material relevance to the fitness of the osteopath to practise osteopathy. The PCC shall then proceed in accordance with Rules 35-39.

20. Under the heading “Cases relating to conduct ...” Rules 27 and 28 set out the procedure to be followed in such cases:

- “27. (1) In cases of conduct ... the Chairman shall ask the osteopath whether he admits any or all of the facts alleged and, in respect of any such facts so admitted, the Committee shall record a finding that those facts have been proved.
- (2) Where all the facts are admitted the osteopath or his representative may submit that in respect of any complaint where the facts have been admitted, those facts are insufficient to support a finding of unacceptable professional conduct ....
- (3) Where such a submission is made, the Solicitor [representing the Council] may answer that submission and the osteopath or his representative shall have the right of reply.
- (4) The Committee shall consider and determine whether to uphold the submission and if it does, the Committee shall record and announce a finding that the osteopath is not guilty of unacceptable professional conduct ... in respect of the matters to which the complaint relates.
- (5) If none or some only of the facts are admitted or if the Committee does not uphold any submission under rule 27(4) above, the Committee shall proceed as follows--
- (a) the Solicitor shall be requested to open the case against the osteopath by presenting the facts alleged on which the complaint is based and by then adducing any evidence of the facts alleged and which have not been admitted by the osteopath;



- (b) any witness called to give evidence may be cross-examined by the osteopath or his representative and re-examined by the Solicitor;
  - (c) if on any allegation no evidence is adduced the Committee shall record and announce a finding that the osteopath is not guilty of unacceptable professional conduct ... in respect of that allegation.
- (6) When the Solicitor has closed his presentation of the case, the osteopath or his representative may submit--
- (a) that in respect of the facts alleged but not admitted in the complaint no sufficient evidence has been adduced upon which the Committee could find the facts proved;
  - (b) in respect of any allegation the facts adduced or admitted are insufficient to support a finding of unacceptable professional conduct ..., and where such submission or submissions are made, the Committee shall proceed in accordance with paragraphs (3) and (4) above.
28. (1) The osteopath or his representative may then address the Committee concerning any allegation that remains and may adduce evidence either documentary or oral, including his own, in his defence.
- (2) The osteopath or any witness called on his behalf may be cross-examined by the Solicitor and re-examined by the osteopath or his representative.
- (3) At the end of the evidence of the osteopath the Solicitor may with the leave of the Committee adduce evidence to rebut any evidence adduced by the osteopath or his representative.
- (4) The Solicitor may then address the Committee following which the osteopath or his representative may also address the Committee.”

21. Rules 29 and 30, under the heading “Consideration by the Committee” provide:

- “29. The Committee shall then consider the case in private and determine whether the facts alleged in the complaint have been proved to their satisfaction by the evidence.
30. If it so determines it must next decide whether the facts as proved amount to [UPC]... .”

22. At the risk of over-simplification, these rules can be summarised as follows:
- i) Rule 27(1) starts with the osteopath being asked if he admits any or all of the facts alleged. There is no prior requirement for the Solicitor to adduce evidence of the facts or their circumstances;
  - ii) Rule 27(2)-(4) governs what is to happen where, in a case relating to conduct, the osteopath admits all of the facts in the complaint. The osteopath may submit that the admitted facts of any complaint are insufficient to support a finding of UPC and, if that submission is upheld, that is the end of that complaint;
  - iii) In a case where not all the facts are admitted, or a case where the facts are all admitted but the Committee has not upheld any submission that the facts are insufficient to support a finding of UPC, the Solicitor opens the case, presenting the facts on which the complaint is based, and adducing evidence where factual issues remain to be proved: Rule 27(5);
  - iv) If no evidence is adduced on any allegation, the PCC is required to record and announce that the osteopath is not guilty of UPC in respect of that allegation. If evidence is adduced on disputed allegations, the osteopath may submit that the evidence is insufficient to support the facts alleged and/or that the facts adduced or admitted are insufficient to support a finding of UPC. The PCC must then rule on such a submission. After that has been done, the osteopath can address the committee on any allegation that remains and adduce evidence in his defence. The solicitor may, with leave, seek to rebut that evidence: Rule 28;
  - v) After submissions by both sides, the PCC then considers and determines whether the facts alleged in the complaint have been proved: Rule 29.
23. Rules 27 to 29 provide the route to determining what facts alleged against the osteopath by the complaint remain to be considered. No such procedure is required in a case relating to conviction because, once proved, the conviction speaks for itself and provides the basis for the PCC's consideration of appropriate sanctions. By "speaks for itself" I mean that proof of the conviction necessarily implies proof of the essential elements of the offence of which the osteopath has been convicted. In contrast, in a case relating to conduct, it is necessary to have the procedure under Rules 27 to 29 in order to establish which of the facts alleged in the complaint, if any, are admitted or proved so that they may form the basis for the PCC's determination whether there has been UPC and, if so, of appropriate sanctions. This is made clear by Rule 30 which provides that, if the PCC determines pursuant to Rule 29 that the facts alleged in the complaint have been proved to their satisfaction, "it must next decide whether the facts as proved amount to [UPC]". Rules 29 and 30 mean that there is no opportunity to introduce further facts between the moment of the PCC's determination whether the facts alleged in the complaint have been proved and their decision whether the facts as proved amount to UPC. This, in my judgment, is principled and fair precisely because it is the facts alleged in the complaint that form the basis of the case the osteopath has had to meet and it is therefore only those facts alleged in the complaint which have been proved that could fairly be brought into account when determining whether the osteopath is guilty of UPC.

24. Once the PCC has decided whether the facts as proved amount to UPC, Rules 31 and 32 provide that:

- “31. „, [T]he Chairman shall announce the Committee’s findings and its reasons for those findings, with regard both to the facts of the case and to whether the osteopath has been found guilty of [UPC] ... .
32. Where the Committee finds the complaint not to be proved the Chairman shall announce this finding and the reasons for it and dismiss the case.”

25. It is therefore clear that the procedure for a case relating to conduct is directed to establishing, first, whether all or any of the facts alleged in the complaint are proved and, second, whether those facts alleged in the complaint that are proved amount to UPC. The announcement of those findings pursuant to Rule 31 is therefore the watershed moment which, by reference to the facts alleged in the complaint, establishes the basis upon which sanctions may be considered and determined. Thus the only remaining step before consideration of sanctions under Rules 35 to 39 is the osteopath’s plea in mitigation under rule 33, which provides:

- “(1) Where the Committee has found the complaint proved, either in whole or in part, the Chairman shall invite the Solicitor to address the Committee as to any additional circumstances leading up to the unacceptable professional conduct or professional incompetence and as to the character and previous history of the osteopath.
- (2) He shall then invite the osteopath or his representative to address the Committee by way of mitigation and the osteopath may adduce oral or documentary evidence to support mitigation.”

26. It will immediately be noted that the matters to be raised by the Solicitor under Rule 33(1) do not include evidence of additional facts over and above those included in the complaint that have been found proved so as to expand the scope of the allegation as defined by the complaint and as found proved by the PCC. Rule 33 is clearly intended to allow the Solicitor and osteopath to raise matters that go to sanction in the light of the prior findings of fact and the finding that the complaint is proved. It mirrors the equivalent provision under Rule 26(3)(a) at the same stage of a conviction case: see [18] above.

27. As I have said, the routes for the two different types of case then converge in Rules 35-39.

*How the procedure should work*

28. I have referred already to the centrality of the complaint. We were told that there are differing practices in and about the formulation of complaints, both in the Council’s jurisdiction and in other professions where similar procedures are adopted. We have not had detailed submissions about the practice in other professions. What I say is

therefore directed specifically to the regime created by the Act and the Rules. Whether it is directly or tangentially applicable to the regime for other professions will depend upon the precise terms of the provisions that regulate their disciplinary proceedings.

29. The essential feature of a complaint is that it should identify for the osteopath clearly and fairly the allegations and case that he has to meet. In a case relating to conviction, this is likely to be straightforward because it is the fact of the alleged conviction that will, if it is proved and has material relevance to the osteopath's fitness to practise, form the basis of the PCC's consideration of the appropriate sanction to be applied. Hence the relative simplicity of the procedure under Rule 26. I refer to the ability of a convicted osteopath to "go behind" his conviction later in this judgment; but, subject to that, proof of the conviction necessarily implies that all of the essential elements of the offence of which the osteopath was convicted are also proved. It is also material to note at this stage that paragraph 2.1 of the statutory guidance at [7] above is in two parts: upholding the reputation of the profession may include acting within the law at all times; *and* criminal convictions may be evidence that an osteopath is unfit to practise. The central thrust of a case relating to conviction is that the conviction is relevant to the osteopath's fitness to practise and renders him liable to disciplinary sanction.
30. The position in a case relating to conduct is slightly more complicated, as reflected in the greater complexity of Rule 27. However, the structure of Rule 27, taken in the context of the other rules to which I have referred, demonstrates that the essential function of the complaint is the same – namely to identify for the osteopath the allegation and case that he has to meet. The question of UPC does not arise unless and until some or all of those facts are either admitted or proved. Basic principles of natural justice require that there should be clarity about what facts are alleged to amount to UPC so that the osteopath can consider what is alleged and decide whether to admit or contest any or all of the facts alleged and, on that basis, whether to admit or contest that the facts amount to UPC.
31. Rules 27 and 28 provide a procedure to enable the Committee to determine under Rule 29 whether the facts *alleged in the complaint* have been proved. Only those facts that (a) were alleged in the complaint and (b) have been proved can be taken into account when the PCC comes, under Rule 30, to decide whether to make a finding of UPC. Read literally, the Rule 29 requirement that the Committee shall consider the case in private and determine whether the facts alleged in the complaint have been proved is unqualified. However, in a case where all the facts are admitted, the Committee will already have recorded a finding that those facts have been proved as required by Rule 27(1). In such a case, there is no purpose in requiring Rule 29 to be implemented so as to determine for a second time that the facts alleged in the complaint have been proved. In such a case, therefore, I would hold that Rule 29 ceases to apply.
32. A number of protections for the osteopath are built into this procedure. In a case where he admits all the facts, he may submit that the admitted facts are insufficient to support a finding of UPC and, if he does, the PCC must rule on that submission: see Rule 27(2) and (4). Where not all of the facts are admitted, the Solicitor to the PCC opens the case by presenting and then trying to prove "the facts alleged on which the complaint is based": see Rule 27(5)(a) and the following provisions. This is not an opportunity for the Solicitor to expand the scope of the facts alleged against the osteopath beyond those alleged in the complaint: it is merely the opportunity to prove those facts alleged in the

complaint which have not been admitted by the osteopath. When the Solicitor adopts this course, the osteopath may respond both by addressing the Committee and by calling evidence. It follows that persons drafting a complaint in a case relating to conduct must make clear what facts or matters are alleged (either singly or cumulatively) to form the basis for the allegation of UPC.

*What should a complaint in a case relating to conduct include?*

33. Issues of practice and procedure were raised during the hearing which are directly relevant to the present appeal and therefore require answers. The first was whether it is acceptable for a complaint in a case relating to conduct to include additional matters, for example matters of background narrative or explanation. In my judgment, it is not inherently objectionable to include such matters *provided* that the complaint makes clear what are the facts or matters that are alleged to have amounted to UPC and what matters are additional (e.g narrative or explanatory) but not part of the facts and matters that are alleged to have amounted to UPC. It is not possible to be prescriptive or to lay down a hard-edged definition of what will properly be regarded as essential and what should be regarded as additional but not essential. It may in many cases be preferable to limit the complaint to identifying the facts and matters that are alleged to amount to UPC without more; but again it is neither desirable nor possible to be prescriptive given the almost infinite variety of factual situations that may give rise to an allegation of UPC.
34. I would add that the reference in Rule 7(a) to serving on the osteopath, in addition to the complaint, “any document or statement on which the Committee will be asked to rely” does not provide an opportunity to expand the scope of the charge that is set out in the complaint. For example if, in a case relating to conduct, the complaint alleges possession of an offensive weapon in a public place without reasonable excuse, and papers are served which disclose evidence that the osteopath assaulted someone, the charge to be met by the osteopath would be that set out in the complaint, which would not and cannot be expanded to include the allegation of assault that has merely been disclosed by the papers. (I leave entirely to one side the question whether, in this example, the disclosed evidence of assault would be admissible at all. That would be a matter for the PCC to determine on normal principles applicable to their control of evidence, which is beyond the scope of this judgment.)
35. The requirement that the complaint shall identify with precision and clarity the facts and matters that are alleged to amount to UPC applies even where new or additional facts arise or become known. If that happens, the solution is to amend the complaint if so advised and provided that can be done without injustice. Rule 24 provides the power:

“If, at any stage of the hearing, it appears to the Committee that the complaint should be amended, the Committee may, after hearing the parties and seeking advice from the legal assessor, make such amendments to the complaint as may seem necessary or desirable if it is satisfied that no injustice would thereby be caused.”

*The need for clarity in the complaint and any admissions*

36. Second, since the opportunity to admit or not admit the facts is integral to the process, the complaint must be formulated in such a way that enables the osteopath to make any factual admissions clearly and unequivocally. This is equally important whether the osteopath is minded to admit all the facts or only some of them: it is essential that there should be no ambiguity about what the osteopath has or has not admitted.

*Qualifying or supplementing admissions*

37. Third, the question was raised whether it was open to an osteopath to qualify or supplement his admission of facts by asserting other relevant facts, in a manner similar to offering a formal basis of plea in criminal proceedings. The Rules do not expressly make provision for this to be done but, to my mind, the natural vehicle to enable it to happen in a case relating to conduct is Rule 28.
38. Rule 28 applies after the procedure under Rule 27 has been followed as it provides that “the osteopath may *then*” take the steps outlined in that Rule. Where the facts alleged in the complaint have all been admitted, the allegation in the complaint will “remain”. It is therefore open to the osteopath to address the committee and to adduce evidence in his defence. Rule 28 provides a natural occasion for the osteopath to present evidence either to contradict the evidence that has been adduced on disputed facts or to put it in context in advance of the PCC making its decisions under Rules 29 (if required) and 30. If the osteopath chooses to do so, Rule 34 enables questioning by members of the Committee or the Legal Assessor, subject always to the requirement that the questioning must be fair.
39. Whether pursuant to Rule 28 or otherwise, even in a case where all the facts alleged in the complaint are admitted, it is essential that the PCC as masters of their own procedure should enable the osteopath to put forward their case, including by the adducing of evidence. In a case where not all of the facts are admitted, this is not least because of the absence of any opportunity for further fact finding between a determination of the facts under Rule 29 and its determination of UPC under Rule 30; but the need for an opportunity for the osteopath to put his case before the PCC is also imperative in a case where all the facts alleged in the complaint are admitted.
40. The complaint in a case relating to conduct will typically allege that the osteopath has been guilty of UPC “in that” the osteopath acted as alleged in the complaint. The issues for the PCC to decide will include both matters of fact and matters relating to whether the facts alleged (and proved) amount to UPC. Fairness dictates that the PCC should, so far as possible, identify all live issues at the outset, which in turn requires that the osteopath should be entitled to raise live and relevant issues of fact and that he should do so. Without prescribing precisely how and when this should be done, the PCC should be astute to ensure that all relevant issues going to its determinations under Rules 29 and 30 are clearly identified as early as possible; and the process of identification may well include the osteopath raising additional relevant matters and issues whether he admits all, some or none of the facts alleged in the complaint. Although there may be an overlap, facts and matters relevant to the PCC’s determinations under Rules 29 and 30 should be distinguished from general matters of mitigation which do not go to those determinations. Rule 33 provides the opportunity to advance matters that go solely to mitigation once the primary facts are found and a finding of UPC has been made.

41. If the osteopath takes the opportunity to support their case, either on the facts or on UPC, by adducing evidence, there is always the possibility that evidence may emerge that is adverse to their position. This may give rise to difficult decisions for the PCC, who may be required to decide whether it is fair to have regard to the evidence and, if so, whether the evidence should be reflected in an amendment to the complaint pursuant to Rule 24. I return to this point when considering Ground 2 of the Council's appeal later in this judgment.

*Alleging criminality in a case relating to conduct*

42. Fourth, the question was raised whether it may be relevant and permissible in a case relating to conduct which is brought under s. 20(1)(a) of the Act to include in the facts alleged to amount to UPC that the osteopath's conduct amounted to a criminal offence or that the osteopath was convicted of a criminal offence.
43. The first thing to say is that it is essential in all cases for the complaint to specify whether the case is brought under s. 20(1)(a) or s. 20(1)(c). In a case relating to conviction that is brought under s. 20(1)(c), it is the fact that the osteopath has been convicted of the criminal offence that may, on its own, open the way to the imposition of sanctions. In a case brought under s. 20(1)(a), what matters is the osteopath's conduct that is alleged to amount to UPC. In some cases it may be alleged against the osteopath both that they have been convicted and that they have been guilty of conduct that amounts to UPC. In such cases, Rule 43 maintains the distinction between cases relating to conviction and cases relating to conduct, providing that the PCC shall first proceed with every allegation that the osteopath has been convicted until it has completed the process required by Rule 26 (save for Rule 26(5)) and shall then proceed with every allegation that the osteopath has been guilty of UPC until it has completed the process required by Rules 27 to 32. It shall then take any proceedings required by way of mitigation and imposition of sanctions under Rules 33 to 39. It is therefore essential that, in any case where reference to criminal behaviour of a conviction is made, the Council should identify in the complaint precisely what is complained of under s. 20(1)(a) or s. 20(1)(c) respectively.
44. The question whether it may be relevant to assert in a complaint relating to conduct that the osteopath's conduct amounted to a criminal offence is likely to arise in a case where the Council does not allege that an osteopath has been convicted of an offence which justifies bringing a case against him under s. 20(1)(c) of the Act, for whatever reason. The most obvious example would be where the osteopath was not prosecuted. Another, which I shall consider separately below, would be where the osteopath was convicted but the conviction may not be relied on as such in order to ground a complaint under s. 20(1)(c). A purist might take the view that all that is necessary is to specify the conduct of which complaint is made and that, in a case relating to conduct, mentioning either the fact of a conviction or that the conduct amounted to criminal conduct added nothing. However, in my judgment, that may be too narrow a view. In principle, it seems to me that the fact that the conduct alleged against the osteopath amounted to a criminal offence (whether or not they were prosecuted or convicted) is capable of being a relevant factual consideration for the PCC when determining the issue of UPC in a case relating to conduct, for two reasons. First, and in general, if it were to be proved that a course of conduct amounted to a criminal offence, that would be a marker of the seriousness that society attributes to such conduct. Second, and in particular, it is an

express feature of upholding the reputation of the osteopath's profession that they should act within the law at all times: see paragraph 2.1 at [7] above.

45. Whether to assert in a complaint in a case relating to conduct that a specified course of conduct amounted to a criminal offence will be a fact-sensitive decision and over-prescriptive guidance is likely to be positively unhelpful. Two observations may, however, be apposite. At risk of repetition, what matters most is that the complaint in a case relating to conduct should specify clearly and unequivocally what the Council sets out to prove as matters of fact that singly or cumulatively amount to and justify a finding of UPC. Although it may in some cases be a material averment, those formulating the complaint should consider whether reference to a particular provision of the criminal law or to the conduct being an offence adds anything material to the primary facts that are being alleged as amounting to UPC. Where it does, it may be preferable to achieve maximum clarity by stating it as a separate factual allegation that is additional to and discrete from the primary allegations of fact setting out the osteopath's conduct.
46. My understanding is that, as in the present case, a complaint will routinely specify whether the allegation against the osteopath is brought under s. 20(1)(a) or s. 20(1)(c). If that is not universal practice, it should be; and in a case brought under both provisions it is essential that the complaint makes clear what is relied on under s. 20(1)(a) and s. 20(1)(c) respectively.
47. Where a person has been prosecuted to conviction and the court has imposed either a conditional or an absolute discharge, additional considerations arise, to which I now turn.

*Section 14(1) of the Powers of Criminal Courts (Sentencing) Act 2000 ("PCCSA")*

48. At the material time, and until repealed and re-enacted in substantially the same form in s. 82 of the Sentencing Act 2020 as part of the Sentencing Code, s. 14(1) of the PCCSA provided:

**"Effect of discharge.**

- (1) Subject to subsection (2) below, a conviction of an offence for which an order is made under section 12 above discharging the offender absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under section 13 above.

...

- (3) Without prejudice to subsections (1) and (2) above, the conviction of an offender who is discharged absolutely or conditionally under section 12 above shall in any event be disregarded for the purposes of any enactment or instrument which—



- (a) imposes any disqualification or disability upon convicted persons; or
- (b) authorises or requires the imposition of any such disqualification or disability.”

49. Two questions about the effect of s. 14(1) arise on the facts of this appeal. First, does s. 14(1) mean that it was wrong for there to be any reference in the complaint to the fact of the Registrant’s plea of guilty to the offence of having an offensive weapon in a public place and to the fact of his conditional discharge? Second, in a case relating to conduct, is the Registrant entitled to “go behind” his conviction, in the sense of requiring the Council to prove the facts on which the conviction was based?

*(1) Referring to a plea of guilty after a conditional discharge*

50. In *R v Statutory Committee of the Pharmaceutical Society of Great Britain ex p Pharmaceutical Society of Great Britain* [1981] 1 WLR 886, students at the London School of Pharmacy were involved in a fracas as a result of which they were convicted of an offence of unlawful wounding under s. 20 of the Offences against the Person Act 1861. They were conditionally discharged. The Pharmaceutical Society as a matter of practice dealt with disciplinary cases either as “conviction cases” or as “misconduct cases”, broadly reflecting the same division as applies under the Council’s Rules in the present case. The students were charged as a “misconduct case” in terms that bear comparison with the complaint in the present case, as follows:

“On behalf of the Statutory Committee of the Pharmaceutical Society of Great Britain, I give you notice that the committee have received a complaint from the Council of the Pharmaceutical Society of Great Britain, 1, Lambeth High Street, London S.E.1, from which it appears that on August 3, 1978, you were before the Central Criminal Court in London on a charge of causing grievous bodily harm to a Mr. David Thompson. You pleaded not guilty. You were made subject to a conditional discharge order for two years, and ordered to pay £50 compensation and £50 costs towards the cost of the prosecution. The council allege that you may have been guilty of such misconduct as to render you unfit to be on the Register of Pharmaceutical Chemists.”

51. The Statutory Committee ruled that s. 13(3) of the Powers of Criminal Courts Act 1973 (the statutory precursor of s. 14(1) PCCSA 2000) required it to disregard the convictions and that the charge was accordingly bad in law. The Pharmaceutical Society brought Judicial Review proceedings. The students submitted that, although the word “conviction” was not used in the letter of complaint, it was clear that the conviction was to be relied upon. The Divisional Court rejected that submission at 893E:

“What was to be relied upon — and the letter makes it perfectly plain — were the facts which lay behind the conviction, namely, the use by these young men of disastrous force upon the body of the injured student.

My conclusion is that on the wording of section 13 there was nothing to prevent the allegation of misconduct being supported by the proof of facts which were adduced in the first instance at the Central Criminal Court before Judge Buzzard. There is nothing in section 13 to suggest that the underlying facts in that way should be disregarded. Apart from any other reasons, it seems to me, if it had been intended that not only the conviction but the facts underlying the conviction should be disregarded in any future proceedings, then the Act should have said so and it did not.”

52. In reaching this conclusion, the Divisional Court referred to and relied upon the decision of the Court of Appeal Criminal Division in *R v Harris* [1950] 2 All ER 816, a decision on 12 (1) of the Criminal Justice Act 1948, a statutory precursor to s. 14(1). The Divisional Court cited the headnote, which stated:

“Under section 12 (1) of the Act of 1948 the conviction of December 13, 1949, was not to be regarded for the purpose of another case as a conviction, and, therefore, the certificate of conviction should not have been accepted in evidence, but evidence would have been admissible by a witness who had heard the appellant confess in court to the charge of having been found in possession of housebreaking implements or had heard him convicted of that offence and conditionally discharged.”

53. The Divisional Court also cited from the judgment of Humphreys J who drew the distinction between relying on the conviction and proving by admissible evidence (including evidence of a formal admission) the facts that had underlain the conviction. The former was prohibited; the latter was not.
54. A similar distinction had been drawn by the Privy Council in *Simpson v General Medical Council*, *The Times*, November 9, 1955, upon which the Divisional Court also relied. There, after referring to s. 12 of the Criminal Justice Act 1948 and identifying that the procedure being followed by the General Medical Council in that case was in substance a case relating to conduct, Viscount Simonds said:

“It was therefore not open to the committee whose duty it was to review the conduct of the appellant to proceed upon the footing that he had been convicted of a crime. It was for them to determine after due inquiry whether he had been guilty of infamous conduct in any professional respect and, if they so determined, then, if they saw fit, to direct the registrar to erase his name from the register.”

In furtherance of that enquiry it was appropriate that depositions of certain witnesses taken at the magistrates’ court should be put in as evidence of the underlying facts that the General Medical Council set out to prove.

55. These authorities establish that s. 14(1) does not prohibit reference in a case relating to conduct to alleged facts that are said to amount to UPC and to criminal conduct; nor does it prohibit proving those facts (including that they amount to criminal conduct), provided that, where the Registrant has been (a) prosecuted and (b) convicted and (c) made subject to a conditional discharge, the Council may not refer to or rely on the fact

of the conviction itself as evidence to prove (or assist in proving) the alleged facts or that they amount to criminal behaviour. It is for that reason that a case where the osteopath has been convicted and made subject to a conditional discharge cannot be brought as a case relating to conviction. Since such a case will have been brought as a case relating to conduct, the procedure that must be followed is that set out in Rules 27-33.

56. In my judgment the answer to the first question is clear. Where (a) an osteopath has been convicted of an offence, and (b) a conditional discharge has been imposed, and (c) the Council brings disciplinary proceedings against the osteopath, it is not open to the Council to rely upon the fact of the conviction as such. In practical terms, that means that the Council may not proceed by a case relating to conviction. However, s. 14(1) does not prevent the Council from proceeding against an osteopath by way of a case relating to conduct, the conduct in question being the conduct which provided the reason for his prosecution and the basis for his conviction. But in a case relating to conduct, it is for the Council to allege and prove the facts that are said to amount to UPC. If the facts alleged are not admitted by the osteopath, they must be proved by the Council. The Council cannot prove the facts by reference to the conviction as such. In other words, the council cannot rely upon the fact of the conviction as proving the elements of the conduct which is said to amount to UPC; but they can prove the facts by reference to any properly admissible evidence.
57. As I have said, the fact that conduct in fact amounted to the commission of a criminal offence may itself be a relevant fact supporting a finding of UPC whether or not the Registrant was either prosecuted or convicted: see [44] above. It is therefore open to the Council in a case relating to conduct to allege and prove relevant facts including that the underlying conduct complained of amounted to a criminal offence. Admissible evidence may include the fact that the osteopath has on a previous occasion admitted either all or some of the material facts. Such an admission could be made by an osteopath pleading guilty to a criminal charge that incorporates allegations of some or all of the facts relied upon by the Council as amounting to UPC. It could also be made in other circumstances e.g. in responses to the Council. The fact that an osteopath pleaded guilty to a criminal charge may also be admissible evidence that the conduct alleged against them amounted to criminal conduct, because it amounts to an admission against interest of the essential elements of the offence with which they were charged.
58. While I accept that the fact of a previous admission of some or all of the matters alleged in a case relating to conduct to amount to UPC may be admissible evidence of the facts alleged, it does not necessarily follow that a previous admission will be sufficient and determinative. Clearly, a formal admission made in the context of criminal proceedings or in other circumstances is likely to be substantial evidence of the facts admitted; but it would be wrong to rule out the possibility that an osteopath who has made admissions in the past may wish to withdraw them or explain them so that their evidential potency is either reduced or nullified. The different procedural rules for cases relating to conviction and cases relating to conduct demonstrate the point. Under Rule 26, once a conviction is proved it speaks for itself provided the osteopath who is the subject of the disciplinary proceedings was the person convicted; under Rules 27-33 the burden is on the Council to prove the facts it has alleged in the complaint.
59. The need for the Council to prove the facts that are alleged to be material in a case relating to conduct emphasises once more the imperative for the complaint to be

specific and to be in a form that enables the osteopath both to understand the case they have to meet and to make clear and specific admissions if so advised. Only by doing so will it be possible to identify with precision the factual issues in the case and the disputed facts that it remains for the Council to prove. This imperative is, as I have explained, integral to the different procedures for cases relating to conduct on the one hand and cases relating to conviction on the other.

60. The Council submitted that the structure of and exceptions to the Rehabilitation of Offenders Act 1974 [“the 1974 Act”] supports its approach. However, I agree with the Registrant that it is neither necessary nor desirable to lengthen this judgment with a detailed examination of the implications of the 1974 Act, for the simple reason that the Council in this case brought the proceedings against the Registrant as a case relating to conduct. The consequence of that was that it was not attempting or entitled to rely upon the fact of the conviction itself pursuant to Rule 26 but was obliged to prove the facts alleged in the complaint and whether they amounted to UPC in accordance with Rules 27-32.

(2) “Going behind” a conviction

61. Turning to the second question, the position adopted by the Council shifted shortly before the hearing. Before the Judge and in its original skeleton argument for this appeal, the Council submitted that the fact of a conviction was an “immovable object”, which an osteopath was not permitted to go behind or question. The high point of this submission before the Judge was that it is never open to a regulatory committee to go behind the findings of a criminal court, relying upon *Kirk v The Royal College of Veterinary Surgeons* [2004] UKPC 4, where Lord Hoffmann said at [6]:

“ ... their Lordships must state the legal effect of a statute such as section 16(1)(a) of the Veterinary Surgeons Act 1966, which entitles the Disciplinary Committee to find that a conviction for a criminal offence renders a registered veterinary surgeon unfit to practise. The effect of the statute is to preclude the practitioner from denying the truth of any facts necessarily implied in the conviction. As Viscount Simon LC said in *General Medical Council v Spackman* [1943] AC 637, 634–635:

“... the decision of the council is properly based on the fact of the conviction, and the practitioner cannot go behind it and endeavour to show that he was innocent of the charge and should have been acquitted.”

As the citation makes clear, *Kirk* was a case under the relevant legislation relating to conviction and not a case relating to conduct (as I have been using those terms).

62. By a supplementary skeleton argument and at the hearing of the appeal the Council submitted that it might be possible for an osteopath to go behind the facts of a conviction, but only in “exceptional circumstances.” Leaving on one side, for the moment, the effect of s. 14(1), the Council’s present submission recognises that s. 11(1) of the Civil Evidence Act 1968 establishes the general proposition that in any civil proceedings the fact that a person has been convicted of an offence by or before any

court in the United Kingdom shall be admissible in evidence for the purpose of proving that the person committed that offence. Such evidence is not made conclusive by the statute because s. 11(2)(a) provides that in any civil proceedings in which by virtue of the section a person is proved to have been convicted of an offence “he shall be taken to have committed that offence unless the contrary is proved.” In the context of disciplinary proceedings such as the present, the Council also recognises that there are some professions where a provision conferring jurisdiction to conduct the disciplinary proceedings expressly provides that proof of the fact of a conviction shall be conclusive evidence of the offence committed: see, for example, rule 34 of the General Medical Council (Fitness to Practise) Rules Order of Council 2004. There is no such provision in relation to osteopaths.

63. Similar questions arose in *Munir v HMRC* [2021] EWCA Civ 799, where the question was whether the First-tier Tribunal had been wrong to refuse to strike out an appeal against an assessment of duty or excise. On the facts, the appellant had pleaded guilty to a charge that involved acceptance that he had been holding or involved in holding excise goods on which no duty had been paid.
64. In the course of a wide-ranging judgment with which Lewison and Arnold LJ agreed, Edis LJ reiterated certain well-established principles. Where an unequivocal plea of guilty is entered by a person who has the benefit of legal representation, that plea is an admission against interest and is likely to be weighty evidence. On the face of it, a criminal conviction is compelling evidence of guilt in cases where the civil standard of proof is engaged, unless there is some compelling evidence to show that it would be wrong to accept it as such. A person’s evidence about why they pleaded guilty when they did may involve a waiver of privilege and may call for close scrutiny. The Court has a residual discretion and power to refuse to entertain a case that amounts to an abusive collateral attack upon a subsisting conviction: see [31], [32], [35] and [41] of *Munir*. These principles are not in doubt and are of general application. But what is important for the present case is that they do not involve a black-letter rule that a person may *never* seek to go behind a conviction even where that conviction was upon their own plea of guilty.
65. These principles are most directly applicable to a case relating to conviction. In that context we were referred to cases indicating that, in a case where the allegation is that the fact of conviction renders the person in question unfit to pursue their practice, exceptional circumstances are required before they will be allowed to go behind the fact of their conviction or to seek to prove that they were innocent. Where, as in the present case, the Council proceeds with a case relating to conduct, the position is different though the general principles remain relevant. There may be circumstances in a case relating to conduct in which it would be an abusive collateral attack upon a conviction by a court of competent jurisdiction for an osteopath to seek to go behind it. But that will depend on all the circumstances of the case including, in particular, the precise way in which the complaint is formulated and the nature of the case and evidence being advanced by the osteopath. I would therefore answer the second question by saying that there is no black-letter rule of law or procedure that prevents a respondent to a case relating to conduct from seeking either to explain or “go behind” the facts on which a conviction is based. That said, it will always be a matter for the body to whom the respondent’s arguments are addressed to determine whether any and, if so, what weight should be attributed to them. It should do so bearing in mind all the

evidence that is available to it and that there may be circumstances in which such an argument should be dismissed because it amounts to an abusive collateral attack on the prior decision of a court of competent jurisdiction. Turning more specifically to the procedural framework established by the Rules, the Committee should also bear in mind that, in a case relating to conduct, the burden is on the Council to prove the facts that are alleged in the complaint to amount to UPC.

*Section 1 of the Prevention of Crime Act 1953*

66. Section 1 of the Prevention of Crime Act 1953 provides:

“(1) Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence, ...

...

(4) In this section ... “*offensive weapon*” means any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him or by some other person.”

67. The elements of the offence of having an offensive weapon in a public place are well known and do not require detailed explanation here. Three points are, however, relevant and common ground. First, a contingent intention to use an article for causing injury, even in self-defence, is sufficient to satisfy the words “intended by the person having it with him for such use... .” Second, in such circumstances the burden is upon the defendant to prove that they have lawful authority or reasonable excuse. Third, fear of an imminent attack *may* be a reasonable excuse. Whether an excuse is reasonable would be a question of fact to be decided on all relevant evidence. It would not be a reasonable excuse for a defendant to arm himself for the purposes of defending himself against unlawful violence which he is about to create or for which he would be responsible.

68. With these principles in mind, I turn to the facts of the present case.

**The factual background – the incident and criminal proceedings**

69. Everyone concerned with this case has recognised that the factual background is highly unusual. It was set out concisely by the Judge below at [8]-[14], as follows:

“8. [The events] relate to the night of 10th March 2018. It was a difficult time; following a family tragedy two years before, his teenage daughter developed behaviour and lifestyle problems, including drug taking. That night, she arrived home very late, dishevelled, distraught and apparently intoxicated by drugs. She went to bed and fell into deep sleep. Her phone rang persistently. Eventually, Mr Wray answered it. The caller was unknown to him (he later discovered it was a young man with whom his daughter was

in a relationship). The phone conversation was shocking; the caller said he had attacked and hurt Mr Wray's daughter and would do it again. The caller suggested Mr Wray come to meet him locally, there and then, to discuss matters "man to man".

9. Mr Wray did so. He said afterwards how much he regretted it. But he said he was highly distressed and fearful about his daughter's state, anxious to know more about her intoxication. He could not wake her. He had extensive experience mentoring young people and thought he could handle a conversation to find out the facts and decide what to do next. His son tried to dissuade him. But they both set off in the car, the son anxious for his father's safety.
10. When they approached the place identified by the caller, they were surrounded by a group of young men who began hitting the car. He stopped the car. Inside was some sports kit which Mr Wray used in his regular coaching activities with young people. He picked up a softball bat before getting out of the car. He said he thought it might discourage the group from attacking him and might be needed for self-defence. He did not brandish it, but held it to his side. As soon as the two of them got out of the car, they were set upon. Someone snatched away the bat and hit Mr Wray over the head with it. He needed stitches, and suffered concussion and psychological after-effects<sup>1</sup>.
11. The police saw that Mr Wray had been the victim of an attack and prepared to take a witness statement. He told them everything that had happened. When the police heard about the bat, however, they decided to charge him with having an offensive weapon, contrary to Section 1(1) of the Prevention of Crime Act 1953. That provides that anyone who, without lawful authority or reasonable excuse, has with them in a public place any offensive weapon is guilty of a criminal offence. By section 1(4), an offensive weapon means 'any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him'.
12. Mr Wray says his solicitor at the time advised him to contest the charge, but on the day of the first preliminary hearing before the magistrates, the solicitor changed his advice at the last minute and recommended an early guilty plea. He says he was advised that, having admitted to possession of the bat, he faced a prison sentence after a contested trial. He had moments to decide, and went with the new advice. He pleaded guilty as charged. There was no other evidence

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<sup>1</sup> I would add that his unchallenged evidence was that he was off work for some months as a result of the attack.

before the magistrates. They accepted his plea and gave him a six-month conditional discharge.

13. Preparing for his PCC hearing a few months later with a new legal team, he was told that the advice to plead was wrong, and he had had a perfectly good defence to the charge all along. ...
14. He applied to appeal his conviction, on the basis that his plea was equivocal and he had been wrongly advised. His application was rejected as being too far out of time.”

### **The factual background – the proceedings before the PCC**

70. The Registrant reported himself and the fact of and circumstances leading to his conviction to the Council. In answer to a request from the Council he said on 3 July 2019 that his car had been attacked, he had grabbed the bat as he got out of his car and that he did so for protection; it was snatched from him and he was hit multiple times on his head and face. His son protected him from further damage. He and his son were both hospitalised. The police arrived and arrested two of the four assailants.
71. On 26 June the Council wrote to the Registrant giving him notice of the hearing and served the final version of the complaint and a short bundle of documents upon which it said it intended to rely. The complaint was in the following terms:

“The allegation is that Mr Wray (the Registrant) has been guilty of Unacceptable Professional Conduct, contrary to Section 20(1)(a) of the Osteopaths Act 1993, in that:

1. On 10 March 2018, at Genotin Road, Enfield, EN1, without lawful authority or reasonable excuse, the Registrant had with him in a public place an offensive weapon, namely a softball bat, contrary to Section 1(1) of the Prevention of Crime Act 1953.
  2. On 27 February 2019, at Highbury Corner Magistrates Court, the Registrant pleaded guilty to the above offence and;
    - a. was conditionally discharged for a period of 6 months; and
    - b. made to pay a surcharge of £20 to fund victim services.”
72. It is and has always been common ground between the Council and the Registrant that this complaint was the initiation of a case relating to conduct, to which s. 20(1)(a) of the Act and Rules 27-33 applied; and that it was not a case relating to conviction to which s. 20(1)(c) of the Act and Rule 26 applied.
  73. The hearing was on 29 July 2020. In advance of the hearing, the Council served its opening skeleton argument in which it recorded its understanding that the Registrant



accepted the factual particulars 1 and 2 in the complaint but disputed that the accepted facts amounted to UPC. A footnote on the first page of the skeleton argument said that:

“a conditional discharge does not constitute a conviction for the purpose of Section 22 of the Act. ... The [PCCSA] section 14 confirms that a conditional discharge “shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made... .””

Under the heading “Allegation” the skeleton argument provided an account of the incident based upon the Police form MG5, which was consistent with what the police had recorded in that document as being the Registrant’s account in interview.

74. The skeleton argument submitted to the PCC on behalf of the Registrant, under the heading “Allegations” said:

- “8. The fact that the Registrant received a conditional discharge is accepted. The matter of whether or not he carried an offensive weapon contrary to the legislation is controversial but the Registrant accepts that he cannot deny that he did plead guilty at the Highbury Magistrate’s Court in 2018 following his then lawyer’s advice.
9. The Registrant accepts that he now cannot go behind that decision and that pleading.”

75. Under the heading “Facts” the skeleton argument said:

- “16. The Registrant accepts that he was holding, at one time, the soft ball bat.
17. He accepts that he was traumatised by the knowledge that his daughter may have been [assaulted] or at least drugged. He acted out of instinct as a father and went to see the man who claimed to have assaulted his daughter.
18. There is no evidence apart from uncorroborated, unsigned, unsworn statements that the Registrant did anything other than attend where his daughter’s alleged assailant was situated and he was attacked and badly injured. He does not deny that he pleaded guilty, although wrongly in hindsight, to carrying a weapon.”

76. By a further skeleton argument before the hearing but evidently after receipt of the Council’s skeleton argument, the Registrant provided further information, as follows:

- “1. The Registrant has admitted to the factual allegations 1 and 2 but not to [UPC].
2. [The Registrant] accepts what is said [in the Council’s skeleton argument summary of the facts under the heading “Allegation”] save that he ... says he held the bat to his side.

[The Registrant] recognises that his attempt to appeal the decision of the Court was refused so he has to accept allegation 1 therefore for that reason recognising that he cannot go behind the decision to conditionally discharge [him].”

77. At paragraph 4 of the further skeleton, the Registrant accepted, with express reference to the *Pharmaceutical Society of Great Britain* case that:

“even when a Criminal Court has given a practitioner an absolute or conditional discharge for the offence, the facts underlying the “conviction” may nevertheless be adduced in evidence in disciplinary proceedings to support an allegation that the practitioner’s fitness to practise is impaired by reason of misconduct.”

78. At paragraph 13 of the further skeleton the Registrant commented on the facts, contending that the PCC should closely read his and his son’s statements, which it was said that the Solicitor to the Council was not contesting. He emphasised the horror of the situation in which he found himself, reiterated that he did not want to fight with anyone and submitted that he was a person of unblemished character put into the most unenviable of positions as a father and who acted instinctively. It is not necessary or desirable to set out the details of what the Registrant was told when he answered his daughter’s phone; but by any standards they were exceptionally distressing.

79. The Registrant’s witness statement contained a table in which he set out his response to the allegations against him. He denied UPC. In relation to paragraph 1 of the complaint he said “Not admitted in so far as the facts are concerned but I was advised to plead guilty so I did. I have been told subsequently by my current lawyers that I should not have but it is too late now.” The allegations under paragraph 2 of the complaint were admitted. Dealing specifically with what happened when they got to Enfield Station and the group of men started hitting his car, the Registrant said:

“31. I was scared for both of us, my son and I. In the back of my car ... was a softball bat which I used in my sports coaching. I reacted automatically in seeing that we were being attacked. I grabbed the bat as a deterrent to defend myself if necessary. It was an instant reaction. I did not feel I could drive on. I got out as did my son.

32. I was holding the bat half way down the shaft and at my side (not swinging it) so that it was not threatening. I see the police have noted that I was pointing the bat. I do not recall I was. I was concussed by the assault upon me and my memory is not the best that it could be. I know that I went forward and asked if one of the men was “T” and, at this point, my son stepped in front of me to protect me. He started talking to the men and, as I leaned forward to talk to them, one of them grabbed the bat from me and proceeded to attack me by hitting me over the head with the bat and kicking me in the face as I fell.

33. I did not even have the chance to defend myself. It was never my intention to fight.
34. I repeat the softball bat [was] as a deterrent and to protect myself if necessary. There was not any thought of using it as an offensive weapon.”
80. Later in the statement the Registrant said that the initial advice from his lawyer had been that as he was not carrying an offensive weapon with a view to harming anybody, he should plead not guilty. On the morning of trial after speaking to the prosecutor, his lawyer told him that if he pleaded not guilty and was convicted he could find himself in prison for six months. His lawyer “told” him to admit guilt and so he pleaded. On the basis of advice received from subsequent lawyers he now understood that he should have pleaded not guilty. He had appealed to the Crown Court but his appeal had been held to be out of time. In conclusion he said:
- “Professionally I accept that I should have reported the conversation to the police or even taken my daughter to a police station. Unfortunately one cannot retrace one [sic] steps and certainly I hope never to face this terrible experience again.”
81. It can be seen from this summary that the position being adopted by the Registrant to the facts alleged in the complaint was not clear before the hearing. He asserted in the first skeleton argument that whether he was acting contrary to the legislation was “controversial”, though he did not deny having pleaded guilty. In the second skeleton it was said that he admitted the factual allegations set out in paragraphs 1 and 2 of the complaint (but not UPC). He said that he had to accept paragraph 1 because his appeal had been dismissed; and he also accepted that the Council was entitled to adduce the facts underlying the “conviction” as evidence in support of the allegation that his fitness to practise was impaired by reason of misconduct. Finally, in his witness statement he said that he did not admit the facts in paragraph 1 of the complaint “but I was advised to plead guilty so I did.”
82. When the hearing commenced, the chairman asked if there were any preliminary matters. The solicitor then acting for the Registrant immediately said that “our position is that we accept all the facts. ... It may just help me to preface that because in the witness statement it looks like we were arguing about one point, but we accept all the facts. We do not accept UPC.” The “one point” was evidently paragraph 1 which was not admitted in the table in the witness statement. The chairman then correctly identified that the first step was to read the allegation after which it would be for the Registrant’s side to state whether any factual particulars are admitted. The complaint was duly read and, on enquiry by the chairman, the Registrant’s solicitor confirmed the position by saying “Each of the two factual particulars are accepted, sir.” The chairman then formally recorded that the factual particulars 1 and 2, and 2 in its entirety, were admitted by the Registrant and that the facts were found proved. He then indicated that the next step was to move on to UPC.
83. It is convenient to interpose at this point that what had been done was in accordance with Rule 27(1) and that the Registrant had clearly and unequivocally confirmed acceptance of all the facts alleged in the complaint.

84. What happened next was that the solicitor to the Council proposed that he should provide a brief opening to the case after which the Registrant would give evidence, with the Solicitor to the Council reserving his submissions on UPC until after the Registrant had given his evidence. The Registrant's solicitor confirmed that he had discussed this with the solicitor for the Council and that they both felt that it was the best way forward. The Legal Assessor advised that the more normal course would be for any submissions on UPC and submissions from the solicitor to the Council to go after the Registrant's evidence; but he said that, if the two legal representatives had agreed that it would be helpful to hear a brief opening before hearing the Registrant's evidence and then to hear final submissions thereafter, there was nothing wrong with that. With the agreement of the members of the committee, the proposed course was therefore adopted.
85. The Committee, with the agreement of the Registrant, therefore departed from the procedure as laid down by the Rules. As set out at [20] above, Rule 27(5) contemplates an opening by the Solicitor in a case where some facts are not admitted and envisages that the opening will be followed by the Council adducing evidence on the facts which have not been admitted. However, there can be no intrinsic objection to taking the course that was adopted here, particularly where it was agreed to by the Registrant.
86. In opening the case, the solicitor to the Council referred to the fact that the Registrant had pleaded guilty to an offence of possessing an offensive weapon and that "in doing so, under the Act, accepted that the softball bat was an offensive weapon and he had no lawful authority or excuse for possessing that weapon." He referred to the passage in the Registrant's statement about carrying the bat as a deterrent "and, consistent with this plea, must acknowledge the weapon as a deterrent would not constitute a lawful authority or reasonable excuse for having that bat." He explained that the conditional discharge "does not constitute a conviction for the purposes of Section 22 of the Osteopaths Act, and as such the allegation is one of UPC. As you have heard this morning, the factual particulars are accepted and the issue at this stage is whether or not that conduct amounts to UPC."
87. The Registrant then gave evidence. He confirmed the contents of his statement and affirmed his previous good character. When cross-examined, he was taken by the Solicitor to the Council to the passage in his witness statement that did not admit the factual particulars in paragraph 1 of the complaint. His solicitor immediately interjected that those particulars had now been admitted and were admitted. The Registrant confirmed the position, saying "Yes, on advice of [my solicitor] I admit it."
88. The following morning, the Committee announced that UPC had been found. It then heard submissions on sanction from both sides and received testimonials in support of the Registrant. After deliberation, the Chairman announced that the sanction would be admonishment with reasons to follow.
89. The written reasons of the PCC recorded at the outset that the allegation against the Registrant had been that he had been guilty of UPC "contrary to Section 20(1)(a) of the [Act]" and set out the terms of the Particulars alleged in the complaint; that he had admitted the entirety of the Allegation "namely Particulars 1 and 2"; and that, in accordance with Rule 27(1) of the Rules, the Committee found the facts as alleged in the allegation proved. In its record of the evidence it included that:

“11. On arriving at the location ... the Registrant got out of his car when he was prevented from driving on by a small group of young men, who had been hitting the car. He armed himself with the bat on the spur of the moment as a deterrent and in an effort to diffuse [sic] a potentially aggressive situation. He acknowledged that there were about a dozen members of the public nearby who were customers of a wine bar.”

90. The PCC recorded the advice that it had correctly been given about making findings of UPC. That advice included that there was no burden of proof, not every falling short of the standards amounts to UPC, that the allegation should amount to conduct that can be considered deplorable and therefore worthy of the moral opprobrium and the publicity which flows from a finding of UPC, and that the bar for a finding of UPC should not be set so high as to make the lowest form of sanction meaningless: for UPC to be found, the conduct must be serious but not of such gravity that the lowest powers of sanction would be inappropriate.

91. The PCC’s reasoning that led to its finding of UPC was contained at paragraphs 30-38 of their decision, in a passage that was cited in full by the Judge on appeal:

"30. The Committee was advised in relation to 3 further points following further submissions by both parties as to the Law. First, it was advised that the criminal offence of possession of an offensive weapon was not an offence involving violence, but that the definition of an offensive weapon as a matter of law was as follows: "any article made or adapted for use to cause injury to the person, or intended by the person having it with him for such use." In this case the conduct admitted by the Registrant was that he picked up the softball bat as a deterrent or for self-defence. Second, the Committee was advised that the case of *Samuel v RCVS* [2014] UKPC 13 was authority for the proposition that the context and events leading to the offending behaviour should be considered in assessing whether or not the conduct amounted to UPC. Third, for the purposes of establishing whether or not UPC was made out, an assessment of the evidence leading to the commission of the offence did not extend to those matters that were properly to be considered matters going solely to personal mitigation, for example the Registrant’s voluntary work as a church organist.

31. In reaching its decision on the question of UPC the Committee read and carefully considered all the material that had been put before it, whether in written or oral form.

32. The Committee considered the context in which the offence had taken place. It accepted the evidence the Registrant had given regarding his motivation for going out on the night in question to meet "T" although the Committee noted that in his written evidence the Registrant did accept a level of anger had clouded his judgment. The Committee considered the Registrant had been subjected to extreme provocation by "T"

on the phone before making the decision to go and meet him, and that his remorse in making the decision to handle the matter as he had done, was genuine. The Committee reminded itself that there was no evidence before the Magistrates' Court, nor was there any evidence before it today that would suggest the Registrant behaved in an overtly aggressive manner when he stepped out of his vehicle, over and above his decision to equip himself with the softball bat. It accepted that the Registrant made no attempt to move towards "T" or any of his companions and that his intention in picking up the bat was as a deterrent or for self-defence. The Committee therefore did not consider that paragraph 2.3 of Standard D17 was engaged in the particular circumstances of this case. Nonetheless this did amount to a criminal offence.

33. Whilst the Committee accepted that at the time the Registrant's judgment may have been clouded by anger and concern for his daughter, it considered that the act of equipping himself with the softball bat in the circumstances of a potentially aggressive confrontation escalated the situation.

34. The Committee noted that the Registrant had chosen not to stay with his daughter and avail himself of the support of other healthcare professionals or the Police, rather choosing to meet "T" in spite of his son's attempts to dissuade him from that course.

35. The Committee had some sympathy for the Registrant. The circumstances he found himself in were exceptional, were upsetting and were extremely stressful. It accepted that his level of criminal culpability was towards the lowest end of the scale.

36. However, in spite of the prevailing circumstances, the Committee considered that the Registrant's behaviour in taking out a softball bat in a public place, which amounted to the criminal offence of possession of an offensive weapon, in front of bystanders, outside a crowded wine bar in the early hours of a Saturday morning, was a serious departure from the standards expected of a registered osteopath. It had the clear effect of escalating and antagonising a potentially dangerous situation, and could and did lead to consequences outside the Registrant's control. The Committee noted the only person to suffer any serious injuries that evening was the Registrant, and that police had treated him as a victim of crime until his own frank admission of possession of the softball bat.

37. In spite of the sympathy the Committee had for the Registrant's position, it could not escape the conclusion that equipping himself with a softball bat in a public place, in front of a crowded bar, in a potentially volatile situation, and thereby committing a criminal act, would attract a degree of moral

opprobrium from an objective bystander, knowing all the facts. Further, the Committee considered that the behaviour would be considered deplorable by other practitioners knowing all the facts. It was behaviour that did not meet the standards required of a registered osteopath, in particular Standard D17 of the OPS, and fell far enough below those standards so as to amount to UPC in all the circumstances. In so finding the Committee reminded itself of the case of *Shaw v GOsC [2012] EWHC 2317*, in which the Court found that for UPC to be proved the conduct in question had to be serious but not so serious that the lowest form of sanction would not be appropriate.

38. The Committee therefore found UPC proved."

92. After setting out the various submissions that had been made on sanction, the PCC settled on the lowest sanction, namely admonishment. In doing so, one of the aggravating features that it identified was its acceptance that the act of the Registrant in stepping out of his car having equipped himself with the softball bat "did, in the circumstances, amount to the commission of a criminal offence."

### **The factual background - the appeal to the High Court**

93. The Registrant's Grounds of Appeal to the High Court were drafted by Ms O'Rourke QC, who had not appeared before the PCC. The Grounds challenged the finding of UPC on the basis that it was wrong in law or perverse. The Grounds were carefully framed and identified relatively narrow issues. In summary, the main contentions raised by the Registrant were that:
- i) The PCC went beyond the facts admitted by the Registrant or found proved in the first stage of the investigation, specifically as to there being bystanders and witnesses to the events and as to their view/reaction and response [to which I will refer generally as "the additional facts"] when that was not part of the Council's case at the factual stage;
  - ii) The Registrant was unfairly asked by the PCC Chair about the additional facts during the UPC stage when the relevant facts had already been admitted at the fact-finding stage and the relevant facts did not include the additional facts;
  - iii) The PCC wrongly relied upon the additional facts as part of a public confidence consideration when there was no evidence from any bystander or in the police report to support them;
  - iv) Public confidence should not in any event be measured by reference to the reaction of individual bystanders and witnesses but was to be assessed by reference to a more objective view of what members of the public would think if they were in possession of the full facts relevant to the incident;
  - v) There were so many inconsistencies in the police report that the PCC should only have relied upon the facts alleged in the complaint and admitted by the Registrant;

- vi) The Registrant's conduct had no connection with his practice as an osteopath;
  - vii) The PCC erred in dealing with the event as a criminal offence at all (and declaring it so in its determination) when the charge was not brought as one of criminal conviction under the Rules because of the conditional discharge, it being alleged that the PCC confused itself on the point and the legal relevance of the conditional discharge;
  - viii) The evidence submitted by the Registrant about his assailants and the injuries he had suffered were such that no reasonable PCC could have reached a conclusion of UPC in all the circumstances.
94. Two points should be noted at this stage. First, we do not have a full transcript of the proceedings. Specifically, we do not have a transcript of any questioning of the Registrant by the Chair of the PCC. Since the hearing, we have been provided with further information from which it appears that the Registrant was questioned by the Chair. In the course of that questioning, he told the PCC that he had stopped his car near a wine bar, and that there had been a lot of people around, including cabs, doormen and customers from the wine bar. On the Registrant's behalf, Ms O'Rourke accepts that this was said. However, there remains a dispute about whether bystanders were nearby and watching or observing what happened.
95. Second, Ms O'Rourke frankly accepted in her submissions to us that the possible scope of any appeal to the High Court was limited by the fact that the Registrant had unequivocally accepted the facts alleged in the complaint, including the allegations in paragraph 1 of the particulars that (a) he had no reasonable excuse for acting as he did and (b) what he did was contrary to s. 1(1) of the Prevention of Crime Act 1953: in other words, what he had done amounted to criminal behaviour. This concession was rightly made by Ms O'Rourke. It is a peculiar and highly relevant feature of the case as it came before the PCC that, despite asserting that he had been wrong to plead guilty before the magistrates, the Registrant unequivocally accepted the facts alleged against him in the complaint, including that his behaviour had in fact amounted to the criminal offence to which he pleaded guilty before the magistrates: see [74]-[82] above. This frank inconsistency in his position lies at the heart of the problems that have arisen.
96. The Registrant's skeleton argument for the hearing before the Judge largely followed the structure of the Grounds of Appeal. It characterised the examination of the Registrant by the Chair as occurring after the conclusion of the fact-finding stage, by which time the Registrant submitted the facts should have been regarded as closed, and limited to the facts alleged in the complaint and admitted by him in full. Very much as a second string (as it appears to me) the Registrant retained the submission that the PCC had been confused in its terminology and had treated the case as one relating to conviction rather than one relating to conduct.
97. The Council's primary submission before the Judge, as set out in its skeleton argument, was that "the Appellant's appearance before the PCC was pursuant to a guilty plea to the offence of possession of an offensive weapon. It is trite law that it is not open to a regulatory committee to go behind the findings of a criminal court." The Council cited *Kirk v The Royal College of Veterinary Surgeons* in support, as to which see [61] above. It submitted that the PCC "were bound by the Appellant's guilty plea before the Magistrates' Court". The skeleton argument drew the distinction between the



Registrant's plea of guilty and the account that he had given to the Committee; and it submitted that the two were irreconcilable. Responding to the Grounds of Appeal, the Council accepted that no evidence had been called at the fact-finding stage. It regarded the Registrant's giving of evidence and being questioned as happening "at the UPC stage" and relied upon Rule 34 as the enabling provision. It opposed the remaining grounds on the basis that nothing unfair occurred, the PCC was entitled to take all relevant matters into account, and that it applied the correct test, namely what an objective bystander who knew all the facts would make of the matter and whether the Registrant's behaviour would be considered deplorable by other practitioners knowing all the facts.

98. Neither party referred the Judge to the authorities dealing with the proper approach to a case relating to conduct after criminal proceedings have resulted in a conditional discharge, to which I have referred at [48] above.

### **The judgment below**

99. The Judge provided a judgment that was closely reasoned and which concentrated to a substantial extent upon the submission that the PCC had wrongly treated the case as if it were one relating to conviction rather than one relating to conduct. In a detailed analysis the Judge described the case as appearing "hybrid": the conviction itself was not alleged but, the Judge said, the complaint "did not lay out a set of facts and an express allegation of UPC. It simply cited the criminal charge brought against [the Registrant], and the historic facts of his plea and (spent) sentence." She found this hard to reconcile with s. 14(1) of PCCSA: "the allegation may not use the word "conviction", but since it recites charge, plea and sentence, it might as well have done so." At [23] the Judge addressed the very problem that others had confronted and resolved previously, but without the assistance of being referred to the relevant authorities:

"Mr Faux says on behalf of the GOsC that the effect of s. 14 is only to wipe away the status of conviction as such – so for example if a prospective employer asks about convictions, nothing need be said – but not to wipe away the historical facts of the underlying criminal process. I was shown no authority for that proposition, and it is on the face of it surprising. The plain words of s. 14 entitle someone to be treated, not least in an employment or professional context, as not convicted. If that could be got around by indirect allusion to conviction, including by reference to the spent conditional discharge itself, it would be set at naught. The allegation in this case clearly identifies Mr Wray as convicted. On the face of it, that disregards his legal protections."

100. At [27], the Judge said that the Registrant's witness statement "unambiguously asserted both lack of intention to injure and, also, reasonable excuse. Before the PCC he unambiguously maintained that position." She then continued:

"30. Mr Faux, however, says all of this is nothing to the point. It is, he says, clear as a matter of law and public policy that the PCC was not only entitled, but obliged, to rely on [the

Registrant's] guilty plea. It (and he) was bound by it and unable to go behind it. It would have been wrong to take any other course (such as requiring the [Council] to adduce evidence of the underlying components of the criminal offence). ...

31. [The Registrant] expressly invited the PCC to go behind his plea. He said it was a mistake, explained how it happened, and recounted his unsuccessful efforts to undo it via an appeal. There is no sign in the PCC decision, nor in what exists of the transcript, that they took any notice. Mr Faux says that is just as it should be.

32. It is certainly so in conviction cases. The authorities have consistently held that where statutory provision is made for disciplinary bodies to attach professional consequences to a criminal conviction, the effect of the statute has been to preclude the practitioner from denying the truth of any facts necessarily implied in the conviction. In such cases, the decision of the disciplinary body is properly based on the fact of the conviction, and the practitioner cannot go behind it and endeavour to show that he was innocent of the charge and should have been acquitted (*Kirk v The Royal College of Veterinary Surgeons 2004 WLUK 267*, paragraph 6; ...). That includes cases where conviction is based on a guilty plea .... Additional evidence about the underlying facts on which the conviction is based may be adduced and relied on in relation to the disciplinary consequences, provided the facts are not inconsistent with the finding that the practitioner was guilty of the offence. What the practitioner cannot do is to relitigate the conviction as to the facts.

33. That is why regulatory regimes, including the one in this case, make special provision for conviction cases. It is both unnecessary and undesirable to re-try a criminal case – unnecessary where the facts have already been pleaded and established to the criminal standard, and undesirable because of the public interest in the finality of criminal procedure. The only issue left for a disciplinary body is the relevance of conviction and sentence to the professional standing of the participant.

34. But this was not a conviction case. Mr Faux says that the same consequences nevertheless flow from a guilty plea in its own right. I was not shown any authority to that effect. ...

35. ... Nor is it obvious how Mr Faux's argument survives s. 14 of the 2000 Act and the public policy expressed there. The effect he seeks to attach to the guilty plea does not in truth attach to the plea itself but to its acceptance – that is, to the conviction and the presumed irrevocability of the plea that that creates.

36. In this case, there had been no trial. No facts had been established to the criminal standard, or even appeared from a prosecution case. Unlike *Samuel*, there was no detailed set of factual evidence before the PCC capable of amounting to any criminal offence at all. All there was, was the plea-and-conviction, and the conviction had been wiped away. The PCC seems to have responded by treating [the Registrant's] case in hybrid fashion. It accepted the plea as conclusive, as it would have done in a conviction case, but in circumstances which left ambiguity as to the precise matrix of facts that it was conclusive of. And unlike in a conviction case, they did not then go on to consider the relevance of the conviction (if any) to [the Registrant's] fitness to practice [sic]. Instead, they turned to apply the UPC test to the 'facts'."

101. Turning to the findings of fact made by the PCC that were the subject of the Grounds of Appeal, she recorded the Council's case as being that the PCC had adduced "evidence about events leading up to the conviction, just as it would have done in a conviction case, and reached such factual conclusions as appeared open to it consistent with the necessary ingredients of the conviction. But that was not the task on which it was properly engaged." The Judge then identified two problems arising from this approach, of which the second was that the PCC appeared to have found a number of new facts adverse to the Registrant which it then simultaneously concluded amounted to UPC.

102. The Judge set out her conclusions on the PCC's decision as follows:

"47. In all of these circumstances, I conclude that the PCC's conduct of [the Registrant's] hearing was seriously irregular. The Rules may not spell out how to handle a case involving a spent conviction based on an early guilty plea which is subsequently renounced. Perhaps such circumstances are rare. But I consider that the hybrid procedure adopted by the PCC is excluded by the express provision made in the Rules, and that it was unfair, for the following reasons.

48. In bringing this as a UPC case, the PCC must have accepted that it was not open to them to bring a conviction case because of the 2000 Act and the public policy considerations underlying it. Yet without using the word 'conviction', the allegation made was in terms of charge, plea and sentence, necessarily implying conviction. That is in substance an allegation of conviction which is in my view contrary to the letter and spirit of the 2000 Act and unfair to [the Registrant].

49. Putting charge-plea-sentence to [the Registrant] as a set of facts at the opening stage of UPC procedure created a situation of real ambiguity as to the 'facts' with which [the Registrant] was being invited to agree. His witness statement and consistent evidence under questioning did not agree that he had acted at any time with intent to injure or without good reason.

Fixing him with actual agreement to diametrically opposite ‘facts’ by inductive reasoning from the recitation of statute in the allegation is not something which I am satisfied was explained, understood or fair – or reflected in the decision.

50. Fixing him with deemed agreement as a legal consequence of his guilty plea – regardless of his evidence that the plea was equivocal - is for the reasons set out above tantamount to treating this as a conviction case. As explained, I am not convinced that there is a legal duty or power, or an underlying public policy reason, for the PCC to do that. Nor does it appear to have made clear to [the Registrant] that that is what it was doing.

51. In any event, unlike a conviction case, the PCC had no proven facts or prosecution case before it, and indeed no factual evidence capable of adding up to criminal conduct at all. It had only the bare plea. So again, there was no clear factual basis, particularly as to intention or reasonable excuse, on which it could anyway have proceed[ed] to the evaluative stage of a conviction case as to the seriousness of the offence and relevance to [fitness to practise].

52. At the second stage, the PCC appeared to be trying simultaneously to apply conviction case and UPC case evaluation processes. Those evaluative processes are in my view mutually exclusive. For a UPC case, [the Registrant] was entitled to the application of the legal tests to facts either agreed or properly established against him at a prior fact-finding stage. For a conviction case, he was entitled [to] submit factual and personal mitigations and make submissions on relevance to fitness to practise. These are entirely distinct procedures for fact-finding, for different purposes and addressed to different legal tests, As it was, the PCC engaged in a degree of further fact-finding; reached factual conclusions adverse to Mr Wray, on no recognisable evidential basis and without explanation as to reasoning or relevance; adopted inconsistent findings; and did not clearly apply the UPC test by standing back and objectively considering the case as a whole. Instead it rooted its conclusion in the (assumed) criminal character of the conduct, without applying the specific test of relevance which would have been applied in a conviction case.

53. In other words, the hybridity of the procedure in this case gave [the Registrant] the worst of both worlds. For that reason, its finding of unacceptable professional conduct cannot fairly be allowed to stand.”

103. The Judge correctly identified the principles upon which she should proceed in an appeal by way of re-hearing, giving due deference to the expertise of the PCC in its assessment of the appropriate standards expected of osteopaths and in its appreciation

of what is necessary to maintain public respect for the profession. She said that, had the case been a case relating to conviction, she would have been entitled to form her own view about the gravity of the conviction and its relevance to fitness to practise osteopathy but that the effect of the PCCSA was that the Registrant “was entitled not to have a conviction case brought against him, either expressly or by necessary implication of alleging plea and (spent) sentence.”

104. The Judge then set out her reasoning and conclusion as follows:

“59. On the assumption, however, that a UPC allegation was properly brought against [the Registrant], then on the factual case as set out in his witness statement and substantially accepted, and uncomplicated by inductive reasoning from the criminal context, the tests of moral opprobrium amongst the public, and deplorability within the profession, would fall to be applied straightforwardly to the whole affair.

60. As to the former, I cannot see how the test is met. At worst, a fair-minded observer might conclude that [the Registrant] had been foolish and ill-advised to rush out that night, contrary to his son’s advice and leaving his daughter unattended, and without seeking the help of emergency services. An observer might also conclude that he had been foolish and ill-advised to get out of the car and face a gang. The observer might think the same thing about picking up the bat. The observer might, especially, think he had been foolish and very ill-advised to plead guilty to a criminal offence if he had a proper defence to the charge. But in the absence of any other information, the observer would in my view be likely to think no worse than that of him, to share the substantial degree of sympathy the PCC expressed for his plight in the whole circumstances of his story, and to be baffled by an invitation to discern grounds for moral opprobrium.

61. As to the judgment of other members of [the Registrant’s] profession, here above all it is important to acknowledge a necessary degree of humility. However, for conduct to be regarded as deplorable in an osteopath, and at least worthy of admonishment - especially where it is not in the conduct of his professional functions and where his identity as an osteopath was irrelevant and probably unknown – it has to cross a threshold of seriousness and of risk of damage to the reputation of the profession. In my view, while Mr Wray’s conduct may be thought ill-judged and regrettable in a professional, and was apparently regretted, there were extenuating circumstances. ‘Deplorable’ would seem an unjustifiably exaggerated response in all the circumstances. I do not see on what basis the threshold can fairly be said to have been crossed.”

105. For these reasons, the Judge allowed the appeal and quashed the decision of the PCC.

## **The Grounds of Appeal to the Court of Appeal**

106. The Council advanced seven grounds of appeal, submitting that the Judge:

1. Wrongly went ‘behind’ the adjudication of a criminal court and dealt with a registrant in a manner that was inconsistent with his guilty plea before a criminal court: and, in so doing; wrongly interpreted section 14 Powers of Criminal Court Sentencing Act 2000 to the effect that it requires a statutory regulator to relitigate the factual basis of a guilty plea before a criminal court;
2. Wrongly found that it was not permissible for a regulatory committee to hear contextual factual evidence after announcing its “finding of fact” and wrongly found the procedural rules of the Appellant required them to consider Facts and UPC together;
3. Wrongly found as a matter of fact that the Respondent’s acceptance of the factual allegations upon legal advice was equivocal and wrongly criticised the Professional Conduct Committee (PCC) for not actively going behind the legal advice proffered to the Respondent by his own lawyer;
4. Wrongly found that the PCC had made additional findings adverse to the registrant;
5. Wrongly found that the PCC confused “objective bystanders” with those present at the scene when considering the objective bystander test;
6. Wrongly concluded that there was no evidence of criminal conduct;
7. Fell into significant procedural error such as the outcome was not just in that it reversed the burden of proof during the appeal proceedings.

107. Mr Ozin QC, who did not appear below but represented the Council on this appeal, formally abandoned Grounds 3 to 7 during the hearing. Ms O’Rourke submitted that the Council’s abandoning of Grounds 3 to 7 was inevitably fatal to the Council’s appeal as there was now no challenge to the Judge’s findings on those issues. I think the position is rather less straightforward, as appears below.

### **Ground 1 – S. 14 PCCSA and “going behind” a conviction**

108. There can be no doubt at all that the PCC understood at all material times that the charge against the Registrant was brought pursuant to s. 20(1)(a) and not s. 20(1)(c) of the Act. This appears from the terms of the complaint, which specified that the allegation against the Registrant was that he had been guilty of UPC contrary to s. 20(1)(a): see [71] above. It was common ground before the PCC. The Council’s opening skeleton argument specifically referred to the fact that the Registrant’s

conditional discharge did not constitute a conviction for the purposes of s. 22 of the Act; and under the heading “Allegation” it identified a course of conduct rather than the fact of a conviction as forming the basis of the complaint against him: see [73] above. Any possibility of confusion about the true position that could have arisen from the statement in the Registrant’s opening skeleton argument that he accepted he could not “go behind” his decision to plead guilty was reduced by his further submission that, even after a conditional discharge, “the facts underlying the “conviction” may nevertheless be adduced in evidence in disciplinary proceedings to support an allegation that the practitioner’s fitness to practise is impaired by reason of misconduct.”: see [77] above. For the reasons I have given earlier in this judgment, that statement was correct and did not involve any confusion about the different routes to be adopted in a case relating to conduct and a case relating to conviction respectively.

109. The hearing formally commenced with the Solicitor to the Council reiterating that the allegation against the Registrant was brought pursuant to s. 20(1)(a). The PCC followed the Rule 27 procedure by asking for confirmation that the facts alleged were admitted and, on that being confirmed, formally recording in open session that the allegations contained in the factual particulars 1 and 2 were admitted and found proved: see [82] above. The fact that the allegation was brought under s. 20(1)(a) and that the Registrant had admitted those particulars was also formally recorded in the PCC’s written decision. It is therefore clear beyond argument that the PCC was fully aware that it was dealing with a case relating to conduct. The only question is whether the PCC failed to adopt the correct approach to such a case. In substance, Ground 1 is directed at the Judge’s conclusion that the PCC had adopted either a “hybrid” procedure or that it had relied impermissibly upon the fact of the Registrant’s conviction in a case that was meant to be a case relating to conduct.
110. In my judgment, the Judge fell into error in her analysis of what was going on. It is apparent from the passages that I have set out above that the Judge was influenced by three things.
111. The first is that the Judge was not referred to the authorities on s. 14(1) of the PCCSA and its statutory predecessors which establish the correct approach to be adopted when a regulatory body brings a case relating to conduct in circumstances where criminal proceedings have resulted in a conditional discharge: see [48] above. Had the Judge been referred to those authorities, it would have clarified that the procedure adopted by the Council in its formulation of the complaint and adopting the Rule 27 procedure was orthodox and lawful. The line between relying upon a person’s admission to a criminal court by a plea of guilty and relying upon a conviction as such may be a narrow one, but it is well-established; and it meant in this case that the PCC had to determine on the basis of all relevant evidence that was properly admissible and admitted before it (a) whether the facts alleged against the Registrant were proved and (b) whether the proved facts amounted to UPC. The conviction as such played no proper part in that process. On close analysis, it is apparent that the PCC was aware throughout that (a) it was dealing with a case relating to conduct and not a case relating to conviction; (b) it was not entitled to rely upon the Registrant’s conviction as such; (c) that the facts alleged as conduct amounting to UPC, if not admitted, had to be proved by admissible evidence; and (d) all of the facts alleged in the complaint which *did* include the fact of his plea of

guilty but *did not* include the fact of the conviction had been formally admitted, as it recorded at the time and in its written decision.

112. The second major influence was the Council's submission, relying upon *Kirk*, that it was not open to the PCC to go behind the findings of a criminal court and that the PCC had been "bound" by the Registrant's guilty plea before the Magistrates' Court. For the reasons given at [55] above, that submission was wrong, and would have been too absolute even in a case relating to conviction under the Osteopaths Act. The Judge did not accept the submission, but at [36] of her judgment she did accept that the PCC had adopted what she described as a "hybrid" procedure under which the PCC accepted the plea as "conclusive, as it would have done in a conviction case" but had then not considered the relevance of the conviction to the Registrant's fitness to practise, instead turning to apply the UPC test to the "facts": see [100] above.
113. The third influence is the Judge's view that the Registrant had "unambiguously" maintained that he had a reasonable excuse for his actions, both in his witness statement and before the PCC: see [27] and [49] of the judgment, cited above. This view was untenable. As I have outlined the Registrant unequivocally accepted paragraph 1 of the particulars without reservation by his supplemental skeleton for the hearing, and then (twice) by his solicitor at the outset of the hearing: see [76] above. Ms O'Rourke told us, and I accept, that her appreciation of the unequivocal acceptance of the particulars was the reason why she drafted the Grounds of Appeal as she did. It was the reason why she felt unable simply to argue before the Judge that the Registrant had a reasonable excuse for his behaviour and, for that reason alone, could and should be acquitted of UPC.
114. The problem for the Registrant was that he had now admitted both that he had no reasonable excuse for behaving as he did and that his conduct amounted to criminal behaviour *twice* in formal proceedings: once before the magistrates and once before the PCC. While the plea of guilty before the Magistrates' Court could properly be regarded as evidence in support of the case relating to conduct, the admission before the PCC constituted a formal admission to the committee (rather than simply being evidence upon which the committee could rely) that he had no reasonable excuse for his conduct. The PCC could not be criticised for taking this admission at face value: to the contrary, they could and would have been open to criticism if they had not done so.
115. Nor, on the facts of this case, did the Registrant seek to "go behind" his plea though, for the reasons I have given, he could have done so. In fact, despite saying that he should not have pleaded guilty if properly advised, he then expressly accepted all the constituent elements of the offence, on the basis of which he would have been right to plead guilty after all. While I accept that there is an irreconcilable tension between what he said about the decision to plead guilty and his unequivocal acceptance of the facts alleged in the complaint, the PCC cannot be criticised for relying upon that unequivocal acceptance.
116. Having reviewed the course of the PCC proceedings in detail I conclude that the Judge was wrong to characterise the committee's procedure as either "hybrid" or as disregarding the legal protections to which he was entitled pursuant to s. 14(1). The complaint adopted the form endorsed by the *Pharmaceutical Society of Great Britain* case: see [50] above. The PCC was reminded that they were not to rely upon the conviction by the Solicitor's opening skeleton argument and they did not do so in their



written decision. Conversely, the Registrant had (correctly) accepted that the PCC could rely upon the facts underlying the “conviction” and, as I have explained earlier, the PCC was entitled to have regard to the fact that he had pleaded guilty to a charge of possessing an offensive weapon as evidence in support of the facts alleged to amount to UPC. The procedure adopted, subject to Ground 2, was in accordance with the Rules governing cases relating to conduct. The PCC’s written decision maintained the proper distinction between finding facts and deciding whether those facts amounted to UPC.

117. Furthermore, I would hold that the Judge was wrong at [51] of her judgment to say that the PCC had no proven facts or prosecution case before it and no factual evidence capable of adding up to criminal conduct at all. The effect of the Registrant’s unequivocal acceptance of the matters alleged in the complaint was that those facts were admitted, including that he had no reasonable excuse for his conduct and that his conduct amounted to criminal conduct prohibited by s. 1(1) of the Prevention of Crime Act 1953. The PCC needed neither further evidence nor further proof.
118. However, returning to the words of Ground 1, for the reasons I have given earlier in this judgment, the fact that the case was one relating to conduct meant that the Council was obliged to prove the facts it alleged to constitute UPC including, in this case, the facts that had given rise to the prosecution; and, in doing so, it could not rely upon the conviction as such. It was therefore open to the Registrant to “go behind” his conviction in the sense that it was open to him to challenge the underlying facts alleged against him unless to do so amounted to an abuse of process, which is not and cannot reasonably be suggested on the facts of this case. As it happens, he unequivocally accepted all the facts alleged against him in the complaint, including the facts that constituted the essential elements of the criminal offence of possessing an offensive weapon; and therein lay his real difficulty before the Judge. But, as a matter of principle, in a case relating to conduct under the Council’s rules where the relevant facts are not admitted by the osteopath, the regulator is required to “re-litigate” (i.e. prove) the factual basis of a guilty plea before a criminal court that results in a conditional discharge if that factual basis is to be relied upon as constituting UPC.
119. I would therefore hold that, despite my disagreement with aspects of the Judge’s reasoning, Ground 1 fails.

**Ground 2 – (a) finding that it is impermissible for a regulatory committee to hear contextual factual evidence after announcing its findings of fact; and (b) requiring the committee to consider Facts and UPC together.**

120. The Rules are clear. There is no temporal gap between Rules 29 and 30. It would therefore have been wrong to interpose a fact-finding exercise between those two determinations. But that is not what happened here. What happened in this case was that the PCC rightly afforded the Registrant the opportunity to put his case, including by the adducing of his evidence. As explained earlier, I consider that this was properly done under Rule 28: see [37] above. If I were wrong about that I would hold that it was both proper and essential for the PCC to have afforded the Registrant the opportunity pursuant to its residual power to regulate its procedure: see [39] above. I do not think it is helpful to attempt to characterise this as being a “second stage” of evidence gathering or fact finding. To my mind it is an appropriate step to take even (or, perhaps, particularly) where the facts alleged in the complaint have all been admitted by the osteopath.

121. However, the Registrant's Grounds of Appeal to the High Court raise a different issue. It is now accepted that, in the course of his evidence, the Registrant gave evidence in answer to questions from the Chair, to the effect that he had stopped his car near a wine bar, and that there had been a lot of people around. It is also apparent that this evidence influenced the PCC in its determination of UPC, because their written decision referred to it twice: see [36] and [37] of the PCC's written decision, set out at [91] above.
122. In my judgment, there was nothing unfair or wrong either in the questioning or in the PCC's reliance on the answers given by the Registrant. The complaint alleged against him that his conduct took place "in a public place". He chose to give evidence and thereby to expose himself to questioning. No objection to the questioning was raised at the time; nor could there have been because it was proper elucidation of the allegation that the conduct happened "in a public place" and the Registrant's explanation of his conduct. The fact that evidence can be described as "contextual" does not provide an automatic answer to the question whether it should be included as a particular in the complaint. I repeat that the touchstone is fairness and that the osteopath should know the case that he has to meet. And, on the facts of this case, it was always clear that the case the Registrant had to meet was that his conduct occurred in a public place.
123. Returning to the wording of Ground 2, it is not permissible for the PCC to hear additional evidence between the implementation of Rules 29 and 30. However, there can be no objection to the hearing of contextual or other factual evidence after admission of all the facts pursuant to the Chair's question under Rule 27(1) and before the implementation of Rules 29 (if required) and 30 provided that (a) the questioning is and remains fair and (b) the PCC keeps a weather eye on the possible impact of such evidence, whether its admission is fair and whether it may be necessary in an appropriate case either to amend the complaint or to exclude the evidence because it is outside the proper ambit of the complaint that has been brought against the osteopath: see [37] above.
124. In my judgment, that is what happened in this case. It is clear from the transcript (so far as it goes) and the notes of evidence where the transcript is missing that the Registrant chose to give evidence that was intended to inform the PCC's understanding of the admitted facts and on the issue of UPC under Rule 30. He gave the evidence about the proximity of the wine bar, its customers and other people. That was relevant and admissible evidence in relation to his behaviour happening in a public place. No objection was taken to the line of questioning at the time and, if objection had been taken, it should have been rejected since there was nothing unfair about the questioning, its timing or its relevance. The evidence he gave did not require an amendment of the complaint in order to render it admissible, since it was reasonable contextual evidence to explain where the incident occurred and that it was in a public place.
125. It is also important to note the limitations of the evidence that was adduced. On the information that is available to this court there was no evidence and no reason to infer that anyone other than the Registrant's assailants was involved. At worst, those members of the public who were present will have seen a violent episode where the Registrant was set upon by his assailants. As the PCC held at [32] of its written decision, this occurred without the Registrant showing any signs of aggression or violence: see [91] above.

126. I would therefore uphold the Council's submission that the Judge erred in her interpretation of what happened before the PCC. Although there is no opportunity to hear evidence between the implementation of Rules 29 and 30, it was appropriate for the PCC in the present case to receive the Registrant's evidence as it did.

### **Disposition of this appeal**

127. For the reasons I have given, I would hold that the Judge was in error in her analysis of the procedure that was followed by the PCC.

128. However, the appeal to the Judge was also an appeal against the PCC's finding of UPC. The Judge allowed that appeal and, exercising her own judgment as she was entitled to do on a rehearing, she held that the Registrant's conduct did not amount to UPC. In doing so she expressly recognised at [61] of her judgment the proper regard that is to be given by the Court to the judgment of a specialist professional regulatory committee such as the Council's PCC. It is not necessary to review the authorities on that point since the Judge was evidently and expressly aware of them. They are summarised by a different constitution of this court in *Sastry v GMC* [2021] EWCA Civ 623 and I bear them well in mind.

129. To my mind, the Judge's approach to the issue of UPC as set out at [59]-[61] of her judgment was correct in principle, applied the correct test for UPC, and demonstrates no error of application. She gave due deference to the specialist nature of the PCC and I would hold that she was entitled to reach the conclusion she did on UPC for the reasons she gave. I make plain that I reach this conclusion on the facts of this case, which I hope and believe to be unique: it should not be taken as any form of precedent for other cases, each of which should be treated on their own particular facts.

130. It follows that, although I disagree with the Judge's approach to the procedure that was adopted by the PCC, I would uphold the Judge's conclusion that the Registrant's conduct did not amount to UPC and would dismiss this appeal.

### **Nugee LJ**

131. I agree.

### **Underhill LJ**

132. The way in which this appeal was argued, both before the Judge and before us, raised various issues about the procedure followed by the Council in this case. I entirely agree with how Stuart-Smith LJ has dealt with those issues in his comprehensive judgment. But, as he says, since an appeal under section 31 of the 1993 Act is by way of re-hearing it was in principle open to the Judge, irrespective of those issues, to take a different view from the Council about whether the Respondent was guilty of UPC (subject of course to the guidance recapitulated in *Sastry*); and she did in fact take a different view. The dispositive question in this appeal is whether she was wrong to do so. I agree with Stuart-Smith LJ that on the very particular facts of this case she was entitled to reach the conclusion that she did.