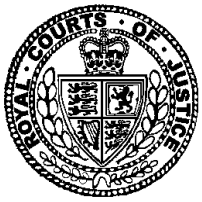

Neutral Citation Number: [2020] EWHC 3285 (Admin)

Case No: CO/727/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 December 2020

Before :

MR JUSTICE BOURNE

- -

Between :

AB, a barrister

Appellant

- and -

Bar Standards Board

Respondent

- -
- -

Marc Beaumont (Direct Access) for the Appellant
Helen Evans (instructed by the Bar Standards Board) for the Respondent

Hearing dates: 6, 7 and 19 October 2020

- -

Approved Judgment

Mr Justice Bourne:

Introduction and factual background

1. The Appellant appeals against a decision by a tribunal of the Bar Tribunals and Adjudication Service ("the tribunal") which was sent to her on 5 February 2020, convicting her of misconduct and disbarring her. She asks this Court to set aside the conviction and sanction, alternatively to set aside the sanction and replace it with a lesser sanction.

2. The Appellant was called to the Bar in 2001. She held a practising certificate until 31 March 2015 and thereafter was an unregistered barrister. In 2008 she gave birth to twins, whose father will be referred to as "Mr X". Some matters concerning the Appellant and Mr X need to remain confidential, and are therefore the subject of a short confidential annexe to this judgment. The Press (and public) are reminded of the need not to infringe that confidentiality.

3. Disputes about the children developed between the Appellant and Mr X, leading to Court proceedings in particular in the period 2014-2016. They concerned issues about payment for the children's education and also involved the Appellant seeking non-molestation orders. Mr X made complaints to the Bar Standards Board about the Appellant's conduct in those proceedings. This led to two sets of disciplinary proceedings against her.

4. The first set of proceedings related to the period from August 2014 to June 2015. More will be said about the charges below. In outline, the allegations which the tribunal would in due course uphold were that the Appellant misled the Court about Mr X's receipt and/or knowledge of a draft order and/or an application (charge 1), failed to comply with four Court orders (charge 2) and misled the Court by telling a judge that a hearing had been listed on 17 June 2015 before Mostyn J when it had not (charge 3).

5. The second set of proceedings related to the period from April 2015 to December 2016. The single charge alleged that the Appellant made a range of Court applications that were without merit, leading to the imposition on her of an order under section 91 of the Children Act 1989 in the nature of a civil restraint order (a "section 91 order") and, on 2 December 2016, a limited civil restraint order. I will refer to this as "charge 4" although that is not how it was referred to before the tribunal (where in fact a different charge 4 in the first set of proceedings was dismissed).

6. There was a hearing before the tribunal ("the tribunal"), consisting of His Honour Jeremy Carey and three members, on 22 and 23 January 2020 ("the tribunal hearing"). In the run-up to the tribunal hearing, the Appellant instructed solicitors to apply for an adjournment but this was refused. The Appellant did not attend the tribunal hearing, although much of it was attended by her PA, Ms McDougall, who also communicated with the tribunal administration by email.

7. The tribunal found the charges mentioned above to have been proved. Before considering sanction, it arranged for the Appellant to be informed of the result. The

Appellant thereupon sent some observations to the tribunal by email on the morning of 24 January 2020. The tribunal then resumed the hearing that day. Her email had suggested that she might attend, and also again asked for an adjournment. The tribunal again proceeded in the Appellant's absence. It imposed a sanction of disbarment in respect of charges 1, 3 and 4 and a prohibition from applying for a practising certificate (for an unregistered barrister, the equivalent of suspension) for 12 months in respect of charge 2. There was no application for costs and no costs order was made.

8. The Appellant instructed her present counsel, Mr Beaumont, by way of the Bar's Public Access scheme. Mr Beaumont (who is licensed to conduct litigation) filed an Appellant's Notice on 24 February 2020 which set out various grounds of appeal against both conviction and sanction, supported by a lengthy skeleton argument.

9. On 4 August 2020, an application dated 29 June 2020 was filed by Mr Beaumont on the Appellant's behalf, seeking permission (1) to make several amendments to the grounds of appeal and (2) to adduce "expert medical evidence on appeal". The expert evidence is a report dated 1 May 2020 by a psychologist, Ms Tamara Licht.

10. The second part of that application has prompted a cross-application by the Respondent. If and to the extent that the Appellant is permitted to rely on new expert evidence, the Respondent applies to rely on the expert report of a consultant psychiatrist, Dr Ian Cumming, dated 1 October 2020.

Application to amend the Appellant's Notice

11. I begin with the application to amend the Appellant's Notice.

12. In a witness statement supporting the application, Mr Beaumont explained that the proposed amendments "arise from a detailed reconsideration of this appeal consequent on service of the trial bundles. These were not released to me by the BSB before I settled the appeal."

13. The amendment application, viewed by itself, merely seeks permission for the Appellant to add material to her original Appellant's Notice. It should also be borne in mind that all of the points which she seeks to introduce by amendment are, as well as being points which did not feature in the original notice, points which were not taken at the tribunal hearing.

14. Where the new material is referable to Ms Licht's report (Amended Grounds of Appeal paragraphs 5g and 7), it must share the fate of the application to adduce that report i.e. the two applications will stand or fall together. I return to that question below.

15. However, most of the proposed amendments involve the addition of new legal arguments or points of construction which do not depend on Ms Licht's report. The Respondent has had plenty of notice of these and ample opportunity to prepare its response to them. There is a separate and more difficult issue about whether the Appellant can rely on any arguments on appeal which were not relied on in the tribunal hearing, in which she did not participate, to which I shall return below.

However, the mere fact that the Appellant's Notice filed in February differs from the proposed amended notice will not cause any material prejudice or injustice.

16. I therefore give permission for the amendments at paragraphs 1, 2, 5 (other than 5g), 6 and 8 of the Amended Grounds of Appeal (bundle A pages 69ff). But that is subject to the larger question of whether the Appellant can (by either the amended or unamended Appellant's Notice) rely on any points which were not taken at the tribunal hearing.

Reliance on points not taken below

17. In *Pittalis v Grant* [1989] 1 QB 605, the Court of Appeal referred at 611 to the general rule of long standing that "if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards". Nourse LJ added:

> "Even if the point is a pure point of law, the appellate court retains a discretion to exclude it. But where we can be confident, first, that the other party has had opportunity enough to meet it, secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he can be adequately protected in costs, our usual practice is to allow a pure point of law not raised below to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it."

18. In *Singh v Dass* [2019] EWCA Civ 360, this approach was refined into three principles by Haddon-Cave LJ:

> "16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (Mullarkey v Broad [2009] EWCA Civ 2 at [30] and [49]).
>
> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. R (on the application of Humphreys) v Parking and Traffic Appeals Service [2017] EWCA Civ 24; [2017] R.T.R. 22 at [29])."

19. Mr Beaumont, for the Appellant, argues that the new points fall within the third of those categories.

20. Mr Beaumont also referred to *Notting Hill Finance Ltd v Sheikh* [2019] 4 WLR 146, in which Snowden J (with whom Longmore and Peter Jackson LJJ agreed) said:

> "**26** These authorities show that there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.
>
> **27** At one end of the spectrum are cases such as the *Jones* case in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As Peter Gibson LJ said in the *Jones* case (at para 38), it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances; but as May LJ also observed (at para 52), there might none the less be exceptional cases in which the appeal court could properly exercise its discretion to do so.
>
> **28** At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court: see e g *Preedy v Dunne* [2016] EWCA Civ 805 at [43]–[46]. In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime."

21. Ms Evans, for the Respondent, relies on the importance of finality which underpins the usual rule that new points cannot be taken on appeal, as stated by the Court of Appeal in *Jones v MBNA Bank* [2000] EWCA Civ 514 (to which Snowden J referred in *Notting Hill Finance*). She also refers to *Diggins v BSB* [2020] EWHC 467 (Admin), another appeal in a Bar disciplinary case, in which Warby J applied the *Singh v Dass* approach and stated at [48] that to admit evidence which had not been adduced before the tribunal below would be exceptional.

22. As the *Notting Hill Finance* case makes clear, the outcome may depend on the type of point which the Appellant is attempting to take.

23. I also note from *Notting Hill Finance* the need to consider the "nature of the proceedings which have taken place in the lower court". Read in context, that primarily means the nature of the hearing below. In *Notting Hill Finance* it was significant that the hearing below was summary in nature. However, I would also attach some weight to the wider nature of the proceedings, in this case a regulatory prosecution ending in the disbarment of a barrister. The interests of justice in such a case may not be the same as in typical civil litigation between parties with competing commercial or proprietary interests.

24. Like Warby J in *Diggins*, I took the course of hearing all of the Appellant's submissions and deferring the decision on whether any of them were barred by not having been made at first instance. I give my decision on each point below, together with my consideration of their substantive merits.

Application by Appellant to rely on new evidence; Cross application by Respondent

25. For the application to adduce expert evidence in this appeal, the starting point is CPR 52.21(2)(b) whereby an appeal court will not receive evidence which was not before the lower court unless it orders otherwise. An application for such an order is subject to the overriding objective of deciding cases justly. The pre-CPR test in *Ladd v Marshall* [1954] 1 WLR 1489 is no longer a primary rule but has nevertheless been described as covering the relevant considerations to which an appeal court will have regard when deciding how to exercise its discretion: *Terluk v Berezovsky* [2011] EWCA Civ 1534 per Laws LJ at [32].

26. By the familiar *Ladd* test, fresh evidence will not be admitted unless it (1) could not with reasonable diligence have been obtained for use at the trial; (2) is such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive); and (3) is apparently credible, though it need not be incontrovertible.

27. As to this, Mr Beaumont's witness statement says:

> "5. There is now produced … a report of Dr Licht, a psychologist, dated 1st May 2020. Dr Licht has found that the Appellant has ADHD. As I understand it, that would have been the case for her whole adult life. This report has already been served on the BSB.
>
> 6. The Appellant submits that it is just in all the circumstances and/or satisfies the test in *Ladd v Marshall* [1954] 1 WLR 1489, for the appellate court to admit this (and, if available, psychiatric) evidence concerning the Appellant. This was not adduced below because having spent some £30,000 on solicitors, she had run out of funding. I am not aware in any event that the Appellant knew she had ADHD until Dr Licht reported on this.

> 7. The Appellant wishes to submit to the Administrative Court on this appeal that the mental condition or conditions that lay behind the Appellant's conduct, were not such as to place her in breach of her professional obligations."

28. The application further states:

> "It has been discovered that the Appellant has ADHD. Adults with ADHD are known to struggle with disorganisation in relation to administrative tasks. That could account for all of the matters in [the allegations in the first proceedings]. Further, the findings of 'impulsivity' and 'lability' could well explain the series of unmeritorious applications in [the allegations in the second proceedings]."

29. Mr Beaumont's statement adds some further argument of a similar kind. He states that the report could not have been obtained with reasonable diligence for use at the trial because the Appellant "would have had no idea that she had ADHD" and that "it is to be inferred that if she knew she had ADHD, she would have told the BSB about that early in their investigation, when they ask if the barrister has any disabilities."

30. Mr Beaumont also emphasises, in his witness statement and, more appropriately, in his submissions, that the expert evidence is relevant to the question of whether the Appellant's conduct might, if it was the consequence of a mental impairment, have lacked reprehensibility, not been such as to diminish the public's trust and confidence in the Bar and not reached the threshold of professional misconduct (comparing *BSB v Howd* [2017] 4 WLR 54).

31. In my judgment, the fresh evidence cannot be admitted. It does not surmount any of the three stages of the *Ladd* test, and there is no other reason why I should exercise my discretion in favour of admitting it.

32. As to the first question of "reasonable diligence", there are two linked problems.

33. The first is the fact that the Appellant's mental health was considered at an earlier stage. The first set of proceedings were served on her in August 2016. A hearing was scheduled for 16-17 November 2017. On 23 October 2017 the Appellant applied to adjourn the hearing on medical grounds and/or to stay the proceedings on medical grounds. This was supported by a consultant psychiatrist's report dated 16 October 2017, which referred to her relevant medical history going back a number of years including a hospital admission in December 2016, and which diagnosed PTSD and severe depression. The report concluded that she would be unable to attend the hearing.

34. The hearing was adjourned to the first available date after 9 March 2018. On 29 March 2018 the Appellant served an updated medical report dated 14 March 2018 from the same consultant. This referred to her being unlikely to be able to attend a hearing within 3 months, to treatment continuing for 6 months and to a possibility of continued illness thereafter.

35. The proceedings were then further delayed by procedural issues to which I shall return below. It was not until 28 January 2019 that the Appellant was served with all charges in their final form. On 5 September 2019 there was a directions hearing before a Judge which the Appellant did not attend. The Judge ordered the Appellant to attend for examination by a consultant psychiatrist, Dr Isaac, who would report on her fitness to defend the proceedings and attend a substantive hearing and on any special measures which might be required at such a hearing.

36. The Appellant attended the examination. In his report dated 13 September 2019, Dr Isaac opined that she was fit to participate in the proceedings but that she should be regarded as a vulnerable witness and should have the benefit of special measures consisting of frequent breaks and of being screened from Mr X while giving evidence. He described her in these terms:

> "She is clearly an articulate and intelligent person, who is able to understand and retain information, as well as weigh alternative courses of action and make her views known."

37. This report indicating that the case could proceed, the result was that other directions made on 5 September 2019 took effect, in particular that there would be a substantive hearing in public taking place in one of two windows in January 2020.

38. In advance of the substantive hearing on 22 January 2020, the Appellant made a written application to adjourn. She was told that this would be considered at the start of the hearing. In the event, she did not attend on 22 January 2020, but her PA attended on her behalf and also sent an email to the tribunal, referring to the effect on her of an assault which occurred in May 2019 and expressing the view that her mental health would deteriorate if the hearing went ahead. In response, the tribunal on 22 January 2020 heard oral evidence from Dr Isaac before deciding to refuse an adjournment and proceed with the substantive hearing in the Appellant's absence.

39. It is apparent from these events that considerable attention was paid to medical and in particular psychiatric issues affecting the Appellant in the run-up to the substantive hearing. She was repeatedly able to obtain professional and practical help in order to bring psychiatric issues to the attention of the Respondent and the tribunal.

40. The second problem is a lack of any information to explain how the suggested diagnosis of ADHD emerged. There is no evidence before the Court to explain what prompted the instruction of Ms Licht to prepare her report dated 1 May 2020 or when this occurred. That report itself makes no reference to the previous psychiatric history or to the previous psychiatric reports, merely recording:

> "I had a video call with [AB] … on 29th of April of 2020. A video call was conducted since given Covid 19 no face to face sessions are taking place. The purpose of the video call and assessment was to identify any factors that may interfere and obstruct [AB]'s organisational skills and concentration.
>
> At our meeting, [AB] answered my questions and talked to me about her developmental, medical/mental health, personal, family, social, academic and professional history, to better

> formulate a potential diagnosis regarding [AB]'s mental health and any potential learning disability."

41. If this professionally represented Appellant wishes to persuade the Court that the psychological evidence could not have been obtained earlier by reasonable diligence, it is necessary for her to explain to the Court how and why her evidence took this belated turn, and why the issues considered by Ms Licht were not considered in 2017 or 2018. That explanation is wholly absent. It is not possible for the Court simply to infer that the evidence could not have been obtained earlier by reasonable diligence.

42. The second and third *Ladd* questions are whether the evidence, if adduced below, would probably have had an important influence on the result of the case and whether it is apparently credible.

43. Ms Licht's report gives the barest outline of its author's qualifications and experience but no detailed career resumé.

44. The report records a video call with the Appellant, followed by "a series of psychometric tests". The duration of these procedures is not known. The only data referred to were the completion of two CAARS scales[1], one being a self-assessment by the Appellant and the other being by her PA in the capacity of an "observer". The report contains no information about the application and usefulness of these scales as a diagnostic tool.

45. The report states that the scores were above average, or very much above average, for a range of symptoms (including "impulsivity/Emotional Lability") and that these, combined with the history taken by Ms Licht, meet the criteria for a diagnosis of ADHD as defined by DSM-V[2].

46. Ms Licht, having read the tribunal's judgment, stated:

> "3. … I note that Charges 1 to 3 of proceedings 2015/0304/D5, seem to have concerned underlying issues of administration or disorganisation. It is in my professional opinion more probable than not, that [AB]'s ADHD would have been the most likely cause of problems in relation to administration.
>
> 4. Furthermore, the DSM-V states that inattention manifests behaviourally in ADHD as wandering off task, lacking persistence, having difficulty sustaining focus, and being disorganised, but is not due to lack of comprehension or a defiant nature (APA, 2013). This being so, I do not believe that [AB]'s behaviour in relation to Charges 1 to 3 would have been deliberately managed, rather than a consequence of undiagnosed ADHD.
>
> 5. It is also my professional opinion that, whilst it may appear to the outsider that someone like [AB], with ADHD, has been

[1] CAARS stands for Conners' Adult ADHD Rating Scales.
[2] Diagnostic and Statistical Manual of Mental Disorders Fifth Edition (American Psychiatric Association, 2013).

> blameworthy in failing to comply with several court orders on different occasions, it is in truth the ADHD that manifests itself in poor occupational performance, attainment, attendance, or even, on occasion, interpersonal conflict (APA, 2013)."

47. I have no reason to doubt that Ms Licht's actions and conclusions were as the report describes, so it is "credible" in that limited sense. However, in one key respect I do not find her expert opinion remotely persuasive and in that sense, it is not a credible expert report. Even if the diagnosis is sound (and the report lacks sufficient detail to give confidence in that regard), there is no more than a bald assertion that ADHD, rather than any personal culpability, was the explanation for the conduct described in the BSB charges. An assertion of that kind, in my view, necessitated a detailed exploration of the facts of the case. No such exploration is found in the report. Nor does the report claim that Ms Licht carried out such an exploration in her single conversation with the Appellant. In particular the report glibly states that charges 1-3 "seem to have concerned underlying issues of administration or disorganisation", ignoring the all-important fact that charges 1 and 3 involved knowingly misleading the Court. There is no explanation of how a diagnosis of ADHD could provide an answer to those charges. And, from the information actually contained in the report, I fail to see how any expert could go further than saying that ADHD was, in general, capable of explaining certain kinds of behaviour. There was no identified basis, either in any information about the Appellant's case or in any information about ADHD generally, for an assertion that it actually explained the behaviour in the present case.

48. It follows that this report, if available below, would not have had had an important influence on the result of the case. In so deciding, I cannot speculate about what other evidence Ms Licht or anyone else might have given in answer to questions or otherwise. What matters is the influence which the evidence in this report would have had on the proceedings. Mr Beaumont conceded that if the issue raised by this psychological evidence were to be tried, it would mean a retrial of the disciplinary charges and further that the report of Ms Licht would not be sufficient for that purpose. It would similarly have been insufficient to provide an answer to the charges if provided to the tribunal in January 2020.

49. In that respect too the *Ladd* test is not satisfied. There are no other grounds for admitting the fresh evidence under CPR 52.21.

50. For those cumulative reasons the application to admit Ms Licht's report is dismissed, as is the application to amend the Appellant's Notice in the terms proposed in paragraphs 5g and 7.

51. In the course of the hearing I also heard the Respondent's cross-application to adduce expert medical evidence, in the form of a psychiatric report by Dr Cumming dated 1 October 2020. That application was made at the last possible moment and it would probably not have been practicable for Mr Beaumont to take instructions on any response to Dr Cumming's report. That report makes certain criticisms of Ms Licht's report. I had no difficulty in drawing the conclusions about Ms Licht's report which are set out above, without expert assistance. For those reasons it was not appropriate to allow the Respondent to adduce Dr Cumming's evidence, and that application is dismissed.

52. Argument on these case management issues took up the first day of the hearing which was listed for two days. A third hearing day was scheduled to ensure that there was enough time to deal with the substantive issues. I now turn to those (together with the question of whether points can be taken for the first time at appeal stage) by taking the amended grounds of appeal in turn.

Ground 1: "The Disciplinary Tribunal erred in law in holding that the Appellant breached CD5 and rC8 of the BSB Handbook under every proven Charge, as gC27 of the BSB Handbook was engaged. That meant that CD5 and rC8 were inapplicable on the facts of the case. The Handbook did not authorise or legalise a violation of private or personal life."

53. The Code of Conduct for barristers is found in the BSB's Handbook. At the time of the events giving rise to the charges, the first edition dated January 2014 was in force, and I quote the Code's provisions from that edition.

54. Section B of the Code contains ten Core Duties applicable to barristers, each numbered and prefaced by the letters "CD". Core Duty CD5 states:

> "You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession."

55. Section C of the Handbook contains numbered Conduct Rules, each prefaced by "rC". Rule rC8 (which cross-refers to Core Duties 3 and 4) states:

> "You must not do anything which could reasonably be seen by the public to undermine your honesty, integrity (CD3) and independence (CD4)."

56. The Conduct Rules are interspersed with guidance. Under the heading "Guidance on Rules C8 and C9 and their relationship to CD1, CD2, CD3, CD4 and CD5", paragraph gC27 states:

> "Conduct which is not likely to be treated as a breach of Rules C8 or C9, or CD3 or CD5, includes (but is not limited to):
>
> .1 minor criminal offences;
>
> .2 your conduct in your private or personal life, unless this involves:
>
> .a abuse of your professional position; or
>
> .b committing a criminal offence, other than a minor criminal offence."

57. By ground 1 the Appellant, relying on paragraph gC27, wishes to contend that the conduct alleged by the charges, if proved, should not have been treated as a breach of the Code because it was conduct in her private or personal life which did not involve any abuse of her professional position or any criminal offence.

58. The first question is whether to permit the Appellant to rely on this contention which was not made before the tribunal.

59. I begin by noting that, since the Appellant took no active part in the hearing below, all contentions by her are effectively new. The law does not provide that a party who does not appear at a first-instance hearing has no right of appeal. The BSB's rules, made under section 24 of the Crime and Courts Act 2013, give such a right without qualification.

60. The appeal, by virtue of CPR 52.21(1), will normally consist of a review of the tribunal's decision. By CPR 52.21(3):

> "The appeal court will allow an appeal where the decision of the lower court was
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

61. By ground 1, the Appellant seeks to contend that tribunal's decision was "wrong" because it wrongly extended its disciplinary jurisdiction over personal or private conduct.

62. In my view, that is a contention of pure law of the kind which Snowden J in *Notting Hill Finance* considered likely to be permitted so long as the Respondent had time to meet it and had not been prejudiced by the omission to take the point below (see paragraph 20 above).

63. I reach that conclusion, bearing in mind (1) that these are disciplinary proceedings which affect the Appellant's livelihood, (2) that dealing with this point on appeal does not require any new evidence to be heard and also (3) that although the Appellant was not there to take the point before the tribunal, the question of whether personal or private conduct could amount to professional misconduct in fact was considered below and in that sense the point is not entirely "new".

64. In its judgment, the tribunal surveyed the charges and considered the scope of the relevant parts of the Code. It said:

> "17. … [rule] rC2.1 states that 'Section 2.B [core duties] applies when practising or otherwise providing legal services. In addition, CD5 and CD9 apply at all times.' In other words, CD5 can apply to a barrister's private life. We will return to that subject in due course.
>
> 18. rC2.2 states that rules rC8 and the associated guidance apply at all times; in other words, rC8 can also apply to a barrister's private life. gC25 provides that, 'Other conduct which is likely to be treated as a breach of CD3 and/or CD5 includes (but it is not limited to) 3 criminal conduct, other than

> minor criminal offences 4 seriously offensive or discreditable conduct towards third parties; .5 dishonesty … 7 abuse of your processional position.' gC27 provides that, 'Conduct which is not likely to be treated as a breach of rC8 or CD5, includes (but is not limited to): .a minor criminal offences; .2 your conduct in your private or personal life, unless this involves: .a abuse of your professional position; or .b committing a criminal offence, other than a minor criminal offence.'"

65. At paragraph 19, having referred to *Iteshi v BSB* [2016] EWHC 2943 (Admin) and noted this Court's ruling that a barrister's conduct in response to a court order and his being made subject to an order restraining him from bringing proceedings could (and almost invariably would) amount to misconduct, the tribunal ruled that conduct in a barrister's "personal life" could, depending on the facts, amount to professional misconduct.

66. In relation specifically to charge 2, the tribunal asked itself whether non-compliance with court orders by a barrister in a personal capacity could fall within CD5. Its attention was drawn to passages in the tribunal's Sentencing Guidance which indicated that it could. The tribunal concluded:

> "33. … Whilst, of course, that is simply advisory in the Sentencing Guidance, in our judgment it is instructive in demonstrating that which we, in any event, without that reference would conclude, namely, that there will be circumstances in which a barrister will fall foul of Core Duty 5 by personally failing to comply with court orders or judgments of the court.
>
> 34. By no means do we apply some blanket approach to the effect that this will always be the case. Each case will depend upon its own facts. There will be circumstances in which there are mitigating features or factual aspects which persuade a Tribunal that the culpability in question does not amount to professional misconduct contrary to Core Duty 5. We have no doubt at all on the particular facts of this case that Charge number 2 does amount to a breach of Core Duty 5 both in respect of its nature, that is the significance of the non-compliances and the failure to satisfy the judgment as to costs and, in our judgment, accurately by counsel for Mr X at the time, namely, her reasons or purported reasons for not complying which were simply not credible and might even be categorised as risible. As for her non-compliance as to costs, she has never advanced any reason for not paying costs. The sum is a substantial one and should have been paid."

67. In respect of charge 4, the tribunal said at [47]:

> "… in connection with our categorisation of the respondent's conduct in the context of the second set of Disciplinary

> proceedings, Ms Evans submitted that the behaviour of this respondent in the court environment is a relevant consideration and that the fact that the respondent was acting as a litigant is nothing to the point given her status as a barrister. In our judgment that is a relevant consideration in this case, for there is a reasonable expectation that the standard to be attained and maintained by a member of the Bar is significantly higher than that of an ordinary litigant."

68. These passages clearly show that although the distinction between public and private conduct was not urged on the tribunal by the Appellant, nevertheless the tribunal was invited to consider and did consider that distinction.

69. The Respondent has since had ample time to consider and respond to the Appellant's contentions in respect of this ground. Its introduction as a ground of appeal causes the Respondent no prejudice.

70. The public/private distinction is in my view a filter which a disciplinary tribunal is bound to apply in any case clearly involving a barrister's conduct in his or her private life rather than in his or her practice as a barrister. If the tribunal's decision could be shown to be wrong in that regard as a matter of law, it would be surprising if this Court nevertheless left that decision undisturbed. I therefore consider that the Appellant should be allowed to rely on this ground of appeal.

71. Mr Beaumont submitted that the Respondent is bound by its own policy as stated in guidance paragraph gC27, that policy being necessary and appropriate in order to avoid disciplinary proceedings failing to respect barristers' right to respect for their private life under ECHR Article 8. As I have said, the guidance states that conduct in a personal capacity is not likely to be treated as professional misconduct unless it amounts to criminal offending or to an abuse of the barrister's professional position. Mr Beaumont went on to emphasise the particularly private nature of family court proceedings concerning children, where hearings are conducted in private.

72. Ms Evans agrees that the relevant conduct occurred in the Appellant's private life but submits that, as it was conduct in and around court proceedings such as form the core of a barrister's professional activity, it was plainly within the Respondent's regulatory reach. By way of example she relies on *Iteshi*, in which this Court upheld the tribunal's decision to disbar a non-practising barrister who in his personal capacity initiated a mass of misconceived litigation in Employment Tribunals, leading to the imposition of a Restriction of Proceedings Order against him under section 33 of the Employment Tribunals Act 1996.

73. Ms Evans accepts that the effect of the Respondent's guidance on this question (as quoted above) is not entirely clear. Paragraph gC25 gives non-exhaustive examples of conduct which is "likely" to be treated as a breach of CD3 and/or CD5, including "seriously offensive or discreditable conduct towards third parties". Paragraph gC27 gives examples, also non-exhaustive, of conduct which is "not likely" to be so treated.

74. It seems to me that, applying the guidance, conduct in a person's private or personal life is in general not likely to be treated as a breach of CD5 but nevertheless can be so treated for good reason. The reason could be that the conduct, though personal or

private, clearly is or is analogous to conduct which contravenes other provisions of the Code.

75. In the present case the relevant conduct involved acts and omissions in, or closely connected with, court proceedings. There is no doubt at all that conduct such as misleading a court, disobeying court orders and wasting or misusing the court's time to the detriment of other court users would be professional misconduct if committed in the course of a barrister's professional practice. In my judgment it was open to the tribunal to rule that conduct of that kind was professional misconduct though committed in a personal capacity, if in fact it infringed a provision such as CD5 or rC8, as in *Iteshi*.

76. I therefore reject Mr Beaumont's submission that the Respondent was bound by paragraph gC27 as if it were a hard-edged rule and therefore was obliged to particularise any criminal offence or abuse of a professional position on which it relied.

77. Although the tribunal did not expressly discuss the public/private distinction in respect of all particulars of all four charges which were upheld, the passages quoted above show that it had the distinction well in mind. In my judgment the tribunal stated the law correctly and was right to proceed to try all of the charges on their facts.

78. Ground 1 therefore fails.

Ground 2: "The disciplinary trial was not ECHR Article 6 compliant. There was no defence legal representation because there was no defence funding provide by resolution of the General Council of the Bar for a trial of this kind, (a) not instigated by a client, but by a litigation opponent, and/or (b) arising out of a barrister's private life; in stark contrast to the funding provided by the General Council of the Bar for the prosecution of such a case."

79. To decide whether the Appellant should be permitted to advance this argument which was not made below, it is necessary to focus on what precisely the argument is.

80. In Mr Beaumont's skeleton argument, he argues that the Bar Council could readily insist that barristers' professional indemnity insurance should provide cover for disciplinary proceedings. Instead, it "*leaves many people like the Appellant to fend for themselves*".

81. Both sides have referred me to *Pine v Law Society* [2001] EWA Civ 1574. The appellant in that case appealed from a decision of the Solicitors Disciplinary Tribunal striking him off the Roll of Solicitors, contending that the absence of any funding for representation of a solicitor who, because of the Law Society's actions, could not afford to pay for it, infringed his right to a fair hearing under ECHR Article 6.

82. Sir Andrew Morritt VC (with whom Buxton and Arden LJJ agreed) referred at [11] to the principle emerging from *Airey v Ireland* [1979] 2 EHRR 305:

> "… only in exceptional circumstances, namely where the withholding of legal aid would make the assertion of a civil claim practically impossible, or where it would lead to obvious

> unfairness of the proceedings can such a right be invoked by virtue of Article 6(1) of the Convention."

83. The Vice-Chancellor continued:

> "13. Counsel for Mr Pine did not dispute that the disciplinary proceedings are civil for the purposes of Article 6. He suggested that some of the charges could also amount to criminal offences. He contended that the possible consequences were so serious for the solicitor that disciplinary proceedings should be placed towards the criminal end of the spectrum of civil proceedings in deciding what is and is not fair. He contended that it was obviously unfair to take and pursue disciplinary proceedings with such immediate and future consequences for the livelihood of a solicitor, particularly where his lack of means stems from the Law Society's own acts in connection with those proceedings, unless at the same time provision is made for the impecunious solicitor to receive legal advice if he wanted it at no expense to himself.
>
> 14. I do not accept this submission. It is clear from the passage I have quoted from Airey in paragraph 9 above that, at least in proceedings in which a party may appear in person, the requirements of Article 6 with respect to legal advice and representation depend on the facts of any given case. Thus if Mr Pine can show on the facts of his case that legal advice and representation for the purpose of the disciplinary proceedings before the Tribunal was required by Article 6 then he does not need to rely on any more abstract principle. Accordingly it is unnecessary to decide that point. In my view it is also undesirable. As is frequently observed, the application of the European Convention on Human Rights depends on the facts of the particular case. A decision divorced from those facts is at best hypothetical and at worst misleading."

84. Mr Pine did not claim that an absence of legal aid made his defence practically impossible but contended that it led to obvious unfairness because of the nature of the disciplinary charges, the severity of the possible consequences for him and the effect of his emotional involvement on his ability to present his case. Having reviewed the facts, including Mr Pine being unrepresented and not appearing at the hearing because he could not afford to travel, the Vice-Chancellor found that Mr Pine "had ample opportunity to indicate any defences he might wish to advance" and rejected his submission as "fanciful".

85. I have not been referred to any case, disciplinary or otherwise, of civil proceedings being held to infringe Article 6 for this reason.

86. This ground of appeal therefore depends on the Appellant being able to prove on the facts that her case, unlike Mr Pine's, crossed the high threshold of being obviously unfair because of a lack of funding.

87. This is therefore not a point of pure law, but a question of fact. It would require a searching evidential examination of the Appellant's circumstances and their effect on the proceedings. Had this point been taken below, the course of the proceedings would have had to be very different in order to explore it. I can have no confidence that the Respondent could be protected from the impact in costs of having to reopen the case now. Following the *Notting Hill* guidance, the Court will be slow to allow a point of this kind to be taken on appeal though there may be exceptional cases in which it would be just to do so.

88. In my judgment this is not one of those exceptional cases. I have seen no evidence which indicates that the Appellant could actually succeed in her Article 6 argument. The evidence tells us that she is an intelligent and articulate person who has practised as a barrister. *Pine* is authority for the proposition that the nature of these proceedings, leading to striking off or disbarment, is not enough by itself to establish the necessary unfairness. Meanwhile the tribunal made a decision, which has not been challenged on appeal, that medical factors were not such as to prevent the Appellant from participating in the hearing below. In addition to the medical evidence which the tribunal saw, the Appellant has only Ms Licht's report which I have already ruled cannot be admitted for the reasons set out above. So far as financial circumstances are concerned, I have been told almost nothing. On the one hand the Appellant is said to be without means. On the other hand, she has from time to time availed herself of legal advice or representation in the disciplinary proceedings and she also appears to employ the PA to whom reference has been made.

89. I therefore refuse permission for the Appellant to rely on ground 2. The ground was however argued before me, and in my judgment had no merit in any event. Imbalance of resources between represented and unrepresented parties in litigation is sadly all too common. The evidence before me does not begin to prove the "obvious unfairness" on which the Appellant relies.

Ground 3: "No breach of CD5 or rC8."

90. As I have said, CD5 prohibits conduct "*which is likely to diminish the trust and confidence which the public places in you or in the profession*" and rC8 prohibits a barrister from doing "*anything which could reasonably be seen by the public to undermine your honesty, integrity (CD3) and independence (CD4)*".

91. Ground 3 in summary is a contention that the relevant conduct in the present case could not have had either of those effects on the public because of the private nature of the family proceedings in respect of which it occurred.

92. Mr Beaumont reinforces that submission with the proposition that ECHR Article 8 is engaged because of the private, personal and family issues of the Appellant which the family proceedings concerned. Any interference with Article 8 rights must be in accordance with the law and, in a case such as this, necessary for the protection of the rights and freedoms of others.

93. I am not convinced that Article 8 adds anything to this ground of appeal. None of the charges could lawfully be upheld unless the conduct in question did in fact fall within the rule that was alleged to have been broken. Therefore it would be open to a

barrister in any such case to argue that the conduct in question could not have had the specified effect on the public.

94. In my judgment, the point in this case is one of pure law and does not necessitate the re-opening of any evidence or any new evidence. If Mr Beaumont is right about it, then the decision of the tribunal must have been wrong in law. There is no practical difficulty for the Respondent in answering the point now. Whilst the Respondent might be prejudiced by having incurred costs in proceedings which could be overturned by this ground of appeal, it seems to me that that is outweighed by the fundamental nature of the legal point being taken. I therefore give permission for ground 3 to be advanced although the point was not taken at first instance, and it was fully argued before me.

95. Mr Beaumont argues that charges under CD5 and rC8 require a tribunal in each case to make a "judicial construct" of "the public" and to consider what the mindset of that hypothetical public would be. He submits that the public should be assumed not to take a narrow-minded prosecutorial view and, more importantly, must be assumed not to have had access to the family proceedings which were heard in private. That is important, Mr Beaumont submits, because Parliament has decided that family proceedings, which by their nature may probe into people's most intimate and sensitive affairs, should in general be private. That may be a reference to section 93 of the Children Act 1989 or to rules made under it, though I was not taken to any specific statutory provision. Mr Beaumont's suggested conclusion is that the hypothetical member of the public would not feel diminished trust and confidence in the Bar or feel that the Appellant's honesty, integrity or independence was undermined because he or she would not know about her conduct.

96. Ms Evans in response submits that the Code's references to "the public" are to a hypothetical reasonable person, and that the Appellant's conduct engaged CD5 and rC8 even if the public at large did not know about it. She relies on *Khan v BSB* [2018] EWHC 2184 (Admin), in which this Court upheld a finding that a barrister had infringed CD5 by sending an offensive LinkedIn message which, by its nature, would or might be seen only by its recipient. Ms Evans also refers to *Diggins v BSB* [2020] EWHC 467 (Admin), a case involving an offensive Tweet which was found to infringe CD5. It was argued on behalf of the barrister that the proceedings were unfair because there was no evidence from the complainant and no evidence of the size of the likely readership of the Tweet. Rejecting that argument, Warby J said:

> "60. The question for the Panel was whether the Tweet was "likely" to undermine the trust and confidence reposed by others in the appellant and the Bar. That is a question about the tendency of the Tweet. It was common ground between the parties that the way to determine that question was to apply the principles in Stocker v Stocker [2019] UKSC 17 [2019] 2 WLR 1033]. These require the tribunal to assess how a hypothetical "ordinary reasonable reader" would be likely to respond to the social media statement under consideration. This is an objective process. It does not require evidence of the reactions of actual readers. Indeed, it is well-established in defamation law that evidence of that kind is irrelevant for the purposes of assessing meaning, and defamatory tendency."

97. In the alternative, Ms Evans submits that if actual knowledge on the part of members of the public is necessary, that requirement is satisfied by the fact that judges, court staff, transcribers and Mr X all witnessed or knew about the Appellant's conduct.

98. In my judgment, Mr Beaumont's proposition is wrong. If it were right, then barristers providing professional services in private family proceedings could misbehave without fear of transgressing CD5 or rC8. That, of course, is not the case. A barrister who, for example, misleads the court when appearing in family proceedings in private can expect to be charged under either of those rules. The only difference in the Appellant's case is that she was acting as a litigant, not as counsel. For the reasons given under ground 1 above, that fact does not assist her in this case.

99. As in *Khan*, a tribunal hearing a charge under CD5 (or rC8) will consider the conduct in question and will decide how a hypothetical reasonable member of the public would react to it. It is not necessary to impute to that hypothetical individual any particular role in the proceedings.

100. However, in a case of this kind, I think it is relevant purely by way of example to consider how an opposing litigant would react to the conduct. The conduct in the present case did come to the attention of a member of the public, namely Mr X. If a person in his position encountered a barrister misleading the court or failing to comply with court orders, it seems entirely reasonable to conclude that this would affect the trust which he would otherwise place in the Bar in general and the individual barrister in particular, and his perception of the individual barrister's honesty and independence.

101. Ground 3 therefore fails.

Ground 4: The Disciplinary Tribunal erred in law in proceeding to find proved such charges as were laid afresh by the Respondent, as they were cause of action estopped and barred absolutely by virtue of the rule in Henderson v Henderson

102. This ground applies only to the second set of disciplinary proceedings i.e. what I have described as charge 4. As will be seen, it turns on a narrow point of law. If made out, it would mean that the tribunal should not have proceeded to try charge 4. As with the other arguments of pure law considered above, I will give permission for it to be raised at this appeal stage.

103. The point arises because of procedural issues with both sets of proceedings which came to the Respondent's attention in May 2018. On 3 April 2017, amendments were made to the BSB Handbook and in particular to certain definitions including "non-authorised person". The change meant that this phrase now included all unregistered barristers including the Appellant. This had the unintended effect of limiting some of the BSB's procedural powers in relation to unregistered barristers who were not in employment, such as the Appellant.

104. As a result, the Respondent's Professional Conduct Committee (PCC) had exceeded its powers when it referred the case to a five-person disciplinary tribunal on 14 December 2017. And, in respect of the second set of proceedings, the PCC had referred the new complaint for investigation on 27 April 2017 at a time when it did

not have power so to refer a complaint from an external source about the conduct of an unregistered barrister.

105. On 29 May 2018 the Legal Services Board authorised the Respondent to amend the Handbook so as to remove the definition problem described above.

106. Different solutions were adopted to the two problems arising in the present case.

107. In the first set of proceedings, the Respondent awaited the outcome of another case where the effect of the error in referring a complaint to a five-person tribunal was considered. In that case, *Dorairaj v BSB* [2018] EWHC 2762 (Admin), a Divisional Court ruled that the error had not deprived the five-person tribunal of jurisdiction. On this basis the Respondent decided that the first proceedings could move forward.

108. In the second proceedings, however, the BSB decided to start again. The PCC considered the complaint anew on 28 November 2018, and on 7 December 2018 informed the Appellant that it should form the subject of one or more charges before a three-person tribunal. New charges were served on 28 January 2019 and were the subject of directions on 29 May 2019.

109. Meanwhile the original charges from the second set of proceedings were simply not proceeded with. They have not been the subject of any tribunal decision.

110. Mr Beaumont contends that these events give rise to a cause of action estoppel. He relies on *Henderson v Henderson* 3 Hare 100, 115 where Wigram V-C ruled that a party could not open the same subject matter in second proceedings as a court of competent jurisdiction has ruled on, and that this extends to all points which the parties by reasonable diligence could have brought forward in the earlier proceedings.

111. He further contends that discontinuance is a sufficient basis for such an estoppel, citing a number of cases (notably *Barber v Staffordshire County Council* [1996] IRLR 209) in which Employment Tribunals had dismissed a claim upon its withdrawal by the complainant and in which the complainants then found themselves barred from bringing subsequent claims arising from the same subject matter. In the present case, says Mr Beaumont, the BSB did not have to withdraw the original charges but could have awaited the decision in *Dorairaj* and then pressed on in reliance on it.

112. In response, Ms Evans seeks to distinguish the present case from the Employment Tribunal cases. When dismissing a claim upon withdrawal, an Employment Tribunal must consider the case and decide that the withdrawal is properly made. In the present case, Ms Evans argues, no tribunal reached any decision in respect of the original charges in the first set of proceedings. There has therefore been no judicial decision which could trigger a cause of action estoppel.

113. In *Barber* Neill LJ (with whom Auld LJ and Sir Iain Glidewell agreed) said at page 387:

> "The critical question is whether the fact that the dismissal of the applicant's claim was on withdrawal by her, rather than after a contested hearing, prevents the application of the principles. In our view, it does not. It is necessary to examine

> first the powers of the industrial tribunal contained in the Industrial Tribunals (Rules of Procedure) Regulations 1985, in force at the time of the decision on 5 May 1993. Rule 12(2)(c) of Schedule 1 provided that:
>
> "A tribunal may, if it thinks fit—. . . (c) if the applicant shall at any time give notice of the withdrawal of his originating application, dismiss the proceedings; . . . "
>
> That confers on the tribunal a discretion whether or not to dismiss the proceedings. The decision to dismiss is not simply a rubber stamping, administrative act; it involves the exercise of a judicial discretion and an adjudication by a competent tribunal as to whether or not it is "fit" to dismiss proceedings in a case where the applicant has given notice of withdrawal. The fact that a notice of withdrawal will, in most cases, result in the dismissal of the proceedings does not prevent the decision to dismiss from being a judicial act."

114. I agree with Ms Evans that in the present case there was no "judicial act" which could constitute a ruling by a competent tribunal from which a cause of action estoppel could arise. It is clear from *Barber* that whilst there is no need for the competent tribunal to have given a reasoned decision on the issues of fact and law in the first proceedings, those proceedings must have been brought to an end by some judicial act.

115. It follows that ground 4 must fail.

Ground 5: There was insufficient evidence to satisfy individual charges.

116. The above heading, though taken from paragraph 5 of the amended Appellant's Notice, is not a sufficient description of the composite ground(s) set out there. Its contentions, which need to be discussed individually though there is some overlap, can be categorised as follows:

i) In respect of charges 2 and 4, the tribunal failed to ask itself whether the Appellant's behaviour was sufficiently serious to amount to professional misconduct ("The test for professional misconduct"). See Appellant's Notice paragraph 5c-e and first part of paragraph 5g.

ii) In respect of charge 4, the tribunal failed to have regard to the Appellant's mental illness when deciding whether she had committed professional misconduct ("The effect of mental illness"). See Appellant's Notice, second part of paragraph 5g and 5h.

iii) In respect of charges 1-3, the tribunal's assessment of the facts was defective, and it failed to apply the appropriate standard of proof to charge 3 ("Assessment of facts"). See Appellant's Notice paragraph 5a,b and f.

iv) In respect of charge 3, inadequate reasons were given for the tribunal's finding of guilt ("Adequacy of reasons"). See Appellant's Notice paragraph 5i.

The test for professional misconduct

117. Not every departure by a barrister or other professional from a regulatory code will amount to professional misconduct. Mr Beaumont contends that the tribunal failed to apply the correct test of whether the facts found in respect of charges 2 and 4 amounted to professional misconduct.

118. This in my view is an issue of law which can be decided without recourse to fresh evidence. The Respondent has had ample opportunity to respond to it. Failure to apply the correct test would be a fundamental error. In those circumstances I give permission for this part of ground 5 to be advanced at appeal stage.

119. Mr Beaumont submits that behaviour will not amount to professional misconduct unless it was "seriously reprehensible", connoting some degree of moral culpability.

120. In *Walker v BSB* (unreported), 29 September 2013, Sir Anthony May said: "

> "11. … the stigma and sanctions attached to the concept of professional misconduct across the professions generally are not to be applied for trivial lapses and, on the contrary, only arise if the misconduct is properly regarded as serious …"
>
> "16. … the concept of professional misconduct carries resounding overtones of seriousness, reprehensible conduct which cannot extend to the trivial …"

121. In *R (Remedy UK Ltd) v GMC* [2010] EWHC 1245 (Admin), Elias J said at [37]:

> "Misconduct is of two principal kinds. First, it may involve sufficiently serious misconduct in the exercise of professional practice such that it can properly be described as misconduct going to fitness to practise. Second, it can involve conduct of a morally culpable or otherwise disgraceful kind which may, and often will, occur outwith the course of professional practice itself, but which brings disgrace upon the doctor and thereby prejudices the reputation of the profession."

122. Mr Beaumont relies in particular on the case of *Howd v BSB* [2017] 4 WLR 54, which concerned complaints about a barrister's behaviour towards colleagues and staff at a chambers party. One ground of appeal was that the allegations, even if proved, did not reach the threshold of seriousness. Lang J referred to the passages from *Walker* and *Remedy UK* which are quoted above. Having received new medical evidence, she concluded that the barrister's offensive behaviour was caused by a medical condition, and so:

> "… Mr Howd's behaviour plainly was not reprehensible, morally culpable or disgraceful, as it was caused by factors beyond his control. In my judgment, it did not reach the threshold for a finding of serious professional misconduct."

123. Mr Beaumont also submits that a test of "serious and reprehensible" is supported by *SRA v Leigh Day and others* [2018] EWHC 2726 (Admin) where the court at [157] referred to authority including the Scottish case of *Sharp v Law Society* [1984] WC 129 for the proposition that:

> "… whether a breach of the rules should be treated as professional misconduct depended on whether it would be regarded as serious and reprehensible by competent and responsible solicitors and on the degree of culpability".

124. Ms Evans, on the other hand, cites *Preiss v GDC* [2001] 1 WLR 1926 (per Lord Cooke at 1936C), cited in *Walker*, for the proposition that "serious professional misconduct does not require moral turpitude". She also refers to *Khan*, cited above, in which Mr Beaumont appeared and argued for a test of "serious and reprehensible". Warby J said at [36]:

> "The authorities make plain that a person is not to be regarded as guilty of professional misconduct if they engage in behaviour that is trivial, or inconsequential, or a mere temporary lapse, or something that is otherwise excusable, or forgivable. There is, as Lang J put it, 'a high threshold'. Only serious misbehaviour can qualify. I am not sure that the threshold of gravity is quite as rigid or hard-edged as Mr Beaumont suggests. I do not believe that in *Walker* Sir Anthony May was seeking to crystallise an exhaustive definition of professional misconduct. Rather, he was reaching for a touchstone to help distinguish the trivial or relatively unimportant from that which merits the 'opprobrium' of being labelled as professional misconduct. Nor do I read Lang J's decision in *Howd* as seeking to set out precise parameters for what can and cannot qualify as professional misconduct. Indeed, in the passage cited she used three separate terms, 'reprehensible, morally culpable or disgraceful'. I think it is perhaps unhelpful for this principle to be tied too firmly to particular phraseology."

125. I agree with Warby J. In my view it is clear from the authorities, in England and Wales as in Scotland, that a departure from professional rules must reach the threshold of being "serious" before it will be regarded as professional misconduct. I do not think that any other gloss is needed. Nor do I think that the word "reprehensible" (whose meaning in the Oxford English Dictionary is simply "deserving of reprehension, censure or rebuke; reprovable; blameworthy") adds anything to that test.

126. The explanation given by Elias J in *Remedy UK* (above) is a reminder that misconduct can arise in different ways ranging from carelessness, via incompetence or ignorance, to offensive behaviour, dishonesty or other kinds of criminality. In any case where the threshold is debatable, a tribunal should explain why conduct is regarded as sufficiently serious. In some cases moral culpability may help to provide that explanation, but moral culpability is not a threshold test for professional misconduct.

127. Turning to the facts, the relevant charges concern failures to comply with court orders (charge 2) and the making of misconceived court applications which led the family court to impose a section 91 Order and a civil restraint order (charge 4). Mr Beaumont describes that conduct as "litigation misconduct" and submits that it was not, or not sufficiently, "reprehensible, morally culpable or disgraceful" to qualify as professional misconduct.

128. In support of that submission, Mr Beaumont suggested that the courts in family cases have a higher tolerance for mendacity or other misbehaviour by litigants because of the stress under which such individuals may find themselves. I know of no basis for that suggestion. Even if it were true, I would find it of no assistance in deciding whether a barrister's misbehaviour in family litigation were sufficiently serious to amount to professional misconduct.

129. When making its ruling on charge 2, the tribunal set out the facts in detail. It reminded itself that the breaches of court orders had been admitted as a matter of fact and that the Appellant's solicitors had said that an explanation of them would be forthcoming but that no such explanation had been put forward since. In the passage quoted at paragraph 66 above, the tribunal noted that in some cases mitigating features or factual aspects might "persuade a Tribunal that the culpability in question does not amount to professional misconduct". It explained its finding of professional misconduct by reference to the significance of the breaches. In my judgment that was an entirely adequate self-direction, and there was no error in the tribunal's decision.

130. Nor do I perceive any error in the inclusion of paragraphs (4) and (6) of charge 2, concerning a failure to serve a witness statement and a delay of seven days in serving a receipt. It may be that isolated instances of that sort of disobedience to procedural directions would not reach the threshold for professional misconduct. It is however clear that in making its finding of guilt on charge 2, the tribunal found a series of failures amounting to sustained and repeated disobedience of the Court's orders. It was not wrong to do so, and it was not wrong to regard the failures specified in paragraphs 4 and 6 as items in that series.

131. Similarly in respect of charge 4, the tribunal set out the relevant facts in detail. It described them, accurately, as "a litany of wholly misguided, misconceived litigation on her part". It ruled, and I agree, that "there is a reasonable expectation that the standard to be attained and maintained by a member of the Bar is significantly higher than that of an ordinary litigant".

132. The tribunal did not, in that context, state or re-state that conduct must be serious to amount to professional misconduct. However, it is clear from its decision on charge 2, that it had the right test well in mind. Nor can there be any doubt that the conduct which caused a section 91 order and a civil restraint order to be made was sufficiently serious to amount to misconduct. I agree with Holroyde J in *Iteshi* who at [61] found it difficult to imagine circumstances in which conduct leading to the making of an order of that kind would not amount to a breach of CD5.

The effect of mental illness

133. The preceding sub-section of this judgment dealt with the first of two contentions contained in paragraph 5g of the amended Appellant's Notice. I now turn to the

second, which is a contention that the tribunal failed to judge the "litigation misconduct" under charge 4 in the context of the mental illness suffered by the Appellant. It is further contended in paragraph 5h that the tribunal failed overall to assess the Appellant's mental state at the time of the alleged misconduct and to consider its effect on her culpability.

134. By her amendment application the Appellant sought, in reliance on Ms Licht's evidence, to change "mental illness" to "ADHD and/or other mental illness". As explained above, I have not allowed that specific amendment.

135. This contention depends to a degree on a comparison with *Howd*. In that case a tribunal had ruled that the barrister's offensive behaviour was, inter alia, a breach of CD5 amounting to professional misconduct. This Court allowed his appeal, ruling that the tribunal "misunderstood and misapplied the medical evidence, when they concluded that his medical condition did not make a significant contribution to his conduct". Having received "more comprehensive medical evidence" at the appeal hearing, Lang J found as a fact that his behaviour was the consequence of a medical condition. On that basis she ruled (1) that it would be unlikely to diminish the public's trust and confidence in the profession or in him, provided that he was fit to practise, and (2) that it was not "reprehensible, morally culpable or disgraceful, as it was caused by factors beyond his control" and it therefore "did not reach the threshold for a finding of serious professional misconduct".

136. The weakness of Mr Beaumont's argument is that, in the present case, there is manifestly no sufficient evidential foundation for a finding that the conduct in charge 4 (or any of the other conduct which was proved against her) was caused by mental illness. The psychiatric evidence which was made available to the tribunal was concerned with the Appellant's capacity to participate in the proceedings and not with the substantive issues in the case.

137. As I have explained above, whilst Ms Licht felt able to opine that ADHD provided a probable explanation for what Mr Beaumont calls litigation misconduct, I have refused permission for that evidence to be adduced, and a key reason for that refusal was the insufficiency of Ms Licht's report, as conceded by Mr Beaumont, as evidence on that substantive issue.

138. Taken at its highest, the evidence that the Appellant has suffered psychiatric problems together with the evidence of Ms Licht could prompt a completely new avenue of inquiry. A tribunal hearing at which the charges were defended on this basis would be a very different hearing from the one which took place in January 2020.

139. In all the circumstances, I will not grant permission for this point – a defence to the charges based on non-responsibility for conduct caused by a psychiatric or psychological condition – to be raised at appeal stage. In addition to the fact that this would necessitate a new and different trial of the charges, I attach substantial weight to the fact that even now, the Appellant has not provided evidence which could realistically form the basis for her defence. That is in spite of the fact that she has previously adduced psychiatric evidence before the tribunal, and she attended the video consultation with Ms Licht on 29 April 2020, more than 6 months ago.

140. In any event, on the evidence as it stands this sub-ground of appeal cannot succeed. The tribunal was not wrong to find that the conduct in charge 4 (and the other charges) reached the threshold of professional misconduct. There was no evidence before the tribunal from which it could reasonably have concluded that mental illness prevented that threshold from being reached.

Assessment of facts

141. The Appellant contends that:

i) In respect of charge 1 the tribunal did not lend due weight to "the fact that the court and not the Appellant served the relevant documents on the complainant".

ii) In respect of charge 2 the tribunal did not lend due weight to "the fact that the Appellant had no control over the payment of school fees as they were in trust".

iii) In respect of charge 3 the tribunal did not correctly apply the criminal standard of proof and/or it failed to lend due weight to the judgment of HHJ Altman QC dated 12 August 2015 which was not provided to it.

Charge 1

142. Charge 1 alleged that the Appellant misled the Family Court on 14 August 2014 in two respects, the relevant one being that she told the court that Mr X had been served with a copy of the draft order sought at that hearing when she knew that he had not.

143. King J on 14 August 2014 heard applications by the Appellant relating to educational arrangements for the children. Mr X did not attend. King J's order recited that the Appellant "has used all reasonable efforts to serve the father by email". I have seen a transcript of the hearing which records the Appellant saying:

> "What I sent to him, and he … he acknowledged this because I served him through DHL on 9th July, was the orders of 4th June and … and 4th July, because I was before Mr Justice Wood, and he was sent the application, as I was ordered to do so, and the order that you have … have before you."

144. For completeness I note that the Appellant appears to have repeated the assertion that she served the draft order on Mr X, at a hearing before District Judge Simmonds on 10 April 2015 (transcript paragraphs 376-410).

145. It does not appear to be in dispute that Mr X had not, in fact, been sent the draft order. That being so, it seems obvious that the Appellant misled the court on 14 August 2014, unless she can explain what was said on that occasion.

146. No such explanation has been given to me. Instead, paragraph 5a suggests that "weight" should have been given to the "fact" that documents were served by the court and not by the Appellant. That alleged fact is entirely at variance with the hearing transcript which the tribunal saw. The Appellant has in any event adduced no evidence of some sort of misunderstanding having occurred, which appears to be the

basis for this sub-ground. Even if she did now attempt to adduce such evidence, in the absence of a convincing explanation for the failure to adduce it at any time before the hearing of January 2020 I would not give permission for this point to be taken at the appeal stage.

147. In my judgment there is therefore no basis for arguing that the tribunal was wrong in its findings at [22]:

> "We are sure on the evidence that we have heard that this respondent knew … that Mr X had not been served with a draft order. We are also sure that she informed the High Court judge that he had."

148. At the hearing of this appeal, Mr Beaumont attempted to mount a more general argument that there was evidence of an exculpatory nature relating to charge 1 before the tribunal, such that the tribunal could not rationally have been sure of the Appellant's guilt. Ms Evans objected on the basis that this went beyond the contents of the amended Appellant's Notice. Mr Beaumont argued that the nature of an appeal of this kind is a "dynamic review" in which there should be a degree of flexibility and said that, insofar as necessary, he applied to amend ground 5a so as to enlarge his argument.

149. In my judgment it would not be fair or appropriate to allow, as it were, an amendment to an amendment in this case. The appeal as a whole seeks to mount arguments which were not attempted below. Several months have elapsed, during which time the Appellant's case could be prepared and any necessary applications made. An oral application at the hearing for an unparticularised amendment, without any good explanation for its lateness, takes the Respondent by surprise. The appeal will therefore be confined to the terms of the amended Notice.

Charge 2

150. Turning to charge 2, paragraph 5b of the Appellant's Notice contends that when assessing the Appellant's various breaches of court orders, weight should have been given to "the fact that the Appellant had no control over the payment of school fees as they were in trust".

151. The tribunal at [27] recorded the fact that the failures to comply with orders had been admitted by the Appellant through her solicitors and that the promised explanation had never been forthcoming.

152. The four breaches of orders were recorded in a table appended to Ms Evans' skeleton argument for the tribunal hearing. One breach consists of failing to send the balance of a sum for school fees. As Ms Evans recorded, the Appellant asserted at a hearing on 20 November 2014 that the payment had in fact been made. It had not, but it was made a week later.

153. This being so, the Appellant's reliance on a claim to have set up a trust to hold monies emanating from Mr X for the children's education is incomprehensible. I am not sure whether such a trust in fact exists or not. But if it does, and if a court ordered monies to be paid for the children's education, then it seems to me that one of two things was

bound to happen. Either the Appellant asked the trust to make the payments and it did so, or, if the trustees were not willing to make the payments, then an application would have to be made to the Family Court (by the Appellant and/or the trustees) to resolve whatever problem there was. Certainly the second of those things did not happen.

154. In fact the Appellant does not appear to have suggested that the existence of a trust was an impediment to the court making orders. On the contrary, the order of DJ Simmonds on 14 August 2014 recited that it was "agreed that from the balance of the contribution towards school fees (£34,213) currently held by 'trustees' appointed by the mother … the sum of £6,500 shall be paid to [school] …".

155. There is therefore no basis for holding that the tribunal was wrong to uphold all particulars of charge 2.

156. The Appellant has in any event not adduced evidence which clearly explains the situation in such a way as could afford her a defence to the charge. Even if she did now attempt to adduce such evidence, in the absence of a convincing explanation for the failure to adduce it at any time before the hearing of January 2020 I would not give permission for this point to be taken at the appeal stage.

Charge 3

157. Mr Beaumont argues that on charge 3 the tribunal did not correctly apply the criminal standard of proof and/or it failed to lend due weight to a judgment by HHJ Altman QC dated 12 August 2015 which was not provided to it.

158. This sub-ground of appeal is capable of being argued without reference to new evidence i.e. as a submission that the evidence before the tribunal was not capable of proving the charge. New evidence is referred to, concerning a hearing before Judge Altman on 12 August 2015. It seems that that evidence was available to the Respondent at the time of the hearing below. In those circumstances and having regard to the nature of the point being taken, I will give permission for the point to be taken at this appeal stage.

159. Charge 3 alleged that the Appellant misled the court on 16 June 2015 in that, when making an ex parte application to transfer proceedings to the High Court, she stated that a hearing had been listed before a High Court Judge on 17 June 2015 when she knew or should have known that that was not true.

160. The background is most clearly set out in a judgment given by His Honour Judge Altman on 12 August 2015. The case was brought before the Judge of his own motion, the Appellant having raised issues with HM Courts and Tribunals Service (HMCTS). The Judge heard from the Appellant but not Mr X, so I bear in mind that he must have obtained any information either from her or from the court file.

161. The judgment describes how the Appellant's application for a non-molestation order (NMO) was listed for a half-day hearing in the Family Court on 17 June 2015. Meanwhile the Appellant had an outstanding appeal to the High Court against a judgment of District Judge Simmonds in financial relief proceedings. On 4th June she applied to transfer the NMO proceedings to the High Court so that they could be

linked with the financial appeal hearing. On 16th June 2015 the urgent referral judge, Judge Cryan, granted the transfer and listed the NMO application for a hearing in the High Court on 17 June 2015 "with the aim of there being one hearing on that date rather than two". The Appellant was ordered to serve the transfer application and order on Mr X. Although she did so, Judge Altman recorded at [6] that:

> "… on 17th June, she appeared at the High Court and the father appeared at the Central Family Court. Unfortunately without there having been a link-up here, the hearing that Judge Harris had directed for that date took place in this court. This all goes back to the fact that, when the matter came before the urgent referral judge, who at this court considers paper applications that are urgent, the decision of Judge Cryan for a transfer to the High Court was not, most unfortunately, communicated to the list office either here at the Central Family Court or at the High Court under the Clerk of the Rules, so that neither were aware of there being this dual listing. So, whilst [the Appellant] went to the High Court, the father came to the Central Family Court where Judge Wright proceeded to deal with the application at ten o'clock. She did not have all the papers before her and was unaware, of course, that the application had been transferred to the High Court."

162. In fact there appears to have been a more fundamental confusion underlying Judge Cryan's order, because there was no prior listing for a hearing in the financial appeal in the High Court on 17 June 2015.

163. The result of all this was that on 17 June 2015 in the Family Court, Judge Wright dismissed the Appellant's application in her absence. The Appellant was turned away from the High Court (or so it seems from an email replying to a query from Mr X's solicitors about the listing, in which a High Court List Officer by the name of Mr Kitley on 16 June said "Go to the Central Family Court in the morning, and if she comes here I'll send her back"). However, according to Judge Altman, the matter also "came before Judge Cryan also on 17th June, in the afternoon". Judge Cryan, unaware of the order made in the morning, extended the NMO to 1 July 2015.

164. Judge Altman's solution to the confusion was to implement Judge Cryan's original intention of bringing the NMO and financial matters together in the High Court, listing both matters before Mostyn J on 21 September 2015.

165. Before me, it was common ground that the tribunal did not see Judge Altman's judgment. Ms Evans initially said that the Respondent did not have it at the relevant time. However, it has emerged that they did. It is therefore unfortunate that it was not provided to the tribunal.

166. It seems that Mr X later sought an explanation for the confusion. I have seen, and the tribunal saw, the first page (and therefore not the signature) of a letter in reply from HMCTS dated 29 October 2015, which states:

> "The application dated 4th June 2015 that was submitted to Central Family Court stamped as received on 12th June 2015

> was forwarded to the Urgent Referral Judge for attention. The information also supplied by the applicant indicated that there was already a hearing taking place at the Royal Courts of Justice on 17/06/15 in front of His Honour Judge Mostyn J. This information did also contain 2 partial e-mail messages purporting to be from Ross Kitley, neither of the messages had a date or time shown. The Urgent Referral Judge (HHJ Cryan) remarks referred the application under ZC15F00204 to transfer to the High Court and listed before Mostyn J on 17/06/15 (10 minutes allowed), listed together with the matter already listed before Mostyn J."

(emphasis added)

167. The crucial question under charge 3 is whether the Respondent could prove the truth of the words underlined in the passage quoted in my previous paragraph.

168. I have also been shown a transcript of the hearing before Judge Altman. This too, I believe, was not before the tribunal. The Appellant told the Judge about the NMO proceedings and the financial proceedings. In particular she said:

> "I just, I had to proceed with the protection of the children and the appeal at the same time, so crucially, your Honour, what I tried to do was, on 10th June (the hearing was supposed to be on 17th June), I asked for both hearings to be heard side by side in the High Court …
>
> Because it seemed odd, wrong, a waste of both our resources, to be in two different courts at the same time …"

169. I have also seen Judge Cryan's order dated 16 June 2015, which says:

> "Upon the Applicant's application dated 4th June 2015 and reading the court file
>
> It is Directed that the application to transfer the application under ZC15F00204 to the High Court is to be listed before Mr Justice Mostyn sitting at the Royal Courts of Justice, Strand, WC2A 2LL on 17th June 2015 at or after 10.30am (ten minutes allowed). It is to be listed together with the matter already listed before Mr Justice Mostyn."

(emphasis added)

170. The document containing the Appellant's application of 4 June 2015 has not been placed in evidence.

171. Faced with this confusing and incomplete picture (not including the transcript and judgment of 12 August 2015), the tribunal said:

> "36. The events of 16th and 17th are, on the face of it, curious. We are conscious that we must not speculate about matters

> about which there is either no evidence or in respect of which the evidence is unclear or conflicting. But we reach the following sure conclusions for the purposes of our consideration of this third charge. First, we are sure that, whether by personal appearance or by ensuring the matter was put before him on 16th June the respondent did inform Judge 1 that a matter to which she was a party was to be heard by a High Court Judge on the following day.
>
> 37. In support of that conclusion we have the letter in evidence from Her Majesty's Court Service dated 29th October 2015 which is appended to a witness statement of [Mr X] which is in evidence before this Tribunal) in which the writer, in response to [Mr X]'s enquiries as to how all this could have occurred, states amongst other things as follows: 'The application dated 4th June 2015 that was submitted to Central Family Court stamped as received on 12th June 2015 was forwarded to the Urgent Referral Judge for attention. The information also supplied by the applicant indicated that there was already a hearing taking place at the Royal Courts of Justice on 17/06/15 in front of a High Court Judge.'
>
> 38. As it seems to us, the inescapable conclusion from that letter is that the respondent did indeed, either expressly or face-to-face or by some other means, represent that which is alleged against her and it is not for this Tribunal to speculate as to her reasons for it. But that she did so we have no doubt. We therefore find that she did mislead the Court on the 16th June in that she made an application ex parte to transfer the proceedings to the High Court for the reasons that are alleged. We are also satisfied that she did know or that she ought to have known that the assertion that she made was untrue, and we are satisfied so that we are sure on the evidence that this is proved."

172. The tribunal therefore was sure that the Appellant told the court that there was a hearing on 17 June 2015. However, it did not know when or how or to whom she conveyed this information, or what words she used.

173. In my judgment, a tribunal correctly directing itself could not have been sure that the Appellant was the author of a communication which deliberately misled the court and thereby amounted to professional misconduct.

174. First, Judge Cryan's order does not identify the source of the offending information.

175. Second, although the HMCTS letter does identify the Appellant, it is an unsatisfactory piece of evidence. It is anonymous hearsay which alleges a communication but does not identify its form, date or precise content. Moreover it says that information from the Appellant "indicated" that a hearing was listed. It is impossible to be sure of the meaning of "indicated".

176. I accept that it appears likely that the Appellant provided the offending information. I am fortified in that view by what the transcript records her saying to Judge Altman. That, however, was not before the tribunal. I am also slightly confused by the reference there to the date of 10th June. Judge Cryan's order only refers to an application dated 4th June and "the court file" as sources of information. His order appears to have been made on 16th June.

177. The vagueness of the evidence about the communication means, in my view, that the tribunal could not logically be certain that any communication was a deliberate deception and not some form of misunderstanding.

178. Ground 5 therefore succeeds in respect of charge 3 only.

Ground 6: At [27] the DT erroneously found (as the BSB urged them to) that the Appellant's former solicitors admitted non-compliance with the orders in Charge 2. That was not the whole picture. The document at Bundle 3/SD19 (a letter dated 14.7.17), in fact contained a denial of 'professional misconduct'

179. This ground, alleging (in effect) an error of construction of a document in the tribunal's judgment, is very clearly a ground of appeal rather than a ground on which the charges could have been resisted but which was not relied on below. It is also a straightforward point which can be resolved by argument and without new evidence. Indeed, it is readily apparent that it is without merit. In those circumstances there is no practical difference between giving permission for it to be relied on and then dismissing it, and simply refusing permission. The end result is the same.

180. Charge 2 was a complaint that the Appellant had failed, in eight specified respects, to comply with court orders made on 2 September and 20 November 2014 and 15 January 2015 or with agreements recited in those orders.

181. On 14 July 2017 Shakespeare Martineau, the solicitors then representing the Appellant, wrote to the Respondent. In response to the tribunal's direction to indicate whether any of the charges or facts were admitted, the letter stated:

> "… we would confirm as follows:
>
> a) The Defendant denies all of the charges.
>
> b) Without prejudice to the above, and in the interests of narrowing the issues, the Defendant admits the following with regard to Charge 2, with the exception of Charge 2(4):
>
> That she failed to comply, either in time or at all, with the agreements recited within and the Orders of District Judge Simmonds sitting in The Family Court made on 2 September and 20 November 2014 and 15 January 2015. The reasons for such non and/or late compliance will be set out in the Defendant's evidence.

> For the avoidance of doubt the Defendant will deny that such non and/or delayed compliance amounted to professional misconduct contrary to Core Duty 5 of the Code of Conduct of the Bar of England and Wales (1st Edition)."

182. That was an admission of fact, not an admission of professional misconduct. The question is whether the tribunal wrongly treated it as an admission of professional misconduct.

183. The tribunal's decision states:

> "27. For a time during these disciplinary proceedings the respondent was represented by solicitors, Shakespeare Martineau. During that period by letter dated 14th July 2017 they, acting on her behalf, admitted non-compliance with these orders as a matter of fact, but suggested that she had an explanation for so doing which she would in due course give. She has in fact never advanced any explanation in these proceedings and indeed has failed to comply with all directions (paragraphs (1) to (8) above by the dates specified or, in some cases at all.
>
> 28. Appendix A to the skeleton argument sets out in tabular form both the nature of the four relevant orders made and the breaches of them. As I have indicated, non-compliance has been admitted by the respondent's solicitor, presumably on instructions Subsequently, in respect of (4) above the respondent has disputed that she failed to send [Mr X]'s solicitors a statement setting out information of the kind that was the subject of the order. That she did send some information is plain but, on any view, it was inadequate as shown by the District Judge's order of 20th November 2014 which required compliance by 12th December 2014.
>
> 29. For these purposes we have regard to a skeleton argument dated 19th November 2014 prepared on behalf of [Mr X] in proceedings before District Judge Simmonds in which he dealt with what he asserted were the breaches."

184. The tribunal then set out the details of the orders and the non-compliance with them and declared itself satisfied to the criminal standard of proof that the breaches alleged were proved. It continued:

> "32. That being so, we are entirely sure that the matters alleged, namely, the subject matter of Charge 2, are proved and we therefore ask whether we are sure that that amounts to a breach of Core Duty 5 …".

185. The decision goes on to note the indication in the Sentencing Guidance that non-compliance with court orders in a personal capacity can amount to professional misconduct: see paragraph 66 above. The tribunal continued (as also quoted above):

> "34. By no means do we apply some blanket approach to the effect that this will always be the case. Each case will depend upon its own facts. There will be circumstances in which there are mitigating features or factual aspects which persuade a Tribunal that the culpability in question does not amount to professional misconduct contrary to Core Duty 5. We have no doubt at all on the particular facts of this case that Charge number 2 does amount to a breach of Core Duty 5 both in respect of its nature, that is the significance of the non-compliances and the failure to satisfy the judgment as to costs and, in our judgment, accurately by counsel for [Mr X] at the time, namely, her reasons or purported reasons for not complying which were simply not credible and might even be categorised as risible …".

186. It is clear that the tribunal did not treat the admission of fact as an admission of professional misconduct. It correctly directed itself that any case of a breach of a court order must be considered on its particular facts. It went through the admitted facts in detail, considering their "significance" and the reasons for them, and reached a conclusion which it was entitled to reach.

187. Ground 6 therefore fails.

Ground 7: the evidence of Ms Licht

188. As I said at paragraph 14 above, this ground of appeal must fall with the application to adduce fresh evidence in the form of Ms Licht's report. And, as I have explained above, even if that evidence had been admitted, it would clearly not have been capable of persuading a tribunal that the facts found did not amount to professional misconduct.

Ground 8: The BSB inserted into the trial bundle (at page AD 79) a grossly prejudicial document … This was irrelevant to the issues at trial. This document was highly likely to have turned the trial panel against the Appellant and meant that she did not have a fair trial and/or cannot be seen to have had a fair trial.

189. My decision is here recorded in outline. Some further details are set out in the confidential annexe to this judgment.

190. This ground arises because of an allegation made by the Appellant against Mr X. Details of that allegation were made known to the tribunal, in particular in expert psychiatric evidence filed by solicitors acting for the Appellant and in the expert psychiatric evidence of Dr Isaac. Reference to it continued to be made up to the time of the tribunal hearing in January 2020, in the context of the Appellant's application to adjourn that hearing and/or the question of whether the tribunal should proceed in the Appellant's absence.

191. The document referred to in ground 8 is an email dated 4 February 2017 from an officer of the Metropolitan Police to the Respondent, providing "an update on our investigation". It stated:

> "The allegations made by [the Appellant] have all been NFA'd by the MPS. There is insufficient evidence to support her allegations and as such the investigations are closed. We did however uncover material that tends to support the complaints made by [Mr X] to you. The MPS will be reviewing this material to consider whether there is sufficient material to justify an investigation into [the Appellant] and whether there is a case to answer in respect of perverting the course of justice.
>
> This review will be done by an independent team and I can't obviously say they will certainly take it on. My view is that an investigation would certainly be in the public interest to pursue.
>
> Once any decision has been made I will ensure you are updated."

192. I have not seen any further communication of this kind and am not aware that any further relevant information was provided to the tribunal.

193. The contention in ground 8 is that the inclusion of the document in the trial bundle was an error of law which made the trial unfair. That in my judgment is a contention of pure law which can be considered without either party needing to adduce further evidence. It is an assertion of an error occurring in the tribunal proceedings, rather than a ground on which the charges could have been contested at first instance. The Respondent has had ample time to consider it. In those circumstances I give permission for the point to be raised for the first time on appeal.

194. I do not accept the Appellant's submission that the contents of the document were wholly irrelevant to the charges. Once the underlying allegation was known to the tribunal, it was potentially relevant to the credibility of the Appellant and of Mr X.

195. It was therefore reasonable, and not unfair, for the tribunal to know what had happened about the underlying allegation i.e. that no further action was being taken on it, the police having found insufficient evidence to support it.

196. The document did also tend to suggest that its author thought there was a credible case that the Appellant had perverted the course of justice in some unspecified way. That causes me more concern. However, the only rational conclusion which the tribunal could have drawn from the available information (and the lack of any further information) was that any investigation against the Appellant had not led to any action, if indeed it had taken place at all.

197. If a document of that kind went before a jury in a criminal trial, objection might well be taken to the fairness of the proceedings. In this case, however, the document went before an expert tribunal chaired by a (retired) judge. Such a tribunal can be trusted to make a proper assessment of information of that kind, and not to attach weight to irrelevant information or inappropriate weight to incomplete information. I do not

therefore assume that the tribunal was at risk of being improperly influenced by the document.

198. Nor is there any indication that the tribunal in fact was so influenced. Its judgment makes no reference to the document or to the matters referred to in it. The Appellant's credibility was directly relevant to charges 1 and 3, where the tribunal had to decide whether she knowingly misled the court. Its findings in that regard consisted, and consisted only, of a careful and convincing analysis of the evidence relating to the Family Court proceedings.

199. Ground 8 therefore fails.

Ground 9: The Disciplinary Tribunal erred in imposing a sanction of disbarment, which was in the circumstances clearly inappropriate, as it was manifestly excessive and disproportionate given her personal circumstances and history.

200. The tribunal imposed a sanction of disbarment on charge 1. Its reasons were that the Appellant's conduct was dishonest, and:

> "This represents very serious misconduct and the guidance at page 30 provides that the starting point is one of disbarment. The Tribunal took into account that there was no professional or other dishonesty prior to this incident. The Tribunal noted the written submissions sent that morning by the Respondent. The Tribunal concluded that the only appropriate sanction was one of disbarment."

201. In respect of charge 2 the sanction was a prohibition from applying for a practising certificate for 12 months. In the case of an unregistered barrister this type of sanction is the equivalent of suspension. The tribunal noted that charge 2 identified repeated misconduct which was not unintentional or due to confusion.

202. In respect of charge 3, against which the appeal has succeeded, the sanction was disbarment, following the guidance in respect of dishonesty. The tribunal added: "This is 10 months after the first dishonesty and the repeat offending was regarded by the Tribunal as an aggravating feature". I note that the tribunal did not state that it regarded charge 3 as an aggravating feature for any of the other charges.

203. In respect of charge 4 the sanction was disbarment. The tribunal referred to "wholly inappropriate conduct by a barrister who should have known better" which was "carried on … over a long period of time and affecting numerous third parties" and was therefore "very serious". The tribunal had regard to the same sanction imposed for "not dissimilar conduct" in *Iteshi*.

204. The appeal takes no issue with anything specific said in the above reasoning and I perceive no error in anything said by the tribunal.

205. Instead, in respect of all the charges Mr Beaumont contends that the tribunal should have perceived that the Appellant has psychiatric or other health issues which do or could amount to mitigation and should have sought further evidence before deciding on sanction.

206. I have already referred to the evidence of Dr Isaacs. In addition, on 22 January 2020 the tribunal had received an email from the Appellant's PA expressing concern about her mental health, and on 24 January 2020 it received a statement from the Appellant. The latter continued to take issue with substantive points about the charges but it also referred to the Appellant having "psychiatric intervention".

207. In my judgment, the material actually before the tribunal did not provide mitigation of a kind which realistically could have changed the outcome on sanction. As Mr Beaumont conceded, at best it indicated that there were psychiatric issues which might be investigated.

208. Even today, there is no coherent and up-to-date evidence before this Court which would be of material assistance in mitigation. Any investigation would be starting largely from scratch.

209. Meanwhile, the appeal against sanction overlooks the public protection element of professional disciplinary proceedings. If a barrister deceives the court and makes vexatious court applications, a regulator must act to protect the public even if there is reason to feel personal sympathy with the barrister.

210. Ground 9 therefore fails in respect of the sanction imposed by the tribunal for charges 1 and 4 (and the sanction for charge 2 is not challenged). Disbarment was correctly identified as an appropriate sanction, based on the facts of those charges and the available evidence.

211. I have considered whether the question of sanction should nevertheless be remitted to the tribunal because I have allowed the appeal on charge 3.

212. However, as I pointed out above, the tribunal did not identify charge 3 as an aggravating factor in respect of any other charge. Instead it clearly identified charge 1 as an aggravating factor in respect of charge 3, a finding which now falls away.

213. In my judgment there is no logical reason why the tribunal would change its decision on the sanction for charges 1 and 4, and no prospect that it would do so if invited to reconsider the case.

214. Looking at charges 1, 2 and 4 afresh, I therefore see no grounds for overturning the sanction imposed and no risk of injustice.

Post-hearing matters

215. Arrangements were made for drafts of this judgment and the confidential annexe to be shown to Mr X so that he could take legal advice on them. Shortly before handing down judgment I received a written submission from Mr X with some enclosures. He suggested some changes to the draft judgment and annexe, but I did not consider it necessary or appropriate to accede to that request (or to have regard to any further evidence), both parties to the appeal having approved the drafts. I have made no order in response to his submission, which otherwise is dealt with in the confidential annexe.

Conclusion

216. The finding of misconduct on charge 3 and the concurrent sanction of disbarment on that charge are set aside. To that extent, the appeal is allowed.

217. In all other respects the appeal is dismissed.