Neutral Citation Number: [2017] EWHC 969 (Admin)

Case No: CO/3286/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 May 2017

Before :

MRS JUSTICE LANG DBE

- -

Between :

DAMIAN McCARTHY	**Appellant**
- and -	
BAR STANDARDS BOARD	**Respondent**

- -
- -

Marc Beaumont (instructed by **Weightmans LLP**) for the **Appellant**
James Counsell QC (instructed by the **Bar Standards Board**) for the **Respondent**

Hearing date: 5 April 2017

- -

Approved Judgment

Mrs Justice Lang :

1. On 9 June 2016, after a 4 day hearing, a Disciplinary Tribunal of the Council of the Inns of Court ("the Tribunal") found two charges of professional misconduct proved against the Appellant, who was a barrister in practice at Cloisters chambers. The Tribunal imposed a sanction of disbarment on the first charge, with no separate penalty on the second charge. The Appellant appealed against the Tribunal's decisions on misconduct and sanction.

2. The members of the Tribunal were: HH Judge Veronica Hammerton (Chairman); Mr Richard Hutchings (Barrister Member); Ms Jacqueline Thomas (Barrister Member); Mr Roland Doven (Lay Member); Ms Lara Fielden (Lay Member).

History

3. The charges arose from the Appellant's actions in relation to Employment Tribunal proceedings in 2008 in which he acted for Ms Tharapatn on a public access basis. This was the Appellant's first public access case that progressed to a final hearing and resolution. Under Rule 6 of the Public Access Rules then in force, barristers were required to send letters to lay clients before items of work were undertaken, setting out the terms of service, information as to fees payable, and complaints procedures. These were commonly referred to as "Rule 6 letters".

4. After the conclusion of the Employment Tribunal proceedings, a dispute arose between the Appellant and his client and her husband Mr Timothy Aron concerning the amount of fees payable. Ms Tharapatn made a complaint to the Bar Standards Board ("BSB"). In the course of its investigation, the BSB asked the Appellant to supply copies of his Rule 6 letters, and he duly produced four letters, which he said he had sent to his client in June and July 2008. Ms Tharapatn and Mr Aron denied receiving any Rule 6 letters and accused him of forging them.

5. The charges against the Appellant were as follows:

> "**Charge 1**
>
> **Statement of Offence**
>
> Professional misconduct contrary to paragraph 301(a)(i) and pursuant to paragraph 901.7 of the Code of Conduct of the Bar of England and Wales (8th Edition).
>
> **Particulars of Offence**
>
> **Damian McCarthy**, a self employed barrister in professional practice, engaged in conduct in pursuit of his profession which was dishonest or otherwise discreditable to a barrister contrary to paragraph 301(a)(i) of the Code of Conduct, in that on or about 22 June 2009 in response to a request by the Bar Standards Board ("BSB") for documentation relevant to its investigation into a complaint against Mr McCarthy by his lay

client – Ms S Tharapatn – he sent the BSB four client care letters which he falsely asserted were sent to Ms Tharapatn in compliance with the requirements of paragraph 6 of the Public Access Rules when he knew the same were recent creations which had not been sent to his lay client in advance of the work being carried out as was required by the Rules.

Charge 2

Statement of Offence

Professional misconduct contrary to paragraph 401(a)(iii) and pursuant to paragraph 901.7 of the Code of Conduct of the Bar of England and Wales (8th Edition).

Particulars of Offence

Damian McCarthy, a self employed barrister in professional practice, between 1 July and 1 August 2008 accepted public access instructions and supplied legal services for reward on behalf of a lay client Ms S Tharapatn – without promptly sending her a written communication in compliance with paragraph 6 of the Public Access Rules contrary to paragraph 401(a)(iii) of the Code of Conduct."

6. These two Rule 6 charges had previously been heard and determined by another Disciplinary Tribunal panel, chaired by HH Judge Crawford Lindsay QC. I shall refer to this as "the previous Tribunal". On 4 February 2011, the previous Tribunal found the two Rule 6 charges proved against the Appellant. On 4 March 2011, the previous Tribunal imposed the sanction of disbarment on both charges. He was also ordered to remit fees in the sum of £5,000 to Ms Tharapatn.

7. The previous Tribunal also found four other charges proved:

   i) Supplying legal services to a public access client without keeping a case record which complied with the rules (admitted and found proved);

   ii) Failing to ensure that proper records supporting the fees charged or claimed were kept (admitted and found proved);

   iii) Failing to provide his public access client with records or details of the work done (admitted and found proved); and

   iv) Failing to deal with a complaint promptly and/or courteously and/or in a manner which addressed the issues raised (not admitted and found proved).

8. The sanctions in respect of those four charges were fines, reprimands and an indefinite prohibition on accepting or carrying out public access instructions.

9. The Appellant appealed against the previous Tribunal's findings of professional misconduct on the two Rule 6 charges. There was no appeal against the sanction of disbarment in the event that the findings of guilt were upheld. The Appellant also

appealed against the sanction imposed on the other four grounds. His appeal was dismissed by the Visitors to the Inns of Court ("the Visitors") on 25 January 2012. The judgment by Sir Mark Waller, a former Lord Justice of Appeal who chaired the panel of Visitors, stated at paragraph 74 that "*the evidence against DM was extremely powerful and accordingly … the verdict of the Tribunal was not unsafe*".

10. The Appellant applied for judicial review of the Visitors' decision on the ground that the Visitors erred in law in upholding the previous Tribunal's decision. The claim was dismissed by the Administrative Court (Moses LJ) on the ground that, despite an error of law by the Visitors, there was "*conclusive evidence*" (at [38]) of the Appellant's guilt, and so there was no real possibility of an alternative result.

11. On appeal, the Court of Appeal held that the BSB had acted unfairly and in breach of its obligations under regulation 7(1)(a) of the Disciplinary Tribunal Regulations 2009 by failing to disclose a draft witness statement made by its witness Mr Aron, which differed materially from the final version of the statement which was served, thus potentially undermining his credibility. The previous Tribunal was unaware of the non-disclosure but it formed part of the Appellant's case before the Visitors. Burnett LJ referred to the strength of the evidence against the Appellant. On 20 January 2015, the Court of Appeal quashed the decision of the Visitors and allowed the Appellant's appeal. All consequential matters were remitted to the Visitors for determination.

12. On 13 July 2015, the Visitors decided that there should be a re-trial of the Rule 6 charges before a fresh panel, rejecting the Appellant's submissions that the lapse of time and the advantage gained by the BSB witnesses would render a fair trial impossible. Sir Stephen Stewart, the High Court Judge who chaired the panel of Visitors, set out a detailed analysis of the evidence against the Appellant, at [9]. He considered the principles established in criminal cases, including *R v Graham* [1997] 1 Cr App R. 302, at 318, in which the Court of Appeal held that the "*[p]ublic interest is generally served by the prosecution of those reasonably suspected on available evidence of serious crime, if such prosecution can be conducted without unfairness to …. the Defendant*". He concluded that it was in the public interest for there to be a hearing of serious allegations made against the Appellant.

13. The case was reported in the legal press. The BSB issued a press release which was reported in two articles, and became the basis for a further ground of appeal. The article in the Law Society Gazette stated:

> "**BSB granted retrial after evidence blunder**
>
> By Chloe Smith 18 August 2015
>
> The Bar Standards Board has welcomed a decision to allow a case against a public access barrister accused of forging client care letters to be heard again, after he successfully appealed against being disbarred earlier this year.
>
> Damian McCarthy launched a judicial review after he was disbarred in 2011, when it emerged that in 2010 the BSB had failed to disclose a statement by one of the principal witnesses against him ahead of his hearing. The Court of Appeal ruled in

his favour, saying the BSB's actions had left McCarthy 'blind to any sense of fairness in the conduct of a disciplinary prosecution'.

The Visitors to the Inns of Court has now ruled that the bar regulator can retry the case.

Commenting on the judgment, Sara Jagger, director of professional conduct at the BSB, said: 'Notwithstanding the history of the case, the BSB remains of the view that Mr McCarthy acted dishonestly and falsified the client care letters during our original investigation.

'As this is a fundamental breach of the integrity expected from all barristers, it is right that this serious disciplinary matter can be re-heard.'

McCarthy had argued that the trial should not be reheard because the delay could affect the reliability of witnesses' memories and because it would give witnesses for the BSB an unfair advantage.

But in his judgment Sir Stephen Stewart said he saw 'no basis' for the argument that McCarthy would be deprived a fair hearing, as both sides would know more than would have been the case at the first hearing and that any impact on the delay could be weighed at a tribunal.

'There is clearly a public interest in there being a hearing of serious allegations made against a barrister,' he said.

Sir Stephen ordered the BSB to pay the costs of the original tribunal hearing and a previous hearing before the Visitors to the Inns of Court. McCarthy was ordered to pay 70% of the BSB's costs on the standard basis.

McCarthy was originally disbarred after a disciplinary tribunal ruled that he had written Rule 6 letters relating to public access to clients after a dispute arose about costs. Public access rules state that all client care letters must be sent in advance of work carried out.

McCarthy denied the charge. He told the tribunal that he had sent versions of the model Rule 6 letter by hand and observed that, had the letters he produced to the BSB been forgeries, 'he might have made a better job of them'.

McCarthy's disbarment was overturned because a witness statement from one of the central witnesses was not disclosed until shortly before the hearing date, which a Court of Appeal judge said was 'extraordinary'."

14. The article in Legal Futures stated:

> "**Barrister who took BSB to judicial review hopes for "fair hearing" of forgery claims**
>
> By Nick Hilborne 20 August 2015
>
> Damian McCarthy, a barrister whose disbarment was overturned by the Court of Appeal, has said he is hoping for a "fair hearing" from a new Bar disciplinary tribunal.
>
> Mr McCarthy launched a judicial review after he was disbarred in 2011, following accusations by the Bar Standards Board (BSB) that he had forged client care letters. The ruling was later upheld by the Visitors to the Inns of Court.
>
> He told *Legal Futures*: "The Court of Appeal found that both my disciplinary and appeal hearings were unfair because of the conduct of the BSB.
>
> "The BSB made a conscious decision to withhold a witness statement to try and secure my conviction. I have never received a fair hearing and have now waited four and a half years.
>
> "If it is possible to receive a fair hearing, I hope that any disciplinary tribunal will examine all of the evidence fairly and objectively and reach a fair decision."
>
> At a Court of Appeal hearing in January this year, Lord Justice Burnett described a BSB official who failed to disclose a prosecution statement in the case of "subverting the rules" and being "blind to any sense of fairness".
>
> However, the court recognised that there was a "strong case" against Mr McCarthy and the following month appeal judges returned the case to a new panel of Visitors.
>
> The Visitors ruled at the end of last month that there was "no basis" for saying that Mr McCarthy would be deprived of a fair hearing "by reason of delay and/or any prior knowledge" of BSB witnesses.
>
> In a statement, Sara Jagger, BSB director of professional conduct, said she was pleased that their judgment enabled a fresh tribunal to take place.
>
> "Mr McCarthy worked as a public access barrister and as an employment advocate, but was disbarred after the initial finding in 2011. The tribunal found that Mr McCarthy falsified client care letters to the BSB during an investigation that he should have issued to the client.

> "The client raised a complaint about the fees charged, for which no client care letters had been issued to the client originally, stating what the fees would be.
>
> "Due to an error in the BSB's handling of the case during the original tribunal, McCarthy's disbarment was overturned after a lengthy appeal process. The BSB issued a statement acknowledging its error when the disbarment was overturned in January 2015.
>
> "Notwithstanding the history of this case, the BSB remains of the view that Mr McCarthy acted dishonestly and falsified the client care letters during our original investigation.
>
> "As this is a fundamental breach of the integrity expected from all barristers, it is right that this serious disciplinary matter can now be reheard by an independent disciplinary tribunal.""

15. The Appellant had been suspended from practice pending the determination of his appeal to the Visitors. From 20 January 2015, he was no longer suspended and the order of disbarment had been set aside. He could not, however, return to practice without renewing his practising certificate, which he did not do.

Grounds of appeal

16. The appeal was lodged on 28 June 2016. The Grounds of Appeal were amended on 11 August 2016.

17. **Ground 1**. The Appellant submitted that the decision of the Tribunal ought to be set aside as it was not objectively independent nor impartial. By the time of the hearing, the only surviving basis for this ground was that the Chairman of the Tribunal, HH Judge Hammerton, had been a pupil of HH Judge Crawford Lindsay QC, who was the Chairman of the previous Disciplinary Tribunal, whose decision the Appellant had successfully appealed. He had also been her Head of Chambers. The Appellant did not pursue the pleaded allegation of bias based upon the fact that HH Judge Crawford Lindsay QC was the former head of chambers of a barrister member of the Tribunal, Mr Richard Hutchings, as this was factually incorrect.

18. **Ground 2**. Other allegations of bias, pleaded in Ground 2, were not pursued at the hearing. In summary, these were: (a) HH Judge Hammerton's brother was regularly instructed as a trial advocate for the BSB; (b) Mr Hutchings had previously been in the same chambers as Mr Paul Pretty, the BSB's Investigations and Hearings Team Manager; and (c) Mr Roland Doven served on the Parole Board with HH Judge Crawford Lindsay.

19. **Ground 3.** The Appellant submitted that the press release issued by the BSB in 2015 after the Visitors had ordered a re-trial, which was published in the legal press, was in breach of the presumption of innocence in Article 6(2) of the European Convention on Human Rights (ECHR) and was "grossly irregular" because it expressed the

opinion that the Appellant was guilty of dishonesty, despite the quashing of his conviction. This placed improper pressure on members of the Tribunal to convict the Appellant.

20. **Ground 4**: At the hearing, the Appellant abandoned his ground 4, which alleged that the Tribunal had made a perverse and unsustainable assessment of the character of the BSB's witness, Mr Aron.

21. **Ground 5**. The Tribunal misdirected itself when deciding upon the appropriate sanction. A fairer and more proportionate sanction would have been 2 years suspension.

Statutory framework

22. The Courts and Legal Services Act 1990 designated the Bar Council as the authorised body for the profession. The BSB was set up under the Legal Services Act 2007 to act as the specialist regulator of barristers in England and Wales. Its regulatory objectives derive from the Legal Services Act 2007.

23. The proceedings of the Tribunal are governed by the Disciplinary Tribunals Regulations 2014. By regulation E143, the Tribunal must apply the criminal standard of proof when deciding charges of professional misconduct. Regulation E155 sets out the procedure for the findings on each charge, which are to be announced and recorded. By regulation E157, if the Tribunal finds any of the charges proved, it will hear evidence of any previous adverse findings, and representations on behalf of the practitioner, before announcing and recording its decision on sentence. The usual practice is for the prosecutor merely to draw the Tribunal's attention to the Sentencing Guidance.

24. As to rights of appeal, section 24 of the Crime and Courts Act 2013 abolished the jurisdiction of the Visitors of the Inns of Court, and made provision in subsection (2) for the General Council of the Bar and the Inns of Court to confer a right of appeal to the High Court in respect of, *inter alia*, a matter relating to regulation of barristers. Subsection (6) provides that the High Court may make such order as it thinks fit on an appeal.

25. The Disciplinary Tribunal Regulations 2014, at E183 to E185 in the Bar Standards Handbook, confer upon a defendant a right of appeal against conviction or sentence.

26. CPR Part 52 (prior to amendment on 3 October 2016) applies to this appeal.

27. Rule 52.10 confers power on the appeal court to affirm, set aside or vary the orders of the Tribunal. It has the same powers as the Tribunal.

28. Rule 52.11 provides, so far as is material:

> "Hearing of appeals
>
> 52.11

> (1) Every appeal will be limited to a review of the decision of the lower court unless –
>
> (a) a practice direction makes different provision for a particular category of appeal; or
>
> (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
>
> ....
>
> (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.
>
> (4) The appeal court may draw any inference of fact which it considers justified on the evidence."

29. An appeal against the decision of a Disciplinary Tribunal is by way of review, not re-hearing.

Ground 1: Bias

30. The Appellant submitted that the decision of the Tribunal ought to be set aside on the ground of apparent bias, because of the association between HH Judge Hammerton and HH Judge Crawford Lindsay QC, applying the principle in *Porter v Magill* [2002] 2 AC 357 and Article 6 ECHR.

31. In *Porter v Magill* [2002] 2 AC 357, at [103], Lord Hope reformulated the test to be applied to allegations of apparent bias to one which was "*in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias*", namely:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

32. In *Helow v Secretary of State for the Home Department* [2008] UKHL 62, Lord Hope described the attributes of the fair-minded and informed observer:

> "1. My Lords, the fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded

> observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word "he"), she has attributes which many of us might struggle to attain to.
>
> 2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
>
> 3. Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

33. Mr Beaumont relied particularly upon cases of "unconscious bias". As Rix LJ observed in *R (on the application of Kaur) v Institute of Legal Executives Appeal Tribunal* [2012] 1 All ER 1435:

> "…the doctrines with which we are here concerned are to guard against the insidious effects of which those concerned are not even conscious."

34. In *Lawal v Northern Spirit* [2003] ICR 856, the House of Lords held that there was a real possibility of lay members of the Employment Appeal Tribunal (though not the legal member) being subconsciously biased in favour of counsel's submissions where he also sat as a part-time judge with them in the same tribunal. Lord Steyn observed at [22]:

> "In the appeal tribunal [2002] ICR 486, 503, para 33(10) Lindsay J was alive to the possibility that "some . . . practices will fall prey to increasing sensitivity". What the public was content to accept many years ago is not necessarily acceptable

> in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago. The informed observer of today can perhaps "be expected to be aware of the legal traditions and culture of this jurisdiction" as was said in *Taylor v Lawrence* [2003] QB 528, 548-549, paras 61-64, per Lord Woolf CJ. But he may not be wholly uncritical of this culture. It is more likely that in the words of Kirby J in *Johnson v Johnson* 201 CLR 488, 509, para 53, he would be "neither complacent nor unduly sensitive or suspicious": compare also [2002] IRLR 225 (second col)."

35. Mr Beaumont also referred me to the test applied in the ECtHR, set out in *Hauschildt v Denmark* (1990) 12 EHRR 266, at [48] – [49].

36. Mr Counsell QC relied upon the dictum of Sales LJ in *Watts v Watts* [2015] EWCA Civ 1297, at [28]:

> "The notional fair-minded and informed observer would know about the professional standards applicable to practising members of the Bar and to barristers who serve as part-time deputy judges and would understand that those standards are part of a legal culture in which ethical behaviour is expected and high ethical standards are achieved, reinforced by fears of severe criticism by peers and potential disciplinary action if they are departed from: *Taylor v Lawrence* [2001] EWCA Civ 119, [33]-[36]; *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] QB 528, [61]-[63]…."

37. Mr Counsell QC submitted that in two recent cases, the position of a judge with a past connection to one of the parties or their representatives, had been considered and in both cases the Court held that the risk of apparent bias was not established.

38. In *Azumi v Vanderbilt and others* [2017] EWHC 45 (IPEC), the Recorder, sitting as a Deputy High Court Judge, refused an application to recuse himself on the ground that he shared chambers with Counsel for the Claimant. He held, applying the test in *Watts*, that a fair-minded observer would have been aware of the professional standards shared between colleagues and would not form a perception of bias (at [16]).

39. In *Siddiqui v Oxford University Chancellor, Masters and Scholars* [2016] EWHC 3451, Kerr J. refused to recuse himself from a university's application to strike out and for summary judgment when (1) he had attended the university 30 years before, (2) had represented the university in the past when he was a junior counsel and (3) until shortly before the hearing had been in the same chambers as leading counsel for the University. Kerr J. held that there was no risk of bias. He had attended the university a long time before and had been in a different college from that of the Claimant in the case with which he was being asked to deal, he could not recall anything of the case which he had done for the university and, as to the third ground, it was "*commonplace in litigation in these courts for a member of a chambers to*

appear before a judicial tribunal comprising a former member of that person's chambers" (at [19]).

40. Kerr J. said at [10]:

> "An application of this kind raises important issues. On the one hand, it is fundamental to our system of justice and to the rule of law itself that every party coming before the courts can be confident of an independent and impartial tribunal. Judges swear an oath of office, including a pledge to do justice without fear or favour, affection or ill-will. No-one should feel inhibited about insisting on their right to impartial justice. On the other hand, it is also of public importance that the law and the administration of justice is not undermined or brought into disrepute by a party trying to pick the constitution of the court, in the hope of getting a judge who, the party thinks, will be more likely than the assigned judge to favour that party's cause; or it may be, in the hope that an assigned judge who is asked to stand down on grounds that lack merit, will take the line of least resistance and accede to the request as a matter of listing convenience. The Court of Appeal has emphasised that a judge should not stand down as a matter of convenience where grounds for recusal do not exist."

41. I now turn to apply these legal principles to the facts of this case.

42. At the Tribunal hearing, the parties provided the panel with a document of "Agreed Admissions" which set out the litigation history in very brief terms, and without mentioning the names of any of the judges who had sat previously. Mr Counsell QC, who appeared for the BSB below, lodged a skeleton argument in which he advised the Tribunal, at paragraph 6:

> "The fact that DM has previously been found guilty of these charges is, of course, not a matter to which the Tribunal should have any regard at all. The Tribunal will wish to consider this matter afresh and to reach its own decision, untrammelled by any decisions at the original hearing or, indeed, during the appeals."

This statement reflected what Mr Counsell believed to be the stance agreed with the defence. However, Mr David Reade QC who appeared for the Appellant below, submitted an opening note in which he quoted from the judgment of Burnett LJ in the Court of Appeal, where he criticised the conduct of the BSB, and provided the case citation. He then went on to say, at paragraph 5.1, that although he had referred to the Court of Appeal judgment, the panel ought not to have regard to the decision of the previous Tribunal.

43. At the Tribunal hearing, the Appellant produced a late supplementary bundle, and the BSB objected to its admission in evidence. By either the end of the first day or the beginning of the second day of the hearing, agreement had been reached between the

parties as to its contents, and it was provided to the Tribunal. In the bundle there was a character reference for the Appellant from a barrister colleague, Mr Spencer, addressed to "*His Honour Judge Crawford Lindsay QC, The Disciplinary Tribunal of the Council of the Inns of Court*".

44. On 7 June 2016 (the second day of the hearing) the following exchange took place:

> "THE CHAIRMAN: The Defendant's bundle.
>
> MR. READE: Yes.
>
> THE CHAIRMAN: Just to mention that we noted, in the various witness statements that have been submitted, the reference in one of them that it'd obviously been sent in to the previous hearing, 2011, that was addressed to His Honour Crawford Lindsay, which was the Chair of that Tribunal hearing.
>
> MR. READE: Yes.
>
> THE CHAIRMAN: I don't think it will cause difficulties, but in the interests of openness there are various connections by members of the Panel with His Honour Crawford Lindsay. I was his pupil and he was my former head of chambers. The last time I saw him was some two years ago.
>
> MR. READE: Right.
>
> THE CHAIRMAN: I had an email exchange with him just before Christmas. Mr. Hutchings sits on the same panel involved with advocacy at Lincoln's Inn and certainly met Judge at some advocacy training in January of this year. It is right to say that neither Mr. Hutchings nor I was ever aware that His Honour sat on tribunals at all, let alone this one specifically.
>
> A further possible contact is that, as far as Mr. Doven is concerned, he has sat on the Parole Board together with His Honour Crawford Lindsay, but that was some time ago, as I think he's stopped doing that.
>
> MR. READE: Right.
>
> THE CHAIRMAN: None of us think there's a problem, but we thought it was right to mention it.
>
> MR. READE: Thank you."

45. I am satisfied beyond doubt that HH Judge Hammerton only became aware of the identity of the Chairman of the previous Tribunal at this stage, and only because she saw his name in the character reference, not because she saw his name referred to in the earlier judgments in the case, or in news reports. As she made a frank disclosure

of her connection with him on 7 June 2016, it is clear she was not seeking to hide it, and she thought it ought to be disclosed. It follows, in my view, that if she had known earlier, she would have informed the parties of her connection with him at that earlier stage. The same applies in respect of the other panellists who declared a connection with HH Judge Crawford Lindsay QC.

46. It is clear from the transcript that Mr Reade QC, on behalf of the Appellant, did not seek any further details from HH Judge Hammerton about the extent of her connection with HH Judge Crawford Lindsay QC. In those circumstances, HH Judge Hammerton cannot be criticised for not providing any further details at the hearing.

47. Mr Reade QC did not raise any objection to her continuing to hear the case and appears to have agreed with the view of HH Judge Hammerton that it was not a problem. The Appellant's submission that he was not given a sufficient opportunity to give Mr Reade instructions on this issue is not credible. The Appellant, as a barrister, would have fully understood the significance of the Judge's disclosure and his right to enquire further or object, through his counsel. Even if he was distracted at that particular moment, he could have raised the issue with his counsel later that day, or on the third or fourth day of the hearing. Mr Reade could have re-opened the issue with the Judge at any time during the hearing, and asked her to recuse herself. In those circumstances, the Appellant cannot properly take this point on appeal.

48. The essence of Mr Beaumont's case was that, typically, a pupil felt respect, affection, gratitude and deference towards a pupil master, which was likely to be life-long. Since he was her pupil master and head of chambers, HH Judge Hammerton would view HH Judge Crawford Lindsay QC as a tutor and role model in respect of professional ethics. Therefore she would defer to his views, whether consciously or unconsciously, and be disinclined to reach a different conclusion on the Appellant's guilt. As Chairman, she would have considerable influence over the other panel members.

49. Mr Beaumont submitted that there was such a similarity between HH Judge Hammerton's assessment of Mr Aron's evidence in paragraphs 23 and 24 of the Tribunal's decision and that of HH Judge Crawford Lindsay QC that she must have somehow secretly obtained a copy of his previous report, demonstrating her wish not to undermine or contradict him. I did not consider that there was any substance in this allegation. Mr Aron was obviously a striking witness and it is no surprise that different judges used similar apt adjectives to describe him. As the defence had invited reference to the Court of Appeal judgment, I accept it is possible that she read it and saw reference there to the language used by the previous Tribunal to describe Mr Aron's evidence. Even if she did, it is fanciful to imagine that five members of a Disciplinary Tribunal might abdicate responsibility for making their own assessment of the credibility of a key witness, and instead rely upon the summary of the previous Tribunal's assessment set out in an appellate judgment. On the contrary, the Tribunal's decision demonstrated that the panel had carefully and conscientiously assessed the evidence and drawn their own conclusions. Those conclusions were not, on their face, surprising or perverse. It is notable that the strength of the case against the Appellant has been confirmed by the Visitors on two occasions, and by the Administrative Court and the Court of Appeal.

50. When Mr Beaumont was instructed on appeal he asked the Bar Tribunals and Adjudication Service to send a list of questions to HH Judge Hammerton about her connection with HH Judge Crawford Lindsay QC, including: how much time did she spend with him during her pupillage; was she taken on as a tenant in those chambers, and if so, did he support her application; were they tenants in the same chambers and if so for how long; did they conduct any cases together, and if so, provide details; did they socialise together and if so, where and how often; and did she ever ask him for advice on professional matters or for a reference; did she receive a pupillage award and if so, was he involved in the granting or approval of the award; was he involved in her recruitment as a pupil; did he sit on the Pupillage Committee; was he involved in offering her a place in chambers; and was he involved in the management of chambers.

51. HH Judge Hammerton replied once she had obtained the transcript, so that she could clarify the information which was given at the hearing. She summarised the exchange on 7 June (set out above) and declined to answer Mr Beaumont's questions because "*The hearing having concluded, the provision of any further information is a matter for the appellate court.*" In my judgment, HH Judge Hammerton was entitled to adopt this position, since she was *functus officio*.

52. At the hearing, Mr Beaumont asked me to order HH Judge Hammerton to provide this information, and adjourn the hearing to await her reply. I refused the application because it was unnecessary for the fair disposal of the claim, and an adjournment was undesirable. This was not an allegation of actual bias, where the court needed to know whether, for example, the judge did or did not have some undisclosed financial or commercial involvement with one of the parties. There was sufficient information already disclosed to enable the court to determine the allegation of apparent bias, namely, that HH Judge Lindsay Crawford QC had been HH Judge Hammerton's pupil master and former head of chambers, and they remained in contact with one another, having last met two years ago and exchanged emails before Christmas. I indicated that I was prepared to infer that she would have the feelings of respect, affection, gratitude and deference towards him which pupils typically felt for pupil masters and that he had assisted her over the years by helping her obtain a tenancy and giving her professional advice and references, which pupil masters typically do. As pupil master and head of chambers, he would have provided guidance on professional ethics, among other matters. I considered that he was likely to have played a part in accepting her as his pupil, but as she was called to the Bar as long ago as the 1970's, it seemed unlikely that she would have received a pupillage award which I believe were introduced at a later date.

53. Even proceeding on these assumptions, which were in the Appellant's favour, I concluded that no fair-minded and informed observer would conclude that there was a real possibility that HH Judge Hammerton would be biased. In comparison with many of the reported cases, HH Judge Crawford Lindsay QC's link with this Tribunal's adjudication was remote. He was not a party to the proceedings, nor was he appearing as an advocate. HH Judge Hammerton was not hearing an appeal from his decision, and would not have to comment upon it or analyse it. It had not even been disclosed to the Tribunal, and the panel had been asked to disregard it. Moreover, HH Judge Crawford Lindsay QC had not been the subject of any criticism, of which

she was aware. The criticism and the basis of the successful appeal was the conduct of the BSB, as was apparent from the Appellant's opening note.

54. The fair-minded and informed observer would also appreciate that HH Judge Hammerton had been a full-time circuit judge, and was therefore accustomed to exercising her independent judgment in respect of the case before her. A judge frequently has to have regard to interlocutory or final decisions bearing on the case before him, made by fellow judges, who may be close friends or senior colleagues who may be informal mentors or who may exercise administrative powers over him. Re-trials or reconsideration of previous decisions are not uncommon. Also, a circuit judge routinely determines appeals against district judges who are often part of a small judicial team in the same court centre. In his skeleton argument, Mr Beaumont mocked "*the myth that judges are somehow a specially trained crack-squad with extraordinary mental powers that enable them to be impervious to their human inclinations, invulnerable to their personal predilections and heedless of their professional affiliations*". However, in my view, it is an integral part of judicial work to hear and determine a case without fear or favour, setting aside personal preferences and loyalties. Unsurprisingly, this task becomes easier with experience. Just as, for example, experienced barristers can represent a client effectively, even when they privately dislike the individual or disapprove of his conduct. The fair-minded and informed observer would know that these professional standards "*are part of a legal culture in which ethical behaviour is expected and high ethical standards are achieved*" (per Sales LJ in *Watts*). There was no evidence that the high ethical standards of the judiciary had been breached by HH Judge Hammerton.

55. For these reasons, Ground 1 is dismissed.

Ground 3: the BSB press release

56. The extract from the BSB press release quoted in the legal press stated:

> "Notwithstanding the history of this case, the BSB remains of the view that Mr McCarthy acted dishonestly and falsified the client care letters during our original investigation. As this is a fundamental breach of the integrity expected from all barristers, it is right that this serious disciplinary matter can be re-heard by an independent disciplinary tribunal."

57. The Appellant submitted that this statement deprived him of a fair trial because:

i) the professional regulator was placing improper pressure on the members of the Tribunal to find the charges proved at the re-trial;

ii) it violated the presumption of innocence in Article 6(2) ECHR which also applies in disciplinary proceedings (see *Albert and Le Compte v Belgium* (1983) 5 EHRR 533, at [39]; *Allenet v Ribemont v France* (1995) 20 EHRR 557; *Krause v Switzerland* (1978) 13 DR 73, at pp 75-76; *Clayton & Tomlinson: The Law of Human Rights*, 2nd ed. para 11.487 referring to the principle that public officials must not declare a person's guilt in the absence of a court finding of guilt); and

iii) the prejudicial nature of the comments gave rise to a real possibility (applying the test in *Porter v Magill*) that the Tribunal members would be biased against the Appellant, particularly since the lay members were akin to jurors.

58. In my judgment, in the exceptional circumstances of this case, the BSB was entitled to issue a press release about the outcome of the earlier appeal proceedings, to which it was a party, particularly in the light of the publicity which the case attracted, and the judicial criticisms of its conduct.

59. I also consider that, in its press release the BSB was entitled to express its view that the Appellant ought to face a re-trial, in the light of the seriousness of the allegations against him (dishonesty and fabrication of documents) and the strength of the evidence against him, which had been acknowledged by the Court of Appeal when allowing his appeal because of the risk of unfairness arising from the non-disclosure of the prosecution witness statement. After all, the BSB had already expressed such views in public at the second hearing before the Visitors in July 2015, which took place at the Royal Courts of Justice, and which was the subject of the press coverage. I agree that the BSB went somewhat further than was proper, in expressing its view that the Appellant had committed the offences with which he was charged. As Mr Counsell QC conceded, it would have been better if the press release had been expressed in more circumspect language, confining itself to commenting on the strength of the evidence against the Appellant.

60. The Appellant cannot establish that any members of this Tribunal actually saw the BSB press release or the articles in the legal press which quoted from it. Solicitors are the target audience for the Law Society Gazette and Legal Futures. It would be surprising if lay members read these articles, and it cannot be assumed that barristers and judges would read the Gazette or Legal Futures on a regular basis, if at all. Moreover, even if members did see the articles in August 2015, it seems unlikely that they would remember them in any detail by the date of the Tribunal hearing in June 2016.

61. The Appellant's submission that the Tribunal members would feel pressurised to find the charges proved because the BSB considered the Appellant was guilty seems to be based on a misconception about the roles of the Tribunal and the BSB. In order to comply with Article 6 ECHR requirements of independence and impartiality, there is a clear separation between the judicial and the prosecutorial appointments and functions. Disciplinary Tribunals are arranged by an independent organisation called the Bar Tribunals and Adjudication Service, operating on behalf of the President of the Council of the Inns of Court. The President has delegated appointments to the Tribunal Appointments Body. These bodies are independent of the BSB, and so panellists are not answerable to the BSB. Under the Disciplinary Tribunals Regulations 2014 (Bar Standards Handbook rE135), no one may sit as a panellist on a Disciplinary Tribunal if he or she is a member of the Bar Council or the BSB or any of their Committees. The role of the Tribunal is to adjudicate fairly and impartially.

62. The BSB was set up under the Legal Services Act 2007 as a ring-fenced part of the Bar Council. It acts as the regulator for the Bar, and as the prosecution authority in disciplinary proceedings against barristers. Once a case has been referred to a Disciplinary Tribunal, the BSB's role is to conduct the prosecution of the charges against the defendant. In that capacity, it invited the Tribunal in this case to find the

Appellant guilty as charged. For example, the BSB's opening note sent to the Tribunal in advance of the hearing stated:

> "17. When the Tribunal has heard the evidence, the BSB will submit that there can be only one conclusion which can be drawn: DM did not send these letters contemporaneously but created them later. No doubt, when first instructed, DM had intended to send out Rule 6 letters but he overlooked the task which, anyway he regarded as merely a "tick box" exercise ….. Having been pressed by the client to provide them with a copy of the letter which he claimed to have sent, he initially prevaricated and, when finally forced by his regulator to provide a document, he then realised that there would have needed to be four such letters to comply with the rules. As a result, he foolishly but deliberately "drafted" the letters then in order to attempt to extricate himself from the BSB investigations. The Tribunal will wish to examine the sequence of events carefully for any other explanation and, if it thinks appropriate, take into account the health and domestic issues raised by DM in his statement ….. but, regrettably the only sensible and, indeed, conceivable conclusion which can be drawn from the correspondence and from the format and content of the letters themselves, is that they were, indeed, a later fabrication."

63. Thus, it must have been apparent to the Tribunal throughout that the BSB was urging them to find the charges proved. The press release, assuming that they were even aware of it, would merely have confirmed the BSB's stance.

64. In my view, it is inconceivable that the Tribunal would have been improperly influenced by the BSB's view of the case. Legal and lay panellists on disciplinary tribunals are subject to stringent selection procedures to ensure that they are suitable for appointment. Once appointed, they are given training and written guidance on their role as adjudicators. They gain experience and expertise through sitting. For these reasons they are not comparable to jurors in a criminal trial. I have no doubt that this Tribunal would have been well aware of the elementary principles that the BSB bore the burden of proving the Appellant's guilt, to the high criminal standard, and accordingly the Appellant was innocent until proved guilty.

65. For these reasons, Ground 3 is dismissed.

Ground 5: sanction

66. The Appellant appealed against the sanction of disbarment. The Appellant's pleaded grounds, repeated in his skeleton argument, were that the panel failed to lend any or any sufficient weight to the fact that the Appellant had been put through no less than six sets of proceedings, five of which had been caused by the grossly improper conduct of the BSB, which had invalidated the trial process. This misconduct of the BSB had compounded the fact that a person awaiting trial is presumed by the law to be in a state of "*exquisite agony*", resulting in a presumption of prejudice as a result of

the passage of time: *R v Askov* [1990] 2 SCR 1199. The unnecessarily prolonged anguish and suffering of the Appellant resulting from an overall delay of some eight years, was substantial punishment in and of itself. Thus the sentence was "*clearly inappropriate*": *Law Society v Salsbury* [2008] EWCA Civ 1285, [2009] 1 WLR 1286. A fairer and more proportionate sentence would have been a period of two years suspension.

67. At the hearing, Mr Beaumont made further submissions, which ought to have been pleaded or at least included in his skeleton argument. In view of the seriousness of the matter for his client, I took them into account.

68. Mr Beaumont submitted that the Tribunal misdirected itself in considering the Sentencing Guidance 2009 in force at the date of the offence, rather than the Sentencing Guidance 2014 in force at the date of the hearing. I accepted Mr Counsell QC's explanation that it was standard practice for the BSB to refer the Disciplinary Tribunal to the Sentencing Guidance in force at the date of the offence, so as not to offend against the general principle (codified in Article 7 ECHR) that a court or tribunal ought not to impose a heavier penalty than the one that was applicable at the time the offence was committed.

69. The two versions of the Sentencing Guidance were substantially the same, but Mr Beaumont particularly relied upon the following passage which was newly included in the 2014 Guidance:

> "6.4 In the case of [*Solicitors Regulation Authority v Sharma* [2010] EWHC 2022 (Admin)] Mr Justice Coulson outlined the following points in relation to the appropriate sanction for dishonesty:
>
> a) Save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll, see [*Bolton v the Law Society* [1994] 1 WLR 512] and [*The Law Society v Brendan John Salisbury* [2008] EWCA Civ 1285]. That is the normal and necessary penalty in cases of dishonesty, see [*Bultitude v the Law Society* [2004] EWCA Civ 1853].
>
> b) There will be a small residual category where striking off will be a disproportionate sentence in all the circumstances, see Salisbury.
>
> c) In deciding whether or not a particular case falls into that category, relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary or over a lengthy period of time, such as Bultitude; whether it was a benefit to the Solicitor, and whether it had an adverse effect on others."

70. In my judgment, the Tribunal would have been well aware, on the basis of the Sentencing Guidance 2009, that disbarment was not mandatory in cases of dishonesty and in exceptional circumstances, a lesser sanction could be imposed. The Guidance

made it clear in the Introduction, and at paragraph 1.4, that it was only guidance and so should not inhibit decision-makers' discretion to impose the sentence they considered appropriate and fair on the individual facts of the case.

71. Under the sub-heading "Disbarment", the Guidance stated, at paragraph 6.2, that disbarment should be reserved for cases where the need to protect the public or the reputation of the profession was such that the barrister should be removed from the profession. It expressly stated that *"[i]t is not possible to provide a definitive list of the circumstances in which disbarment will be appropriate as it will depend on the facts of the case and the individual background of the barrister*". It listed circumstances where disbarment "*may be appropriate*" which included acting dishonestly.

72. Under the sub-heading "Dishonesty", at paragraph 6.3, it stated that in cases of dishonesty "*disbarment will almost always have to be considered (see section 7 – Acts of Dishonesty)*" (emphasis added). Mr Counsell QC emphasised the use of the verb "considered" not "imposed".

73. Under the heading "Acts of dishonesty", the Guidance stated that the general starting point for acts of dishonesty should be disbarment unless there were "*clear mitigating factors that indicate that such a sanction is not warranted*". Mitigating factors included (1) clear evidence that the behaviour was out of character and the consequences were not intended, (2) dishonesty in personal not professional life, and those listed in Annex 1, which included: (3) guilty plea, (4) genuine remorse, (5) limited experience, (6) single incident, (7) heat of the moment, (8) co-operation with the investigation, (9) voluntary steps to remedy, (10) attempt to prevent reoccurrence, (11) previous good character, (12) unusual personal circumstances and (13) good references. It was clear, therefore, that the starting point of disbarment could be departed from in a broad range of circumstances.

74. Under the sub-heading "Proportionality", paragraphs 3.4 and 3.5 emphasised the obligation to ensure that sanctions were proportionate, weighing the interests of the public with those of the practitioner.

75. In my judgment, the Disciplinary Tribunal correctly applied the Guidance and did not misdirect themselves in law. Members of the Tribunal were well placed to assess the Appellant's conduct and character, as they had spent four days examining the extensive email correspondence and hearing oral evidence, including from the Appellant. The Tribunal took disbarment as a starting point, and identified the following aggravating factors: the Appellant had frustrated the administration and resolution of a complaint to the BSB; he attempted to hide the misconduct by blaming the client and Mr Aron; the case involved gross deception which would have the undoubted effect of damaging the reputation of the bar; and there had been no acknowledgment of wrong-doing or expression of remorse. The Tribunal fairly took into account the relevant mitigating factors in the Appellant's case, in particular, that the misconduct occurred in the heat of the moment and appeared to be a one-off. He was previously a man of good character. At the relevant time he was suffering from difficult personal circumstances and an adjustment disorder.

76. The mitigating factors were matters which were evidenced in his character references, which the Tribunal clearly read as they earlier referred (at paragraph 36) to "*the*

Defendant's good character and the very high esteem in which he was held by his peers and those for whom he worked. This was an action out of character.". In the Tribunal checklist, the Chairman ticked the box for "good references" in the list of mitigating factors.

77. The Tribunal also considered the report from Dr Briscoe, consultant psychiatrist, dated 10 May 2016, whose view was that the Appellant was suffering from an adjustment disorder and harmful use of alcohol at the relevant time. It is likely that the report set out the Appellant's personal circumstances.

78. In mitigation, Mr Reade QC made the point that the Appellant had suffered enough because of the lengthy process of the earlier disciplinary proceedings, which were not his fault. He had already been unable to practise as a barrister for five years. This was recorded by the Tribunal and there is no reason to believe that they did not take it into account.

79. In my judgment, the Tribunal was entitled to reject Mr Reade's submission and conclude that disbarment was the appropriate, fair and proportionate sanction, despite the history, because his dishonest conduct was totally incompatible with practice at the Bar.

80. Mr Beaumont referred me to a number of other decisions where a barrister found guilty of dishonesty was not disbarred. I found these of little assistance, as each case turned on its own particular facts, and the assessment which the Tribunal made of the defendant and his/her conduct during the hearing.

81. This is a case in which the guidance in *Bolton v The Law Society* [1994] 1 WLR 512 is particularly apt, applying as it does to both barristers and solicitors. Sir Thomas Bingham M.R. said, at 519B:

> "Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of

> suspension is past. If that proves, or appears likely, to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."

82. For these reasons, I consider that the sanction of disbarment ought to be upheld.

Conclusion

83. The appeal is dismissed.