ON APPEAL TO THE VISITORS
TO THE INNS OF COURT

Royal Courts of Justice
Strand
London WC2A 2LL

24/25 January 2012

B E F O R E:

SIR MARK WALLER

MARINA WHEELER

SIR DAVID MADEL

- - - - - - -

DAMIAN McCARTHY

- v -

THE BAR STANDARDS BOARD

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DAVID READE QC and **CHRIS QUINN** appeared on behalf of THE APPELLANT

GERARD POUNDER appeared on behalf of THE BAR STANDARDS BOARD

Sir Mark Waller :

1. This is an appeal by Damian McCarthy (DM) against a decision of a Disciplinary Tribunal of the Council of the Inns of Court (HHJ Crawford Lindsay QC, Veronica Thompson, William Henderson Esq, Andrew Carnes Esq and Mrs Moya Reed) [the Tribunal] made on 4th February 2011 and 4th March 2011 finding Charges 1, 2,and 4 proved. That finding resulted in a sentence of disbarment and there is no challenge to that sentence if the appeal against the finding on charges 1 and 2 were dismissed. DM further appeals against the sanction imposed in respect of Charge 4 (which he contested) and Charges 5 and 6 (as to which he pleaded guilty) namely that he be prohibited from accepting or carrying out public access instructions indefinitely.

2. Charges 1 and 2 were very serious charges. By Rule 6 of the Rules relating to a Barrister engaging in Direct Access, it is a requirement that in respect of each piece of work the Barrister sends to the Client a client care letter setting out inter alia the terms and fees on the basis of which the barrister is prepared to take on the work. Charge 1 alleged that during its investigation of a complaint by DM's lay client, which related to a dispute about fees, in response to a request for documentation by the BSB, DM sent the BSB four client care letters which he falsely asserted had been sent to his client in compliance with that rule. Charge 2 was a charge that he had supplied legal services for reward on behalf of a lay client without sending a letter in compliance with Rule 6. The issue on those charges was thus whether the BSB could show that the letters provided to them were forgeries in the sense of being produced only contemporaneously with the BSB's request for documentation, or whether, as DM asserted, they were copies of letters sent just prior to or contemporaneously with work carried out for DM's lay client Mrs S Tharapatn (ST).

3. The Tribunal found by a majority of 4 to 1 that the four documents produced to the BSB during their investigation were forgeries in the above sense and that no Rule 6 letters had been sent when under the rules they should have been. They found DM to be dishonest and the sentence of disbarment was unanimous.

4. The main focus of DM's appeal has been on the findings in relation to Charges 1 and 2. The grounds of appeal raise the following:

    a. that there was a serious procedural error which no Tribunal acting fairly should have allowed;

    b. that the Tribunal applied the wrong burden of proof;

    c. that there was a failure to make necessary findings and /or to give adequate reasons for the findings that it did make;

d. that the Tribunal's decision was perverse and they reached a decision that was not open to it.

5. The alleged procedural error was only discovered and/or taken as a point on this appeal. Although it is a point which could have been taken by those acting for DM before the Tribunal and was not, it has caused us some concern particularly because of certain correspondence undisclosed to DM prior to this appeal. One critical question for us on the appeal will be to assess the seriousness of that error and its effect on the fairness of the hearing. That, we think, can be best done by considering the factual background, the detail of the charges, and the other grounds of appeal before considering the procedural error and its impact. The approach we intend to take is to set out in some detail how DM came to be instructed and a dispute as to fees occurred, setting the dates when DM asserted he sent the Rule 6 letters in the chronological place he set them dealing so far as convenient with points taken by Mr Reade QC for DM and points taken by Mr Pounder for BSB. We will then deal with points on the judgment of the Tribunal and the grounds of appeal other than the procedural error which is raised by ground 1. We will then turn finally to the procedural error.

Background

6. DM was approached by Mr Timothy Aron (TA) to act for his wife ST on a Direct Access basis before an Employment Tribunal. This was the first Direct Access case which DM had undertaken. DM was a member of Cloisters Chambers, a leading employment set, but the Chambers had decided members of chambers who conducted public access work should deal with their own fee arrangements including negotiation, billing and recovery of fees. DM had attended the Bar Council course, training members of the Bar as to the requirements and rules if they took on direct access work. This included the need for Rule 6 letters. DM was aware of that need as demonstrated by an e-mail written early in the negotiations to which we will come in its correct chronological place.

7. The first approach was by an e-mail from TA dated 16th May 2008 [233] requesting DM to accept instructions in relation to ST's constructive unfair dismissal and race discrimination claim in relation to which TA and his wife had done all the preliminary work and which stated "The date for trial is now set for Monday 28 July and the case is expected to last 5days." [The reference to 5 days is important]. DM replied to that e-mail on the same day [234] quoting a brief fee of about £5000 and refreshers of £1000 indicating he could perhaps offer a discount.

8. On 5th June TA dropped off papers seeking an initial view on the merits. DM skim read part of the papers and e-mailed on 6th June [235] saying it will take two hours to read in detail and a conference is likely to take 1 hour 30minutes – those being his best guesstimates. He quoted fees as usually being £250 per

hour plus VAT but that he would charge ST £175 plus VAT. The estimates were accepted by TA by e-mail on 6th June [236].

9. There then followed the e-mail of 9th June [237] which recognised the need for Rule 6 letters, to which we have referred, agreeing to the conference on the next Friday and which contained the following :-

> "I will start working on your case asap but I must have cleared funds before the conference for the below.
>
> So please bring in or send me a cheque for £719.18. (£175 × 3.5 = £612(plus VAT of 17.5 % (£107.18))
>
> If the conference takes longer than below I will need to charge you.
>
> I will also need to send you some letters confirming the terms under which I work for signature and return to me . . ."

10. The above e-mail referred to Rule 6 letters being necessary and was relied on before the Tribunal by DM as supporting his case that Rule 6 letters were sent, and particularly it was relied on as supporting a submission that TA was dishonest in suggesting that Rule 6 letters had not been received because the e-mail had not been disclosed by him.

11. DM asserted that he sent the first Rule 6 letter on 11th June that letter under the heading "Fees" providing "Option 1: My fee for the Conference described in paragraph 4 will be a fixed fee of £719.18 plus VAT." That letter if sent was inconsistent with the 9th June e-mail in that the e-mail showed the fee being £719.18 inclusive of VAT. This is a point much relied on by the prosecution as indicating the letter was not sent contemporaneously. DM explained the reference to VAT as a mistake which he made contemporaneously and he produced another Rule 6 letter in a different case which, he suggested, made the same mistake.

12. As we have said the 9th June e-mail had not been disclosed by TA or ST and was only produced by DM himself. DM accused TA of deliberately withholding e-mails. TA accepted he had not produced the e-mail but suggested that that was because it was sent to his Lehman e-mail. It could be shown on behalf of DM that other e-mails to that account had been produced. The accusation that TA had deliberately withheld e-mails was rejected in the judgment of the Tribunal.

13. On 11th June TA paid £719.18 to DM, and a conference took place on Friday 13th June.

14. DM's evidence was that also on 13th June he sent the second Rule 6 letter. This letter, if sent, described the work to be carried out as "preparations for and advice in conference" and under fees stated "Option 1: My fee for the advisory and drafting work described in paragraph 4 be a fixed fee of £1028 plus VAT". The chronology placed before us by Mr Reade shows that there was a telephone conversation on 3rd July between TA and DM in which TA agreed to pay for a further 5 hours. TA then dropped off the bundles and a cheque for £1028 being the sum of £175 an hour and VAT on the same. Once again therefore the Rule 6 letter which DM said he sent is inconsistent in that the letter suggested that fees should be £1028 plus VAT.

15. TA and ST were during this period involved in preparing ST's witness statement and agreeing the bundle with JP Morgan's representatives. JP Morgan were the respondent in the ET case. In this context TA e-mailed DM on 8th July saying that the respondent was refusing to take without prejudice documents out of the bundle. On 8th and 9th July TA, using his own and ST's e-mail, sent versions of ST's witness statement for DM to scrutinise.

16. By 10th July e-mails suggest that the 5 hours were close to being used up and that TA was content to "provide another [cheque] for the next stage or make transfer" [251]. TA in his evidence did not accept that he agreed to pay for further preparation work. His evidence was that he agreed to pay the brief fee early to enable DM to start on preparation. DM e-mailed saying he had received a cheque and files (i.e. £1028) and he would let TA know "where we are in terms of fees after I have finished working on the statement. I need your agreement to fees etc for the brief fee (i.e. incurred at rate agreed on 21 July) or I have no choice but to take this out of my diary to free my diary up for another case" [252]. DM's evidence was that in a conversation on 10th July he told TA that to complete the work before him he would need another payment of £5000 plus VAT and that TA agreed. TA accepts there was some conversation but did not accept that there was any agreement that a fee was agreed for further work.

17. DM's evidence was that on 12th or 13th July he sent the third Rule 6 letter. This refers to the work being carried out as "(1) advice and drafting of witness statements; (2) advice on procedure and bundles; (3) prep for CMD; (4) advice and representations on WP documents; (5) advice on issues. Under Fees Option 1; my fee for the advisory work and drafting work described in paragraph 4 will be a fixed fee of £5000 plus VAT."

18. On 16th or 17th July (the e-mail is undated) TA e-mailed DM setting out the contents of recent e-mails between them in a question/answer fashion. It records that the Tribunal hearing is scheduled for Monday 28th July. It starts with an e-mail from TA saying he will drop off a cheque for £5000 to book you for the week beginning 28th July tomorrow or early Friday (which would have been the 18th). DM's response was to protest that TA had told him that £5000 was going to be placed in DM's account on 10th July and to emphasise

the work he had been doing on that assumption; he also promised a refund if there was a settlement. He also emphasised that the above £5000 was separate from the £5000 for his brief fee which was payable on 21st July. He described what that was to cover in terms of preparation for the hearing. He continued:-

> "However you now tell me that you will bring a cheque tomorrow (18 July). This will clear sometime next week. This is not good enough I am afraid.
>
> In addition there is now a CMD tomorrow which will require preparation and my attendance (albeit on the telephone).
>
> I should not do the CMD tomorrow without cleared funds.
>
> However I will do so on the basis that you **now** transfer the £5000. From that I will deduct my fees up until this stage. I will then ask you to transfer the balance by say Wednesday next week. I can itemise everything as per our agreement but this will divert my time away from prep for your case . . ." [254].

19. By e-mail sent at 1.25 on 17th July TA wrote to DM "Just to clarify on fees - the £5000 has already been transferred to your bank account. The reason I mentioned dropping the cheque in before is because I have meetings in the City so thought you would want it in your hand. I can still do that on Monday if you want with regard to the 5k due on 21st since bank transfers take up to 4 days although I understand 2 days is more normal." It then recorded the rearranged timing of the CMD as being at 12.30 on 18th July [259]. TA's evidence insofar as he maintained that there was no understanding of sums being due in addition to the £1028 in respect of work prior to delivery of the brief is inconsistent with the above e-mails, although those e-mails were also inconsistent with any fixed fee of £5000 being agreed for such work which DM later alleged.

20. DM's evidence is that it was on 18th July that he sent the fourth Rule 6 letter. That records as the work "Representation at Central London ET (28-31 July 2008)" and fees as "Option 1: My fee for the advisory and drafting work described in paragraph 4 will be a fixed fee of £* plus VAT". Then "* BRIEF (£5000) REFRESHER £1000 PER DAY" [223]. It was a major point of the prosecution that if this letter had been drafted on 18th July it would have referred to a five-day hearing.

21. By e-mail dated 21st July [260] DM wrote to TA "I have still not received the £5000 that was promised on 10th July and have not had a cheque (i.e. the second payment) delivered yet . . ." TA responded "I am very sorry you have not received it. The money has left my account so it should be with you by now or will be with you very soon. I can drop off two cheques for £5000 to your clerks today (one for next week) and you can either rip one of them up or

transfer back the £5000 transferred electronically when it arrives . . .” DM responded that he “will trust you on this” and will keep preparing for the ET.

22. The transfer was received in DM’s account but only after DM had banked the two cheques each for £5000 dropped in on DM’s chambers on 21st July. Thus DM had cashed both cheques before he was aware of the receipt of the transfer [266].

23. Discussions as to settlement took place by e-mails dated 23rd July [263/264] in which DM was to include his fees at £12,000(plus VAT). DM explained by e-mail of 24th July how he had banked both cheques and received the transfer and that “However I have not charged you vat on the fees already incurred (£12000 I believe). I believe this adds up to £2,100 . . . I can look into this when I have more time but I am concentrating on your case right now. This means I owe you £900 . . . however you will recall that I will also have to charge £1000 per day (plus VAT) as a refresher . . . if the case goes ahead you will have to give me a cheque for 4×£1000 (plus VAT) by tomorrow.” Mr Reade for DM relies on the above as showing that DM was already thinking that the £719.18 and £1028 were not inclusive of VAT when in fact they were. The prosecution relied on the above as being inconsistent with any Rule 6 letter having been sent in that it was inaccurate as to the sums of the first two payments.

24. On 25th July there was a conference. An e-mail exchange on that day recorded DM reminding TA/ST to bring a cheque to that conference at 4.30 and ST/TA’s response “Yes it’s in the bag . . .” [267]. The cheque for £4700 was brought to that conference at which both TA and ST attended.

25. The hearing before the ET took place and was completed by Thursday 31st subject to judgment and a remedy hearing on 1st August. It resulted in a judgment in favour of ST in relation to an unfair dismissal claim but with damages assessed at £30,000 somewhat less than TA and ST had hoped. The discrimination claim was also dismissed. At this stage there is no vestige of any complaint as to DM’s conduct of the case and indeed TA and ST seemed pleased with the way he had conducted it [see 269 dated 31st July describing closing submissions as excellent].

26. The next period however dealt with the issue as to the sum which DM was due to return. It became far from amicable. DM appreciated he had been overpaid but he did not deal with that question with any alacrity and nor did he simply go to the Rule 6 letters which on his case existed and which on his case provided certainty as to the position.

27. By e-mail of 1st August DM spoke about the case and how he hoped TA and ST could now get on with their lives, stating in the final paragraph “I will get back to you on Monday about reconciling what is owed to you. I think this

may be down to an error on my part but I will check." [271] On Monday 4th August DM e-mailed as regards payments as follows - "You paid me two cheques I believe? Could you tell me when you paid these and how much they were for? I believe the first two bills were for £1000 (plus VAT) each. Do you agree? I then received the following sums . . . 22nd July BAC T Aron £5000. This represents £5000 (plus VAT) for prep, i.e. time spent on witness statements etc. In the end I also took part in a CMD and prepared for this too. 23rd July 608008 10,000 this payment was the £5000 (set out above) plus £5000 (plus VAT) for the brief fee – in other words there has been a duplication of payment of £5000. However as I recall no VAT was paid on the previous payments and none was paid on the prep fee or the brief fee. If you agree I can work out what you are owed and send you a finalised bill and receipt . . . 28th July 560013 4,700 - this was a cheque sent for the refreshers (£4000 plus VAT)." [272]

28. That e-mail is inconsistent with the Rule 6 letters in the following respects. It inaccurately records the fees charged as recorded in the first two Rule 6 letters relied by DM. It inaccurately suggests that VAT had not been paid on those first two items. It is also inconsistent with the Rule 6 letters having been sent by this time because if sent one would expect some reference to them.

29. TA responded on 5th August [274] setting out the payments that they had made, which correctly recorded the payments of £719.18 and £1028.

30. DM did not respond until 5th September when he accepted the accuracy of the sums as set out by TA. He then wrote "As I recall you may have made an overpayment as the sum of £4700 was paid on the basis that you had not paid vat on at least the second payment (£1028) I believe that you had paid VAT on this and so are due for a refund from me for this sum. I believe this is £179.90. I may also have suggested that you did not pay VAT on other sums. However I cannot find an e-mail I sent you regarding this. I know that between you, you have several e-mail addresses. It may be that I sent the e-mail concerning fees/VAT to one of these other addresses. I am sorry to ask but could you have a quick look? I welcome any comments on the above so that I can make sure you get a refund as soon as possible . . ." [277]

31. The above e-mail is not accurate as to what the £4700 was for. The e-mail is inconsistent with the existence of Rule 6 letters. On DM's evidence those letters would have answered all queries and yet DM is asking his clients to search among their e-mails.

32. On 29th September TA e-mailed DM stating that the overpayment was represented by one of the payments of £5000 (which was true). It seems some chasing of DM then took place which resulted in DM e-mailing TA on 20 November: "Just to be clear - I will go through my previous e-mails and see what we agreed and payments made. I think you suggested that you are due

back £4700? If this is correct I would like to get this paid as soon as possible. Any help would be great - but I accept it is something I should deal with. In terms of hours billed- I do not work on that basis. We agreed fees for the work done, e.g. one day in court. So I will not be producing a schedule of hours worked. I just want to recall what was agreed and what was paid. I hope the above is helpful . . ." [278]

33. The above e-mail is again not consistent with Rule 6 letters which plainly set out the work and the fees. Why was there a need to search his own e-mails rather than referring to the Rule 6 letters which on his case had been sent?

34. DM's explanation in relation to the criticism that e-mails were inconsistent with the existence of Rule 6 letters was that he had not searched for the letters until quite late in the history and had then only found them in his Bar Council box when pressed by the BSB.

35. On 12 December DM offered to pay £4700 because that is what TA said was owed and because DM said he was too busy to check [280]. By e-mail dated 12th Jan 2009 TA wrote [283]:-

> "I have now had a chance to look into this in detail.
>
> It seems you quoted us a brief fee of £5875 including vat and refreshers of £1000 per day including vat (£4700) [email 2 July/amount of refreshers amended on email dated 25 July.]
>
> I made the payment of the brief fee by electronic transfer on or around 18 July.
>
> Since this hadn't reached you I dropped off two cheques for £5000 each in Chambers for you. These show in my cheque book stub as 'Damian brief/refresh'. From memory the reason I paid two cheques was because you were concerned the electronic transfer hadn't reached you. My email dated 21.07/2008 asked you to destroy one of the cheques when the transfer arrived.
>
> A few days later Su sent you a cheque for refreshers unaware that this was a duplicate payment.
>
> On top of this we also made payments for 10 hours of specific work with vat included at 175 per hour plus vat.
>
> Excluding this specific work it appears we have paid you £19700 whereas the agreed amounts were £10575. By my calculation it appears £9125 is due back to us.
>
> If you agree with this once you have checked your records our bank details are: . . ."

36. TA was on the basis of the e-mails quoted previously inaccurate in the above e-mail in suggesting that the second £5000 was for refreshers and the duplication was by virtue of the payment of £4700. But that is two-edged because it is also thus inconsistent with TA and ST having the Rule 6 letters and having accepted their contents. DM's case has to be either that the Rule 6 letters have been received by TA and ST but lost at this stage or that TA and ST are at this stage acting dishonestly to build a case for the repayment of money.

37. In any event DM was not swift in responding but after pressure from TA including an e-mail of 27th January threatening to report DM to the BSB, DM responded by e-mail dated 30th January [289]. In that e-mail he referred to a glitch preventing him having access to all his e-mails; to TA/ST not being able to use a complaint to the BSB as a bargaining chip for fees; he said that fees had been spoken about at length and that he explained "that I would not be producing a breakdown of work done per hour but that I was agreeing to work for a fee for a specific piece of work. You agreed to these fees on each occasion and were clear on what fees were to be paid. I also produced a letter for you which set out fees and the basis on which they would be incurred. If you recall we agreed amendments to this and I asked for a signed copy of it back on a number of occasions. It proved difficult to obtain this from you."

38. Much was made by the prosecution of the fact that the reference is to one letter whereas ultimately DM produced four. DM's explanation was that he was confusing this case with another where there was only one letter, and where amendments had been agreed.

39. The 30th January e-mail continued to set out DM's position on fees; it suggested that no VAT had been paid on either of the first two payments; it stated that the third sum (£5000) was an agreed fee for reading e-mails preparing statements, appearing at the CMD on which also VAT was payable; the fourth payment, again £5000, was the brief fee and that for a 5-day hearing he would have expected much more and VAT was payable thus he was owed £5875; the fifth payment was the overpayment of £5000; and the sixth payment of £4700 was four times £1000 plus VAT. Finally in that e-mail he referred to TA having instructed him to "misrepresent the position to ST" during the hearing before the ET and how he now needed a letter of authority demonstrating that TA acted for ST.

40. The above e-mail elicited an angry response from TA of 3rd Feb [292] objecting to the reference to using a complaint to the BSB as a bargaining chip. On fees it stated TA's position in the following terms :-

> "1) In your section 1), you did not explain that you would not be producing a breakdown of work per hour. In fact you provided us with your hourly rate and there are emails which show this. I do not recall seeing or being asked to sign any

letter setting out a breakdown of fees. Did you give it to us in conference? Why didn't you ask me to sign and return it there? On what dates were the amendments made? Where is the letter now?

2) In regard to items 1 and 2 in your list under your section (2), VAT was included in both of these.

3) In regard to your item 3 under section (2) at no time did we ever agree to a sum of £5000 for any of the work you identify. Based on your hourly rate of £175 this would have been 28 hours work in addition to the 9 hours we had already paid for and the 28 hours of brief prep time. This is truly preposterous. I would be happy to demonstrate to the BSB why this is the case. However you seem to be claiming that these fees are due because they were agreed. These fees were never agreed and would not ever have been agreed. If you are looking to us to agree the fees after the case is over I would point out that any time you spent drafting (to argue that certain documents were 'without prejudice') was ultimately a waste of time because you forgot to ask for those same documents to be removed from the bundle prior to the Tribunal reading them despite my reminder by text to you to check with the Respondent's solicitor who prepared the trial bundle that they had been removed.

4) In regard to your item 4, 5 and 6 under section (2) I agree that the fourth payment was the brief fee. I agreed to pay this to you early to cover any work you were doing in the lead up to the case. Because there was a delay between my transferring it to you and it arriving in your bank account I also said I would drop two cheques off with you in Chambers. One of these cheques was for refreshers and the other was meant to be ripped up once the brief fee arrived in your bank account. Unfortunately, despite assurance to the contrary, you cashed both cheques. Independently of me dropping the cheques off in Chambers, Sumanee sent you a cheque for £4700 which was a duplication of the second cheque I had dropped off for you at Chambers. If it matters, Sumanee is sure this cheque was sent to you by post in the week before the hearing rather than given to you on the day.

5) I'm not aware of you having set out the position previously or asking me to confirm this. I am somewhat surprised by your emails which ask <u>us</u> to let <u>you</u> know what has been paid particularly given the BSB requirements on these matters which I am now aware of.

6) My setting out £9700 is not a change of position. It is the amount due based on agreed fees and I only carried out the analysis because I was extremely surprised by your claim that

> these fees had been agreed. Given your profession, Sumanee and I were both relying on you to carry out an honest assessment of what was agreed and owed after VAT was worked out etc. If the £2000 paid in addition to the brief fee for conferences and prep work was not enough you should have informed us of this rather than suggesting some months after the case that our overpayments were agreed fees.
>
> 7) I never assured you that I had transferred the brief fee and refreshers. I said I had transferred the brief fee and I had indeed done this. Because it had not reached your account I dropped off the cheques (for brief fee and refreshers) in Chambers asking you to destroy the brief fee cheque when the money that I had transferred arrived in your bank account.
>
> 8) In regard to your section 4) I do not agree that you have set out matters accurately. I am also surprised that only now – after four+ months of emailing with me in regard to monies due back to my wife – you now choose to ask for a letter of authority. Under what authority were you emailing previously? Perhaps you should send a letter to Sumanee explaining the grounds on which you have been communicating with me in regard to her case to date. Please also note that Sumanee attempted to resolve these matters with you for much of August and September but after a number of occasions in which you promised to get back to her but failed to do so I took over the matter."

41. There was then an interchange of e-mails about fees in which [296] DM in relation to the first two payments again stated that VAT was due on both and said "I believe if you think about this honestly you will be able to recollect this. However if we are able to agree I will forget this . . ." TA in his response of 16th Feb [298] set out the position in relation to the first two payments and retorted that if DM thought about it honestly he would agree that VAT was paid, and continued "If you wish to question our honesty again I will be happy to respond . . . in the meantime please send to ST the letter you refer to in 30 Jan e-mail . . . neither of us recall any such letter and we are curious to see it (if it exists)."

42. On 16th Feb [299] DM offered to pay ST £3250 plus interest and as to the letter said "I sent all the papers back to you some time ago. However I am certain I kept a copy of the letter".

43. On 17th Feb ST/TA e-mailed [301] saying that TA is authorised to act for ST; it set out their position as regards fees. It inaccurately stated that one of the payments of £5000 was for refreshers; it made a complaint about DM acting without ST's authority. It also said "You also claimed that there was a letter involved. That is also untrue. Neither of us recall seeing it.''

44. There was then an interchange in which DM said that he believed the letter to be in the bundle of papers returned; TA/ST maintained that no letter was sent, and queried why no copy was taken if the letter was returned. DM insisted that a copy would be with the papers and that TA/ST were not being candid in saying otherwise.

45. The complaint was lodged with the BSB on 23rd Feb and the BSB wrote to ST with their understanding of the complaint which at this stage simply included a complaint that no Rule 6 letter was sent. On 14th April ST wrote to the BSB asking them not to send a copy of the complaint form with her signature on it because she was certain that no Rule 6 letter existed and she was anxious that DM might forge a letter.

46. DM was informed on 7th April that a complaint had been made. The details of what was understood to be the complaint was sent by the BSB to DM on 29th April [319] inter alia complaining that no Rule 6 letter had been sent.

47. In DM's response of 22nd May [328] DM still maintained that VAT was due on the first two payments although he had been prepared to forego that sum. So far as a Rule 6 letter was concerned his response was "This letter was provided to the complainant. Further I discussed this letter and the basis for payment . . . it was also subsequently discussed and altered as appropriate."

48. The BSB ask to be provided with a copy of the letter by letter dated 28th May. DM's response was as follows:-

> "I have attached the model letters used. I have used the model client-care letter provided during access training. I did this as the guidance for barristers states that a barrister who uses this draft, save in exceptional circumstances, be deemed to have complied with the requirements with regard to information which must be given to the clients . . . there are four copies in total. My Understanding is that I need to provide a copy as each piece of work is agreed . . ."

49. The complaints officer telephoned DM on 29th June to query whether DM had an actual copy of the letter sent to ST and she records in an attendance note [337] "Counsel said that what he had sent me were copies of what were sent to ST . . ."

50. The BSB then provided TA and ST with the letters DM said he had sent. They sent a detailed response dated 17 July [339] not only denying strenuously that they had ever received such letters but setting out arguments that they suggested supported their version of events.

The hearing before the Tribunal

51. We will come back to the directions given and the procedural error about which complaint is made and which lead to DM putting in his statement before that of TA. At the hearing TA and ST gave evidence first, TA having prepared a statement which stood as his evidence in chief. Much of TA's statement was concerned to argue the prosecution case, asserting points which TA suggested supported the case that the letters produced by DM were not contemporaneous e.g. a reliance on DM not having ST's address at the time he suggested he had sent the letters. Some of these points were shown to be misguided. On the appeal a point is taken as to the contents of TA's statement containing irrelevant material. No objection was taken at the time to the contents and we do not think there is substance in this point. Tactically even the irrelevant parts gave material for cross examination and TA in the result was rigorously cross examined; thus the address point is recorded as being conceded by TA in the Tribunal Judgment at paragraph 12.

52. DM's case on the appeal is that the Tribunal did not pay enough regard to the inaccuracies of TA's evidence which on DM's case were not just innocent, but were dishonest. DM's case had to be that TA and ST had copies of the Rule 6 letters and either mislaid them and were now not prepared to accept their receipt or, worse, had set out from a very early stage to write e-mails inconsistent with the existence of the same in order to attempt to get money back from DM. It was suggested to TA that he had deliberately withheld e-mails but he did not accept that. This was a charge rejected by the Tribunal and Mr Reade for DM argued that the Tribunal should have found otherwise and should have concluded that TA was a dishonest witness or at least that the risk that he was meant that they could not be sure of DM's guilt.

53. ST did not prepare a written statement. Her evidence was that she had not received any Rule 6 letters. She, too, was rigorously cross-examined, e.g. about the fact that she had been prepared to make allegations of dishonesty during the ET case which were found to be without merit. Again Mr Reade asserts that ST was dominated by TA and that the risk again was such that her evidence should have been rejected or have been held insufficient to allow a Tribunal to be sure of DM's guilt.

54. DM also produced a detailed written statement dealing with the e-mails passing between him and ST/TA and explaining when he had sent the Rule 6 letters. He also produced a Supplemental Statement. His statements stood as his evidence in chief. He too was rigorously cross-examined. He accepted that in the e-mails post the hearing he had been mistaken about the charging of VAT on the first two payments but he denied it was a coincidence that the letters he produced reflected his 2009 thinking. He said that the dates on the fourth letter, reflecting a four day hearing and not a five day hearing, were a contemporaneous mistake. When he wrote the emails referring to "a letter" he explained that he probably thought there was one letter but he found there

were four letters. He said he was wrong and he was referring to another case where there was only one letter. He knew the hearing was to last five days and it had in fact lasted five days and the dates on the fourth letter were a mistake.

55. When asked about the lack of reference to the Rule 6 letters and to having to go through e-mails to analyse what fees were due, he said he was not in chambers that often and it was easier to go through e-mails. When asked generally why he had not produced the letters he said he had not found them and he was busy and had personal problems. He found them in his Bar Council box kept in his room. He could not remember when he started looking for them.

Judgment

56. The Tribunal recorded their impression of TA as a not very appealing witness. They did not find it necessary to resolve many factual disputes between DM and TA. Mr Reade for DM criticises this approach. In our judgment the Tribunal were entitled to concentrate on the real issues and were not bound to deal with all points of difference.

57. The critical points are as follows. They found TA to be an honest witness when he said that he did not receive the letters. They found ST to be an honest witness when she supported that evidence. They supported those findings on the following bases. First they said that they were in "no doubt" that had TA received the letters he would have communicated about them - there being fruitful areas of discussion, e.g. the VAT on the first two payments, the £5000 in the third letter, and the date of hearing in the fourth letter. They then referred to ST's response to the BSB when informed of the letters produced by DM. They referred to the exchange of e-mails set out above, and recorded that they accepted the accuracy of the e-mails sent by ST and TA that they were unaware of the "letter". They recorded: "the Tribunal is satisfied" that in 2008 TA and ST had not seen or received any of the four letters sent to the BSB by DM. In paragraph 51 the Tribunal said "Regrettably but with no hesitation the Tribunal finds DM to be an (sic) untruthful and unreliable witness."

58. The Tribunal took into account the reference in the 9th June e-mail to the need to send Rule 6 letters and to indications given on notes of an awareness of that need but they were unpersuaded that the documents established that any letters were sent. The Tribunal then between paragraphs 55 and 60 gave trenchant and persuasive reasons as to why they were "satisfied" the letters produced by DM were not contemporaneous. We use the word "satisfied" because that is consistent with all the language used and because it is the language actually used in relation to the third letter in paragraph 58.

Grounds of appeal 2, 3 and 4

59. Ground 2 suggests the Tribunal applied the incorrect burden of proof. In our view there is no substance in this ground. The Tribunal correctly directed themselves in paragraph 4 as to the burden and standard of proof. The language they used in making their findings gives no cause for thinking that they departed from that direction. It is true that in paragraph 41 the Tribunal recorded that "there is no avoiding the fact that on charges 1 and 2 the Tribunal has to decide whether TA and ST or DM have told the truth." It is also true that in paragraph 52 the Tribunal recorded that the reference to the need to send Rule 6 letters does "not establish that the letters were sent". Those statements are in accordance with sound reasoning and when one takes account of phrases such as "no doubt" in paragraph 47, the Tribunal "is satisfied" in paragraph 50; and "with no hesitation" in paragraph 51, we are quite clear the correct burden and standard was being applied.

60. As to Ground 3, the complaint is that sufficient reasons were not given for rejecting the criticisms of TA's credibility. We are unpersuaded that the Tribunal were bound to do more than they did. It is not incumbent on a Tribunal to deal with each and every dispute of fact. In this instance their findings were amply supported by reasons.

61. Ground 4 suggests that the Tribunal reached a decision that was not open to them. Reliance is placed on certain matters set out in the petition to appeal on which it is said the Tribunal failed to place sufficient significance.

    a. The first point taken is that ST and TA anticipated the possibility of forgery and they had made serious allegations in the ET proceedings. The fact that serious allegations had been made in the ET proceedings by TA was appreciated by the Tribunal (paragraph 44). As to the anticipation of forgery we do not find there to be any significance in this point. The e-mails between TA/ST and DM in the later stages show TA/ST being adamant that they had not received any letters and DM suggesting they had and inferring ST and TA were not being candid in saying they had not. It was not unreasonable if TA and ST were honest witness that they should worry about the possibility of bogus letters being produced.

    b. The next six points are points on TA's credibility. Taking the numbers from the petition to appeal - 31.1- it is suggested that the Tribunal should have found that the 9th June e-mail was deliberately withheld and that this should have lead the Tribunal to the conclusion that the reason for withholding was that that it demonstrated that DM had referred to Rule 6 letters in the correspondence. It is said, this should have lead the Tribunal to hold that TA was lying when he said there was no reference to Rule 6

letters and was lying when he was saying that he had not received the letters. In our view the Tribunal having seen all witnesses were entitled to find that there had been no withholding; they were entitled to find that in saying the letters had not been received TA and ST were being honest. Indeed the Tribunal as already indicated set out many points which supported that view.

c. 31.5 The making of a complaint that was withdrawn in the event does not establish dishonesty.

d. 31.2 , 31.3, 31.6 The fact that a witness is inaccurate or even less than candid in one area does not establish that the witness is dishonest in all that he or she has said.

e. 31.8 It is true that the letters are strange in not being personalised but it seems that it was DM's view that the type of letters he produced were sufficient and that being so there is nothing in the point that more personalised letters could have been produced if they were to be forged.

62. We are not persuaded by the points taken in paragraph 32 of the Petition. These are attempts to reargue the case. As regards the VAT point, DM was persisting in VAT being due on the first two payments despite the fact that it could be said to be obvious that the payments did include VAT. The production of a letter making the same error without some corroboration of it being sent and received proves nothing. The relevance of the dates on the fifth letter is that if the letter had been sent just prior to the ET hearing there was no reason at all to put the wrong dates at the top; the likely time for putting the wrong dates was after the hearing and after a period of time had gone by and because the hearing was for four days prior to judgment day. The Tribunal were entitled to find that the reference to one letter was significant; if four letters had been sent four letters would have been referred to. The Tribunal were entitled to comment on what they would expect of a barrister conducting direct access business.

Ground 1 Procedural Error

63. This ground has caused us to question whether there was unfairness in the process and what remedy would be appropriate if there was unfairness.

64. The starting point is the Rules applicable to Disciplinary Hearings Rules 5,7 and 9 of which provide as follows:

"**5. Service of Charges**

(1) Following the formulation of the charge or charges by counsel appointed by the BSB Representative, the BSB Representative shall cause a copy thereof to be served on the defendant, together with a copy of these regulations and details

of any directions sought not later than 10 weeks (or 5 weeks if the Complaints Committee has directed that the prosecution of the charges be expedited) after the date on which the complaint was referred to a disciplinary Tribunal by the Complaints Committee.

(2) The BSB Representative shall at the same time cause copies of the charge or charges to be supplied to the President.

. . .

7. Documents to be served

(1) The defendant shall, as soon as practicable, be supplied with:

(a) a copy of the evidence of each witness intended to be called in support of the charge or charges;

(b) a list of the documents intended to be relied on by the BSB Representative;

(2) If the documents referred to in paragraph (1) of this Regulation are not supplied to the defendant within 28 days of the defendant being served with charged in accordance with Regulation 5(1) above, then the BSB Representative shall provide to the defendant within that period:

(a) details of the evidence that is still being sought and

(b) a statement of when it is believed that it will be practicable to supply that evidence to the defendant.

(3) Nothing in this Regulation shall preclude the reception by a Disciplinary Tribunal of the evidence of a witness that has not been served on the defendant (within the time specified aforesaid, or at all), or of a document not included in the list of documents, provided the Tribunal is of opinion that the defendant is not materially prejudiced thereby, or on such terms as are necessary to ensure that no such prejudice occurs.

. . .

9. Directions etc

(1) The President shall designate a Judge or Judges ("the Directions Judge(s)") to exercise the powers and functions specified in this Regulation.

(2) The defendant shall, within 28 days of service of the Directions sought by the BSB Representative (as required by

> Regulation 5(1) above) agree such Directions in writing, or propose amendments to such Directions.
>
> (3) If the BSB Representative and the defendant are thereafter able to reach agreement on such Directions, the BSB Representative shall submit the agreed Directions to the Directions Judge for approval.
>
> . . ."

65. Mr Pounder submitted on behalf of the BSB that even in cases where the BSB are to call evidence, Rule 7(1)(a) does not require the service of any statements. He accepted that in some cases statements are served but he submitted the rule does not require it. He submitted that all that was required was the service of the documents to be relied on as occurred in this case. That bundle it is fair to say contained more than correspondence between the parties, it contained correspondence between the BSB and TA and ST including the detailed e-mail of 17th July giving a fairly clear impression as to the evidence that ST and TA would give if called.

66. Notwithstanding, we cannot read rule 7(1)(a) in the way that Mr Pounder submits we should. It seems to us that the rule requires service of statements if witnesses are going to be called. It does provide for a situation in which the witnesses are not available to provide statements and for the putting in of statements at a later stage, but essentially the rule is consistent with the criminal process and requires service of evidence to be called as well as documents.

67. In this case it seems that the BSB were keen not to serve TA's statement before DM had served his. Disclosed on this appeal are two letters. The first dated 27th July 2010 says in one paragraph:- "We have decided that we will not disclose Tim's witness statement until shortly before the hearing date. This will remove the possibility of Mr McCarthy fitting his case around that statement", a sentiment repeated in a letter of 26th August 2010. Mr Pounder accepted this was a quite inappropriate stance for prosecutors to be adopting at least if it is undisclosed to DM's advisers.

68. The Rules also require the parties to try and agree directions where they can, otherwise a directions judge can be asked to rule. The Rule requiring statements to be served with the charge would be capable of being displaced by a specific direction. It would thus have been perfectly permissible for the BSB to go before the directions judge and seek an order that DM put his statement in to be followed by one from TA. They would have to explain the basis for that request and if it were put starkly on the basis set out in the above letters it would be difficult to see a directions judge so ordering if it had been opposed by counsel for DM.

69. The Directions were however in fact agreed and the e-mail exchange was produced by Mr Pounder. The Directions ultimately provided so far as material:

i) That the Bar Standards Board's bundle of documents be admitted into evidence without further proof of the authenticity of the documents contained therein.

ii) That the Bar Standards Board's witnesses namely Mrs Sumanee Tharapatn and Mr Tim Aron, are required to attend at the substantive hearing for the purposes of cross-examination.

iii) The Bar Standards Board shall file and serve 28 days before the substantive hearing any additional evidence upon which it proposes to rely.

iv) Mr McCarthy shall by 28th July 2010 provide to the Bar Standards Board:

a) Copies of the statements of any witness whom he wishes to rely upon at the hearing; and

b) Documents upon which he intends to rely.

70. Those advising DM and DM himself were unaware of the attitude of the BSB to the service of a statement by TA, but it was obvious that neither TA or ST had put in a statement and that if they were not required to do so but DM was, that they would be able to give their evidence with the benefit of knowing what DM was going to say. The attitude of DM and those advising him must have been that they knew at least in broad terms what TA and ST would say having regard to the many e-mails including the 17th July e-mail to the BSB. They accordingly did not require a statement from either.

71. Has there in the result been any unfairness? Mr Reade devoted considerable time to comparing the witness statement in draft - which it seems was in draft before DM put in his statement and which he argues would have been likely to have been served if Rule 7(1)(a) had been followed - with the statement that was served and also with some of the e-mails. He suggests that TA's credibility would have been dented if that draft statement had been his evidence in chief. He submits that by reason of the BSB's approach, DM lost a potential forensic advantage.

72. The first point to make is that if the BSB had been forced to serve the statement of TA there would not have been any draft to compare that with. The second point is that if compliance with Rule 7 had been agreed, it is not clear what statement would have been put in. It could have been limited to a statement that the letters had not been received and evidence along the lines of 16th July e-mail or it could have been as extensive as the statement ultimately put in. The third point to make is that Counsel for DM had the material he needed in the e-mails to expose TA and ST if they were to be exposed; there were points on which TA and ST were inaccurate and it was their demeanour in dealing with those points and the tone and contents of the e-mails on which the Tribunal would be assisted in considering whether TA and ST were being honest in saying they had not received the rule 6 letters. The extent to which TA tailored his statement as argued by Mr Reade following receipt of DM's statement is extremely limited, and would have been open to him when he came to give evidence in any event.

Conclusion

73. It is our clear view that that the Rule requiring evidence to be served does include statements of witnesses. They equally ought to recognise that the attitude exemplified by the letters quoted in paragraph 67 above is unacceptable. One member of the Visitors Panel was sufficiently concerned that the procedural error may have lead to unfairness, and therefore it could be argued that a breach of natural justice had occured, and therefore it was fair and reasonable to order a rehearing" But two of us do not think in this case there was, in the result, any unfairness first because it was plain to DM and his advisers the order in which statements were going to be exchanged; and secondly because if DM had insisted on TA and ST putting in statements first, he would not actually in this case with all the e-mails including that of 16th July to the BSB, have been in any stronger position forensically.

74. We are also regrettably quite clear that the evidence against DM was extremely powerful and accordingly that the verdict of the Tribunal was not unsafe. The appeal against the findings on Charges 1 and 2 must be dismissed. This conclusion makes it unnecessary to deal with any other grounds of appeal.