IN THE COUNCIL OF THE INNS OF COURT
BOARD OF VISITORS

Case No. PC 2010/0496/A

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 16/12/2013

Before :

Mr Justice Field
Ms Satya Schofield
Ms Julia Dias QC

Between :

Francis Evans QC	**Appellant**
- and -	
Bar Standards Board	**Respondent**

- -
- -

The Appellant was in person
Mr Tom Forster for the **Respondent**

Hearing date: 10 December 2013

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Approved Judgment

1. This is an appeal by Mr Francis Evans QC against the findings made and sentence imposed by a Disciplinary Tribunal ("the Tribunal) on 30th July 2013.

2. The offence charged against Mr Evans was one of Professional Misconduct contrary to paragraph 603 (g) and pursuant to paragraph 901.7 of the Code of Conduct of the Bar of England and Wales ("the Code") in that, as a self employed barrister in professional practice between 4 January and 8 April 2010, he accepted instructions when to do so would cause him to be professionally embarrassed because he accepted a brief from EBR Attridge LLP, a firm of solicitors in respect of whom a Withdrawal of Credit Direction ("a WCD") had been issued by the Chairman of the Bar, and his fees had not been paid directly by the Legal Services Commission and the instructions were not accompanied by payment of an agreed fee.

3. The Tribunal concluded that every fact which formed part of the particulars of the offence set out in the charge had been proved beyond reasonable doubt. It had not been disputed that Mr Evans acted on a number of occasions in 2010 for a client on the instructions of EBR Attridge. Nor was it disputed that that firm was a firm in respect of whom a WCD had been issued by the Chairman of the Bar. The only point raised by way of defence was that the Chairman of the Bar had allegedly not followed the appropriate procedures before making the WCD in respect of EBR Attridge on the 5th December 2008. The Tribunal held that the Bar Standards Board ("BSB") did not have to prove the validity of the Chairman of the Bar's WCD naming EBR Attridge in order to establish its case. All clerks and Heads of Chambers had been directed not to extend credit to EBR Attridge. The Tribunal were satisfied beyond reasonable doubt that Mr Evans was guilty of the charge.

4. The sentence imposed was a fine of £1,500 payable no later than 25 March 2014 and a reprimand to be administered by the Treasurer of the Middle Temple.

5. Paragraph 603 (g) of the Code provides:

> A barrister must not accept any instructions if to do so would cause him to be professionally embarrassed and for this purpose a barrister will be professionally embarrassed:
>
> (g) if he is a self employed barrister where the instructions are delivered by a solicitor or firm of solicitors in respect of whom a Withdrawal of Credit Direction has been issued by the Chairman of the Bar pursuant to the Terms of Work on which Barristers Offer their Services to Solicitors and the Withdrawal of Credit Scheme 1988 (the "Scheme") as amended and in force from time to time (reproduced in Annex G1) unless his fees are to be paid directly by the Legal Services Commission or the instructions are accompanied by payment of an agreed fee or the barrister agrees in advance to accept no fee for such work or has obtained the consent of the Chairman of the Bar.

6. Paragraph 17(2) (a) of the Withdrawal of Credit Scheme provides that where the conditions specified in paragraph 17 (1) are satisfied the Chairman of the Bar "shall

issue a direction "that no barrister may without written consent of the Chairman ... knowingly accept instructions from any person or firm named in such direction or from any person who or firm named in such direction ...". Paragraph 17 (2) (a) is contained within Annex G1 of the Code.

7. The WCDs issued in respect of EBR Attridge each stated that "no member of the bar shall knowingly accept instructions from this firm unless he is paid directly by the Legal Services Commission ..."

8. Mr Evans's ground of appeal was that the word "knowingly" in paragraph 17 (2) (a) of the WCD Scheme referred not to the acceptance of instructions but to the naming of the solicitors concerned in a WCD and since the charge was based on the Withdrawal of Credit Scheme, the charge against him could not be made out unless the BSB proved beyond a reasonable doubt that he knew at the time he accepted the instructions from EBR Attridge that that firm had been made the subject of a WCD.

9. When giving reasons for the sentence imposed, the Tribunal said that they were not satisfied to the requisite standard that there had been a deliberate breach of the Code of Conduct. The Tribunal also noted in its reasons that Mr Evans's evidence had been that he was not aware that EBR Attridge had been named in a WCD and that the Tribunal had observed during the hearing that lack of knowledge of the WCD (even if proved) did not provide a defence to the charge but could be relevant as to mitigation.

10. Mr Evans ground of appeal was not a ground that was relied on before the Tribunal. Rule 9 (4) of the Hearings Before The Visitors Rules 2010 ("the Visitors Rules) provides that an appellant may not without the permission of the Directions Judge support an appeal on a ground not relied upon before the body which took the relevant decision. Rule 14 (7) of the Visitors Rules provides that the Visitors may consent to a ground of appeal that was not relied upon below in exceptional circumstances. It seems clear that Mr Evans's notice of appeal and his petition of appeal went before the Directions Judge whose Directions were limited to extending time and did not address the question concerning a ground of appeal that had not been taken before the Tribunal. Mr Forster for the BSB did not object to us hearing Mr Evans's appeal and invited us to consent to do so. In the circumstances, we had no difficulty in agreeing to adopt this course.

11. Mr Evans submitted that the word "knowingly" could not be construed as relating only to the acceptance of instructions from a firm of solicitors since it was difficult to think that there could be an acceptance of instructions other than knowingly. The word "knowingly" must therefore apply to the fact that the firm issuing the instructions was named in a WCD.

12. Mr Evans also prayed in aid those criminal cases in which the court proceeded on the presumption that *mens rea* was a necessary ingredient of an offence even though the wording constituting the offence did not refer to knowledge or some other state of mind. Mr Evans submitted that those authorities were applicable because, although he was not charged with a crime, a finding of professional misconduct was a serious matter.

13. Mr Evans further pointed out that the charge he faced did not allege even that he had knowingly accepted instructions from EBR Attridge, let alone that he knew that that

firm was the subject of a WCD. However, he accepted that if "knowingly" in paragraph 71 (2) (a) applied only to the acceptance of instructions and did not apply to the naming of the instructing solicitors in a WCD, his appeal must fail, notwithstanding that there was no averment of knowledge in the charge.

14. Mr Forster for the BSB contended there was no requirement on the BSB even to allege or prove that a barrister knew that he had accepted instructions which turned out to be from a firm named in WCD. In support of this submission he relied on the wording of paragraph of 603 (g) of the Code. Mr Forster also argued that the Code of Conduct, including Annex G1, was a regulatory scheme founded on the fundamental principle stated in paragraph 306 that "a barrister is personally and individually responsible for his own conduct and for his professional work; he must exercise his own personal judgment in all his professional duties" which fundamental principle informs paragraph 403.5 of the Code that a self employed barrister:

> "(a) must take all reasonable steps to ensure that:
>
> (i) his practice is sufficiently and properly administered having regard to the nature of his practice .....
>
> (ii) .....
>
> (iii) He complies with the Terms of Work on which Barristers Offer their Services to Solicitors and the Withdrawal of Credit Scheme 1988 ... and with any Withdrawal of Credit Direction issued by the Chairman of the Bar pursuant thereto".

15. Accordingly, it was incumbent on a barrister pursuant to the Code to inform himself of the existence of a WCD by administering his practice efficiently and properly and it was therefore entirely reasonable to expect a practitioner to keep himself aware of the content of WCDs so as to comply with paragraph 603 (g). Mr Forster also pointed to the serious practical difficulties that would ensue if the BSB had to prove actual knowledge on the part of a barrister that the firm of solicitors whose instructions he had accepted had been the subject of a WCD. For these reasons it was not appropriate to approach the meaning of "knowingly" in paragraph 17 (2) (a) on the basis that there was a presumption that *mens rea* was an element of the offence charged. To the extent that "knowingly" imported a requirement of knowledge it was a requirement that the barrister knew that he had accepted the instructions in question and not that he knew that the instructing solicitors had been named in a WCD.

16. In our judgment, the word "knowingly" in paragraph 17 (2) (a) must be construed in its context. It is part of the Code and the Code is not a criminal statute but a set of regulatory rules and principles with provisions for the enforcement thereof. It is true that a finding of professional misconduct can be a serious matter and that, depending on the breach found, sentences can be imposed that can have a serious impact on an individual barrister. Nonetheless, the purpose of the Code of Conduct so far as the self-employed Bar is concerned is not to punish but "to provide the requirements for

practice as a barrister and the rules and standards of conduct applicable to barristers which are appropriate in the interests of justice and in particular:

> (a) … to provide common and enforceable rules and standards which require them:
>
> > (i) to be completely independent in conduct and in professional standing as sole practitioners;
> >
> > (ii) to act only as consultants instructed by solicitors and other approved persons (save where instructions can be properly dispensed with);
> >
> > (iii) to acknowledge a public obligation based on the paramount need for access to justice to act for any client in cases within their field of practice. (See para 104 (a) of the Code)

17. It is also important to have regard to the purpose of the Withdrawal of Credit Scheme which is to protect barristers in the context of a relationship with solicitors that is not based on an enforceable contract. In our judgment, in the light of these considerations and in light of the fact that it would be very difficult to enforce the Scheme if it were necessary to prove that the barrister had actual knowledge of the fact that a firm of solicitors was the subject of a WCD, we find that there is no applicable presumption of *mens rea* and conclude that the word "knowingly" in paragraph 17 (2) (a) relates to the acceptance of instructions and not to the fact that the instructing solicitors have been named in a WCD. True it is that in a significant number of cases instructions will be accepted in the knowledge of their solicitorial source but it is possible that this might not be the case. Thus instructions might be accepted in the mistaken belief that they are from a different firm than the firm which actually sent them and we think that it was to guard against this sort of possibility that the word "knowingly" was used in paragraph 17 (2) (a).

18. The charge did not aver that Mr Evans knowingly accepted instructions from EBR Attridge but it does not follow that the finding of professional misconduct must for that reason be set aside. We say this because even if it had been necessary to include such an averment, it was common ground that Mr Evans knew that he had accepted instructions from EBR Attridge.

19. Very properly, Mr Forster drew our attention to the decision by another Board of Visitors presided over by Sir Anthony May in *Walker v Bar Standards Board* (19 September 2013). There it was held that the word "serious" should be imported into paragraph 901.7 of the Code of Conduct that reads: "Any failure by a barrister to comply with any provision of this Code other than those referred to in paragraph 901.1 above shall constitute professional misconduct". Adopting this approach we considered whether Mr Evans's breach of paragraph 603 (g) was sufficiently serious to amount to professional conduct for the purposes of paragraph 901.7 and we concluded that it was. We took this view because Mr Evans knew of the Withdrawal of Credit Scheme, having played a part in devising the Scheme when he sat on the Bar Council, and its importance to the profession and ought to have known of the WCD naming EBR Attridge, particularly since that firm is a well known firm of solicitors

practising in criminal law and Mr Evans is a criminal Queen's Counsel who at the time was co-head of Chambers.

20. We accordingly uphold the finding of the Tribunal that Mr Evans was guilty of professional misconduct as charged.

21. Mr Evans also appealed against the sentence imposed by the Tribunal. In our view that sentence was too severe. Unlike the Tribunal, we are completely satisfied that Mr Evans is remorseful for having breached paragraph 603 (g) of the Code. Mr Forster confirmed that Mr Evans apologised to the Tribunal for his conduct and he repeated that apology to us. We concluded that the facts of this case called for a reprimand to be administered by ourselves but that there should be no fine and we reprimanded Mr Evans accordingly. To this extent the appeal against sentence succeeded.

22. The Visitors Rules require an appellant to pay the sum of £250 when lodging the petition of appeal. Mr Evans provided a cheque for this sum at the appropriate time but it has not been paid because it has been mislaid by the BSB. We accordingly directed at the hearing that Mr Evans must pay the sum of £250 to the BSB within 28 days. Save as aforesaid we make no order as to costs against Mr Evans.