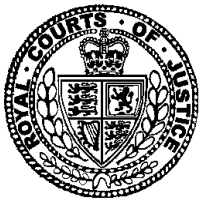

Neutral Citation Number: [2022] EWHC 1128 (Admin)

Case No: CO/3995/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2022

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between:

KEVIN STEWART FARQUHARSON **Appellant**

- and –

THE BAR STANDARDS BOARD **Respondent**

- -
- -

Marc Beaumont (direct access) for the **Appellant**
Mark Ruffell (instructed by the **Bar Standards Board**) for the **Respondent**

Hearing dates: 6 – 7 April 2022

- -

Approved Judgment

Mrs Justice Heather Williams:

Introduction and preliminary matters

1. This is a statutory appeal pursuant to section 24 of the Crime and Courts Act 2013. It is governed by CPR Part 52. The Appellant appeals from the 21 October 2021 decision of a five person Disciplinary Tribunal of the Bar Tribunal and Adjudication Service ("the Panel"), who found by a 4 – 1 majority that the three charges he faced were proved and that the appropriate sanction was disbarment in relation to each charge. The Chairman of the Panel, HHJ Pawlak, provided written reasons for the decision dated 22 October 2021.

2. All three charges alleged that the Appellant was guilty of professional misconduct in breach of core duty 5 ("CD5") and/or rule C8 ("rC8") of the Code of Conduct of the Bar of England and Wales (9th edition) Bar Standards Board Handbook ("the BSB Handbook"). CD5 provides that "you must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession"; and rC8 states, as relevant, that "you must not do anything which could reasonably be seen by the public to undermine your honesty, integrity…".

3. The Appellant admitted Charge 1, which concerned a sexual assault on a female colleague in a night club. He pleaded guilty and had been convicted of an offence of sexual assault contrary to section 3 of the Sexual Offences Act 2003 in respect of this incident. Charge 2 related to a text message the Appellant sent to the complainant the day after the assault asking her to respond to a future message from him with an untruthful account of the previous evening. Charge 3 concerned a similar approach he made to a further colleague. It was accepted that the Appellant's aim in sending the text messages was to construct a false narrative to pacify the suspicions of his then partner, rather than to mislead a police investigation.

4. At the hearing I directed, pursuant to CPR 39.2(4), that the complainant, as the victim of a sexual offence, was to be referred to as "A" and that there was to be no reference in any report of the proceedings to her name, address or any other details leading to her identification, including the chambers that she was a member of at the time of the material events. I made a similar order in relation to "Z", the recipient of the text message that gave rise to Charge 3, since identifying him risked identifying the complainant. As they were referred to respectively as "A" and "Z" before the Panel, I used the same ciphers. I also indicated that I accepted that details of the Appellant's medical conditions and references to his childhood experiences should not be disclosed in any report of the proceedings, given the extent of the personal material involved and the protection afforded by Article 8 of the European Convention on Human Rights ("ECHR"). In my judgment, this outweighed the fundamental principle of open justice in these particular circumstances and to this limited extent. The entirety of the hearing was held in public and I am able to set out my reasoning within this judgment without making specific reference to the Appellant's medical conditions and to his childhood, which I have described in a Confidential Annex.

5. I also indicated at the hearing that I would make:

   i) An order pursuant to CPR 5.4C(1) and (4) that a person who is not a party to the proceedings could only obtain a statement of case from the court's records

if any references to the name or identifying details of "A" and "Z" had been removed, along with any references to the Appellant's medical conditions and to events in his childhood; and

ii) An order pursuant to CPR 5.4C(2) and/or the inherent jurisdiction of the court, that any application by a non-party for access to other court records or other documents concerning this appeal should be referred to me. In this eventuality, if I were to grant access, the limitations that I have indicated must apply to statements of case would also be applied to the other documents. I also record that in so far as any documents submitted in this appeal may have inadvertently referred to medical matters relied upon by the appellant barrister in *Howd v Bar Standards Board* [2017] 4 WLR 54 ("*Howd*") that were not part of the material that was made public, this must be redacted from any documents supplied to third parties.

6. The Appellant was unrepresented at the hearing before the Panel and when he commenced this appeal. His Honour Judge Palwak granted an extension of time for filing the notice of appeal until 18 November 2021. In the event, it was not successfully filed until 22 November 2021, due to a misunderstanding over the date of the Panel's decision when the Appellant first attempted to file it on 18 November 2021. The Respondent has never taken a point on this; both parties proceeded on the basis that it was a properly constituted appeal. Without objection from Mr Ruffell, I therefore granted an extension of time for the filing of the appeal notice, pursuant to CPR 52.15.

7. A further procedural matter which I addressed at the outset of the hearing concerned the Amended Grounds of Appeal ("the Amended Grounds"). These were drafted by Mr Beaumont after he was instructed by the Appellant. They were filed with the court, along with a skeleton argument on 10 February 2022. However, no application was made to amend the grounds of appeal. Plainly that application should have been made. However, the Respondent did not object to the Appellant relying upon the Amended Grounds; and I was satisfied that no prejudice would be occasioned by my permitting the amendment, whereas the Appellant would have been significantly disadvantaged had I not allowed it. Accordingly, I granted the Appellant permission to rely upon the Amended Grounds, pursuant to CPR 52.17.

8. I refer to the Amended Grounds in more detail below, but by way of brief summary, the Appellant contends:

i) On the admitted facts underlying his conviction for sexual assault there was nonetheless no "professional misconduct", in light of the impact of his medical conditions on his behaviour. An analogy should have been drawn with the decision in *Howd*. Although not explicitly addressed in the Amended Grounds, Mr Beaumont accepted that to succeed on this basis, he would need to show that the Appellant's admission to Charge 1 should be set aside;

ii) Charges 2 and 3 concerned personal correspondence which was protected by Article 8, ECHR and the Panel erred in not considering this and in failing to identify any permissible basis for the interference with his private life and correspondence. A second argument identified in the Grounds, but not pursued in oral submissions at the hearing, was that his actions did not amount to "professional misconduct" in light of his medical conditions;

iii) In the alternative, the sanction of disbarment in relation to each of the charges was clearly inappropriate and manifestly excessive.

The charges

9. Charge 1 stated:

> " STATEMENT OF OFFENCE
>
> PROFESSIONAL MISCONDUCT, contrary to Core Duty 5 and/or rC8 of the Code of Conduct of the Bar of England and Wales (9th Edition) Bar Standards Board Handbook (version 4.2).
>
> PARTICULARS OF OFFENCE
>
> KEVIN STEWART FARQUHARSON, a practising barrister, engaged in conduct which was likely to diminish the trust and confidence which the public places in him or in the profession, contrary to Core Duty 5, and/or did something which could reasonably be seen by the public to undermine his integrity contrary to rC8, in that he, in the early hours of 28 September 2019, sexually assaulted A, and as a result, on 18 March 2021, appeared before Cardiff Magistrates Court and was convicted of one offence of Sexual Assault against A, contrary to section 3 of the Sexual Offences Act 2003, and was sentenced to six-months imprisonment, suspended for 18 months, with a Rehabilitation Activity Requirement, ordered to pay £1800 compensation, a victim surcharge of £128 and made subject to the Notification Requirements of s.80 of the Sexual Offences Act 2003 for a period of seven years."

10. The "Statement of Offence" was in like terms for Charges 2 and 3. The particulars of Charge 2 alleged:

> "KEVIN STEWART FARQUHARSON, a practising barrister, on 29 September 2019, engaged in conduct which was likely to diminish the trust and confidence which the public places in him or in the profession, contrary to Core Duty 5, and/or behaved in a way which could reasonably be seen by the public to undermine his integrity contrary to rC8, in that he, having been informed on 28 September 2019 about his conduct towards A in the early hours that day, sent a text message asking her to respond to a future text from him with a scripted message he had prepared which was not a truthful account of the events in the early hours of 28 September 2019."

11. The particulars of Charge 3 followed the wording of Charge 2, save that the conduct in question was described as "sent Z (another barrister) messages asking him to lie about events in the early hours of 28 September 2019".

The material events

12. The Appellant was admitted as a student member of Middle Temple on 2 December 2009 and was called to the Bar on 13 October 2011. At the time of the Panel's decision he was 45 years old.

13. In addition to a statement made by A to the BSB, the documents before the Panel included: (i) witness statements obtained by the police investigation into the sexual assault; and (ii) the investigation report, disciplinary findings and related documents from the internal disciplinary proceedings conducted by the Appellant's then chambers.

Events relating to Charge 1

14. The Appellant, A and Z met after work on Friday 27 September 2019. Z was a more senior barrister, who had arranged to take the Appellant and A out for drinks and a meal. The Appellant had undergone a very difficult week and was very tired. During the course of the evening he drank a substantial number of double whiskies. After the meal, the three went on to a local public house and during this part of the evening Z went home. The Appellant cancelled a taxi he had booked to collect him at midnight. He and A went on to a nightclub. A had messaged a friend 'Sam' who she asked to join them. The timing of text messages between the two indicate that the Appellant and A arrived at the night club shortly before 00.18 hours on 28 September 2019. Sam arrived just over 10 minutes later. Subsequent text messages showed that by 01.19 hours the Appellant had been removed from the club by staff. Between 00.18 and 01.19 hours the Appellant repeatedly assaulted A. The Panel accepted that he recalled virtually nothing of the events during that period. He did not dispute A's account of what had occurred.

15. The Charge Sheet explanatory note summarised the sexual assaults comprising Charge 1 as follows:

> "i. Touching A's breast while in the photobooth
>
> ii. Touching A's buttocks while at the bar getting a drink.
>
> After A had told KF to stop touching her
>
> iii. Touching A's buttocks while dancing, on more than one occasion, including after A moved away from KF
>
> iv. Touching A's breasts while dancing on more than one occasion, including after A moved away from KF
>
> While at the bar after leaving the dancefloor:
>
> v. Pressing against A's back, pinning A's arms to her side, touching A's vaginal area over her clothing with both hands
>
> vi. Pinning A's arms to her side and trying to kiss A, before and after A made it clear she did not want to kiss
>
> After A shouted that KF was sexually assaulting her and should stop:

> vii. Standing behind A at the bar and touching her vaginal area over her clothing with both hands"

16. The Panel's decision described the incident in the following terms (at para 14):

> "In the night club the Respondent touched A sexually repeatedly despite A making it clear to him that she did not want to be touched in that way. In her police statement she describes his behaviour as persistent and relentless. For example, when she went to the bar he followed her. 'I suddenly felt him pressed up against my back. He was standing behind me in very close proximity. I had my hands by my side and he put his arms around my arms pinning them down to my sides. I resisted this, but he is stronger than me and was applying force pinning them down to my sides. I was completely stuck and could not get out. From here he started reaching his hands down my front and began touching me. He was putting both hands against my vagina, whilst I was continuing to wiggle free. He was touching me over my jeans. Luckily the bar man then came to take the drinks order, which made Kevin get off me.' Eventually A was able to speak to staff, who had already noticed that she was uncomfortable with the behaviour of the Respondent. A's friend who had joined them in the club, saw that the Respondent was touching and 'groping' A aggressively and grabbing her breasts despite A looking scared. He told her to run to the toilets to escape the Respondent's attention which she did, and it was there that a member of staff came to speak to her."

17. Shortly after A went to the toilets, the Appellant was removed from the club by members of staff. They called the police because he was threatening to fight with them. In a statement dated 2 December 2019, PC Hewitt described speaking with the Appellant outside of the club, saying; "it was clear to me that he was drunk". The officer said that Mr Farquharson had confused a cash note with his driving licence; had not recognised his own phone; and had given an incoherent answer when asked to provide his home address. He said he believed these responses were due to the Appellant being drunk and potentially under the influence of drugs. He also described Mr Farquharson as animated and emotional and speaking in abusive terms about the bar staff. A did not give an account to the police at this point, as she was then unsure whether she wanted there to be a prosecution.

Events relating to Charges 2 and 3

18. The subsequent contact between the Appellant and A was largely documented in text messages passing between them. Again, the Appellant did not dispute A's account. In her BSB witness statement (at paras 14 – 15) she said:

> "Kevin pursued me in what felt like a relentless way over the two days following the night out on 27 September 2019. Kevin rang me twice on Saturday…During these calls I let him know what had happened, how he behaved towards me. However, despite this and despite the fact that he knew that the police had been

> called as a result of the sexual assault, he still sent the text in the early hours of 29 September (01:46) asking me to lie on his behalf in respect of the events of the night of 27 September 2019.
>
> Kevin followed up this text on Sunday morning with a call and then a text at 10:01 am. The text was friendly in tone, as if nothing had happened: presumably this was the text that he wanted to [sic] me to respond to with the script that he included in the 29/09/2019 01:46 text. There was no acknowledgement at all about the information that I had told him on the phone on Saturday. I sent a short text back to tell him what time he left, and mentioning that the bouncers were dealing with him. I was not prepared to lie for him. He responded to this, '*I hope I didn't affect your night…I'll maybe call later to have a chat about what the hell led to the bouncers wanting me out.*' These text messages really upset me; it was as though Kevin was trying to control the story. I thought, I don't want to be answering how Kevin has told me to answer, because it is a lie; Kevin was giving me a script which was untrue. His texts seemed to be about re-inventing the evening to exonerate Kevin. There was no acknowledgement of any distress that his behaviour caused me, nor that his persistent texts, calls and instructions were making me feel worse."

19. The text from the Appellant to A sent at 01.46 hours on 29 September 2019 which was the subject of Charge 2 said:

> "I'm in real trouble with X [his then partner]. Would you help by responding to my text tomorrow by simply stating: 'we lost sight of you at about 1.45. I think you left after you had a run in with one of the bouncers. I hope you're feeling ok.' X thinks I've been with someone else possibly you!!!! I'm such an idiot. I'd be grateful if you could help dig me out of this hole. Please don't respond to this text as X is monitoring my phone. So sorry! I hate myself a lot right now."

20. The text message which the Appellant sent to Z was subsequently deleted. However, he did not dispute Z's account, set out in a witness statement made on 27 January 2020, that he received one or two text messages from the Appellant during the evening of 29 September 2019 asking him to say that "you were with me in the nightclub when the bouncers came in" should his partner ask what had happened.

The internal disciplinary process and the criminal proceedings

21. On 11 October 2019 A made a formal complaint to the Appellant's chambers. On 27 November 2019, a disciplinary hearing found that he had sexually assaulted A as she alleged. The findings noted that there was "a great deal of material" supporting her allegations, including the witness accounts from those present. Reference was also made to the difference between them in status, as the Appellant had been called to the Bar in 2011 and A in 2016; "the profound effect" the incident had upon A; the persistence of the Appellant's conduct during the assault; and the fact they had been

friends and A had trusted him. The Panel's decision quoted the following from the internal disciplinary findings (at para 24):

> "We should add that we recognise that this incident placed A in an exceedingly difficult position both generally and specifically in relation to whether she should make any complaint either to chambers, the police or both. We regard A's decision to report this matter to chambers as both courageous and entirely right and proper. We are very grateful to her for raising the matter in very difficult circumstances and for her considered involvement throughout."

22. The Appellant was not expelled from his chambers, but restrictions were placed upon his future involvement in activities and his use of their facilities. In the event, the Appellant resigned on 2 October 2020. He has not practised as a barrister since then; initially this was on a voluntary basis and from 26 April 2021 pursuant to an interim suspension order imposed by a BTAS tribunal.

23. The Panel's decision summarised A's victim impact statement, in the following terms (at para 26):

> "As the Respondent was a senior colleague, she was worried that there would be issues. For the first few weeks she was scared to go to work. The investigation brought another level of stress. She took time off work for significant periods. Her self-confidence was damaged, and she felt like giving up the Bar. She required counselling to help her through this difficult period."

24. It is agreed that the Appellant pleaded guilty at the first opportunity in the criminal proceedings. The Memorandum of Conviction (quoted in the Panel's decision at para 3) referred to:

> "…prolonged and predatory behaviour with a work colleague after she made her thoughts abundantly clear, in drink with far-reaching emotional consequences for the victim. However, previous good character, extensive mitigation in support of his family situation and his emotional background, his having lost his career and having sought help himself since being charged, a realistic prospect of rehabilitation so therefore can suspend."

The medical evidence

25. The Appellant relied upon: letters dated 30 November 2020 and 29 January 2021 from Professor Gordon Turnbull, Consultant Psychiatrist; a report from Jonathan Stubbs, Registered Psychotherapist, dated 6 December 2020 and an addendum dated 14 December 2020; and reports from Dr Marilyn Tew, dated 13 April, 26 July and 22 September 2021. All three were involved in the assessment and treatment of Mr Farquharson after the September 2019 events. I detail their contents in the Confidential Annex accompanying this judgment.

The Appellant's communications with the BSB

26. On 20 October 2019, the Appellant self-referred to the BSB. In representations dated 15 December 2019, he accepted that his behaviour at the night club was "appalling" and that he had "behaved terribly, causing a friend and colleague considerable distress and upset". He said that whilst he accepted the possibility that his behaviour may have been the result of consuming too much alcohol, he did not believe it was the sole cause. He characterised the period preceding the incident as "the worst week of chronic work-related stress, lack of appropriate nutrition and sleep deprivation in my 8 years at the Bar" and referred to his medical conditions and the help he had been receiving from professionals since those events. In relation to the text messages, he said he believed "the conduct complained of occurred within the context of mine and the complainant's private life" and "not being in any way related to the professional activities of myself or the complainant, nor the business activities of Chambers, do not qualify as occurring within my professional life, and were an entirely private matter". He said that the texts showed "very bad personal judgment", but they were sent when he was in a very poor state of mind. His representations referred to *Howd,* both in relation to intrusion into his private life and in terms of whether his actions amounted to serious professional misconduct. He said that the circumstances leading up to the early hours of 28 September 2019:

> "…[had] created a toxic combination of physical, emotional and mental health factors, several of which were beyond my control, which combined with alcohol, affected the degree of personal agency over my thinking, impulsivity, judgment and disinhibition, and ultimately led to me quite literally 'losing my mind' for a short period of time."

27. The Appellant set out his response to the allegations in a document dated 28 May 2021. He said he did not dispute the sexual assault. He accepted that the text to A "represents an act of personal deceit on my part". He said that he was in a poor state of mind at the time and suffering from the health conditions set out in the medical evidence, which influenced his judgment. He made similar observations in relation to the third allegation. He questioned "the proportionality of allegations 2 and 3, given they relate to my family and personal life".

28. On 23 September 2021, the Appellant sent his response to the charges. Of Charge 1 he said: "This charge is admitted. I remain horrified and hugely remorseful about the conduct described and the resulting conviction". He said he did not in any way condone the conduct described in Charges 2 and 3 but they "are disputed on the basis of the evidence contained within the bundle" which he said indicated he "was incapable of clear or rationale [sic] thought at the time the messages were sent".

The hearing before the Panel

29. The hearing took place remotely. Mr Ruffell represented the BSB. When the charges were put, the Appellant admitted Charge 1. In response to Charge 2 he said: "I just question that charge on the basis of the medical evidence that has been filed". This was recorded as a denial. He gave a similar response to Charge 3. Before opening the case in relation to Charge 2 and 3, Mr Ruffell asked the Panel whether they found Charge 1

proved by admission. The Chairman replied: "Yes, we do find it proved by admission because he admitted it".

30. In his opening, Mr Ruffell summarised the BSB's position in relation to Charges 2 and 3 as follows:

> "We submit that on Charges 2 and 3 the public test is satisfied. What would the public think about a barrister who went out on a drunken bender, sexually assaulted a female colleague over a period of time and then tried to cover up what had been happening, either just the period of time or where he had been by trying to persuade the victim and another colleague to lie.
>
> We submit that it is likely to diminish the trust and confidence which the public place in that barrister and in the profession as a whole. There is an element of dishonesty within that and an element of lacking integrity within that, and we urge you to find Charges 2 and 3 proved on the balance of probabilities."

31. After some discussion, the status of the sexual assault conviction was clarified. Pursuant to rE169 of the BSB Handbook, the Memorandum of Conviction was conclusive proof that Mr Farquharson had committed the offence; and any court record of facts found was to be treated as proof of those facts, unless proved to be inaccurate. As to the latter, Mr Ruffell stressed that the Panel should form their own view of the facts referred to in the Memorandum, particularly because the Appellant challenged the characterisation of his conduct as "predatory".

32. After Mr Ruffell's presentation, Mr Farquharson gave evidence. He focused on the medical evidence he had provided in so far as it related to Charges 2 and 3 and described the circumstances in which he had sent the texts and the background to this conduct. He confirmed that he recalled sending the messages. During the course of his account, Mr Williams, one of the Panel members, asked him whether *Howd* was relevant to their consideration of the case. The Appellant replied that it was "relevant in terms of the weight that needs to be given to the medical evidence and how that applies to a level of culpability and moral responsibility". He said that in the criminal context, voluntary intoxication was not a defence even if it was as a consequence of trying to supress the symptoms of a mental health condition, which he thought the evidence showed he was doing. He concluded his answer by saying: "It is still voluntary intoxication and the mental health element is purely mitigation". Mr Williams observed that this did not necessarily detract from an application of *Howd* as it might be said that drinking exacerbated his underlying condition in a way that caused him to behave as he did. Mr Farquharson responded that this is what the experts had said and he cited their references to "disassociation". He agreed with Mr Williams that he was saying the medical evidence fell "within the four corners of *Howd*". Further questions and answers between Mr Williams and the Appellant followed in which he explained that he was relying on the medical evidence in disputing the District Judge's description of his behaviour as "predatory".

33. When he was questioned by Mr Ruffell, the Appellant accepted that he was not drunk when he sent the text messages and that asking another barrister to lie for him had been wrong. He emphasised his emotional state that day and that he was "not in a good way".

He maintained that his medical problems afforded a defence in relation to Charges 2 and 3 but accepted "that it is shameful and wrong and does not reflect well on me, it does not reflect well on the bar". He said he was very sorry. He accepted that he was asking A to give "a false impression". Questioned about his past use of alcohol, he accepted that he had experienced black outs with whisky and associated memory loss, but emphasised that nothing like these events had occurred before.

34. Mr Ruffell then closed his case. After an adjournment, the Chairman announced that Charges 1, 2 and 3 were found proved, by a majority decision of 4 – 1.

35. Mr Ruffell then addressed the Panel on the Sanctions Guidance. He said that the starting point was disbarment and he identified potential aggravating factors. When he referred to misuse of the professional relationship as an aggravating feature, the Chairman intervened to say that had never been put to Mr Farquharson. There was a similar intervention when Mr Ruffell appeared to question the Appellant's account that he could not recall events in the nightclub or getting home afterwards, with the Chairman observing that Mr Farquharson should have an opportunity to answer this. The Appellant agreed to be questioned about these matters by Mr Ruffell and he denied the propositions put to him. Mr Ruffell then identified potential mitigating factors.

36. The Appellant then addressed the Panel. He referred to the medical evidence saying: "it has been suggested to me repeatedly that the behaviours that night are indicative of an episode of disassociation as opposed to being mere alcohol consumption". He emphasised the numerous sessions of counselling and other medical interventions he had undergone since the incident and how out of character his behaviour had been.

37. After a short adjournment, the Chairman announced the Panel's decision on sanction, namely disbarment on each charge.

The Panel's written reasons

38. In relation to Charges 2 and 3 the Panel observed (at para 21):

> "It is clear that each person A and Z was asked by the Respondent to lie about the evening in order to deceive X but not specifically in relation to whether the Respondent had touched A sexually. Z was being asked to tell an obvious lie, whereas A was being asked to obfuscate the circumstances of the night. We note that the Respondent appears to have been more concerned about X than his behaviour towards A."

39. The Panel rejected the opinion advanced in the medical evidence that the Appellant was "incapable of rational thought" when he sent the texts, (at para 19) as follows:

> "The text, the subject of Charge 2 appears to us to be entirely clear and rational in that, appreciating he was having a problem with his partner, having returned home around 4am, over where he had been and with whom, he was asking the victim of his sexual touching to lie about when and where she had last seen him in order to help him with his problem with his partner who suspected him of having been with someone for much of the

> night. Although the Respondent said he did not remember anything about his behaviour, by the time of this text he had been told about his behaviour inside the club by A."

40. The reasons referred to the Appellant seeking to bring himself within the conclusion reached in *Howd*, that his behaviour was a consequence of his medical condition and his excessive consumption of alcohol was likely to have been a response to his medical condition. Under the heading "Findings", the decision then said (at para 33):

> "By a majority of 4 to 1 we rejected that submission. While the majority accepted the uncontradicted evidence of the three experts as to the condition from which he had suffered for many years, his behaviour that night was the direct result of his excessive consumption of alcohol and over-familiarity with a much younger barrister."

41. At para 36 the decision said:

> "With regards to charges 2 and 3 we find by a majority of 4 to 1 that there was a lack of integrity and an element of dishonesty in what he wanted to present to his partner, but it is his seeking to use A and Z, fellow-barristers, to misrepresent the facts to his partner which could reasonably be seen by the public to undermine his honesty and integrity and to diminish the trust and confidence which the public would place in him but more particularly the profession. He was aware of the police involvement and was trying to construct a false narrative."

42. Turning to sanction, at para 39 the Panel quoted at length from one of the Appellant's statements to the BSB. This referred to his remorse and his acceptance that he had let the profession down; that he had lost the thing he cherished most, namely his family; that he had undergone intensive medical treatment since the incident; that the financial costs to him had been in the region of £200,000 given the lengthy period in which he had not worked; that he had lost contact with friends and had withdrawn from the world, and that he had been subject to criminal penalties, including notification requirements for seven years. The Panel noted that he had provided many glowing references. It made further reference to the medical evidence.

43. The Panel's conclusions on sanctions were then set out in paras 43 – 45 as follows:

> "We are conscious of the need for deterrence when considering the sanction in cases of sexual offending. The misconduct occurred 'out of hours'. The visit to the night club was not in any way related to a chambers event or any business activity. However, it did occur within the context of a professional relationship and there was a significant difference in age and call.
>
> This was in our judgment a conviction for a serious sexual offence for which the starting point is disbarment or in exceptional circumstances a long suspension. The gravity of the offence was his continuing to touch A in public and despite her

> repeated requests for him to stop, and his taking advantage of the professional relationship. He had insight into how excess alcohol might affected him as demonstrated by his text…sent on 23 September to Z…We would not describe him as a predator as the District Judge did when sentencing him, but the offence was prolonged and serious and with distressing consequences for A. There is no doubt that the Respondent immediately and thereafter has expressed genuine remorse. His excessive consumption of alcohol on that Friday night came on the heels of a very demanding week of work. His record hitherto has been entirely clean. He self-reported and was entirely co-operative with all three investigations, the police, his chambers and finally with the BSB. He has taken extensive steps to deal with his…[medical conditions]…He has attended all the sessions despite finding the work gruelling both physically and emotionally. The Respondent told us he has attended over 100 sessions with the psychotherapist and the consultant psychiatrist, almost all of them at his own expense. The probation service had reported that he poses no particular risk to the public. He gave up drinking alcohol almost immediately after September 2019 and has stayed teetotal ever since. In his own words in mitigation, he stressed how sorry he was for letting A and his chambers down, that he was utterly ashamed of what went on that night and that he has tried to do everything to put it right. There were many references from those who worked with him stating how shocked they were by the allegations and that his behaviour was totally out of character.
>
> Nevertheless, we are of the view that there are no exceptional reasons for imposing a period of suspension instead of disbarment. The sanction for each of the charges will be disbarment and therefore the BSB should not issue a practising certificate to the Respondent."

The legal framework

The Court's powers on appeal

44. An appeal is limited to a review of the Panel's decision (CPR 52.21(1)). CPR 52.21(3) provides that the court will allow an appeal where that decision was "wrong" or "unjust because of a serious procedural or other irregularity in the proceedings". The appeal court is entitled to draw any inference of fact which it considers justified on the evidence (CPR 52.21(4)). Pursuant to CPR 52.20(2) the court may set aside or vary the Panel's decision; refer any issue for determination by the Panel; or order a new hearing.

45. The approach to be taken by the appellate court was summarised by the Divisional Court (Davis LJ, Foskett J and Holgate J) in *Solicitors Regulation Authority v Day & Ors* [2018] EWHC 2726 (Admin) ("*Day*"), after a review of the authorities. The court considered that Lord Reed's judgment in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600 contained "a particularly convenient summation of the required approach" (para 67). After referring to the general principle that on matters of

fact the appellate court may only interfere where the court below has gone "plainly wrong", the court cited the following passages:

> "62. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge…What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> 67. It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of the relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

46. As to evaluative conclusions, the Divisional Court noted that the observations of Clarke and Ward LJJ in *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642; [2003] 1 WLR 577 emphasised the need for "appropriate restraint" and that the "general caution applies with particular force in the case of a specialist adjudicative body" (para 69). Citing the judgment of the Court of Appeal in *Bawa-Garba v General Medical Council* [2018] EWCA Civ 1879 at paras 60 – 67, the Divisional Court said that the appellate court would only interfere with such an evaluative decision "where an error of principle is involved or where the evaluative decision falls outside the bounds of what could reasonably and properly be decided" (para 69).

The BSB Handbook

47. I have already set out CD5 and rC8 (para 2 above). Core Duty 3 ("CD3") provides that: "You must act with honesty, and with integrity" and rC8 reflects the text of CD3. Rule C9 sets out a number of requirements that follow from the duty to act with honesty and integrity, which relate to working as a barrister. The list is non-exhaustive, as the gC16 guidance indicates. Mr Ruffell confirmed that the rules and guidance do not deal explicitly with circumstances in which CD5 and/or rC8 would be breached by other kinds of conduct.

Professional misconduct

48. In *Khan v Bar Standards Board* [2018] EWHC 2184 (Admin) ("*Khan*") Warby J (as he then was) referred to the principle "by now firmly established in the jurisprudence of professional disciplinary proceedings…that misbehaviour must attain a certain level of gravity before it can qualify as professional misconduct" (para 31). In this regard he referred to the decision of the Visitors to the Inns of Court, given by Sir Anthony May, in *Walker v Bar Standards Board* PC 2011/0219, 19 September 2013 ("*Walker*"), who accepted a submission that the courts had been "astute to differentiate the isolated, albeit negligent, lapse from acceptable conduct from the serious kind of culpability which attracts the opprobrium of a finding of professional misconduct" (para 33). Mr Justice Warby then summarised the position as:

> "36. The authorities make plain that a person is not to be regarded as guilty of professional misconduct if they engage in behaviour that is trivial, or inconsequential, or a mere temporary lapse, or something that is otherwise excusable or forgivable…Only serious misbehaviour can qualify."

49. One of the authorities cited by Warby J was *Howd*. Mr Howd appealed successfully against findings that six charges of professional misconduct had been proved in relation to his behaviour towards female colleagues and staff at a chambers' party. The Tribunal found that his conduct breached CD5 and also CD3. Mrs Justice Lang was satisfied that his conduct did not demonstrate a lack of integrity, was not such as to diminish the public's trust and confidence in the profession and that his behaviour did not reach the threshold for a finding of professional misconduct. Her conclusions stemmed from the medical evidence, including additional material supplied for the appeal, which was set out in a confidential annex to her judgment. Mrs Justice Lang was satisfied that it showed Mr Howd's behaviour "was a consequence of his medical condition. It also established that his excessive consumption of alcohol was highly likely to have been a response to the onset of his medical condition, and it probably had the unfortunate consequence of exacerbating his disinhibition and loss of judgment on that occasion" (para 21). In turn, she determined that:

> "48. In principle…Mr Howd's inappropriate, and at times, offensive behaviour towards female barristers and junior members of staff, at a Chambers marketing event attended by professional clients, could be capable of diminishing the trust and confidence which the public placed in him, as a barrister, or in the profession, contrary to CD5, since it occurred in the course of his professional life, and was not an entirely private matter. However, if the public was aware that his behaviour was a consequence of a medical condition and so lacked any reprehensible or morally culpable quality, it would be unlikely to diminish their trust and confidence in the profession or in Mr Howd as a barrister, provided he was fit to practise...
>
> 55. …The medical evidence established on the balance of probabilities that his inappropriate, and at times offensive, behaviour was a consequence of his medical condition. It also established that his excessive consumption of alcohol was very likely to have been a response to the onset of his medical condition and had the unfortunate consequence of exacerbating his disinhibition and loss of judgment. In these circumstances, Mr Howd's behaviour plainly was not reprehensible, morally culpable or disgraceful as it was caused by factors beyond his control. In my judgment, it did not reach the threshold for a finding of serious professional misconduct."

50. In *Beckwith v Solicitors Regulation Authority* [2020] EWHC 3231 (Admin) ("*Beckwith*") a partner in a leading solicitors firm successfully appealed a finding that he had breached the SRA Handbook's Principle 2 (duty to act with integrity) and Principle 6 (duty to behave in a way that maintains the trust the public places in you and in the provision of legal services), by his conduct in initiating or engaging in sexual

activity with Person A, a more junior solicitor in the firm who was intoxicated. Mr Beckwith submitted that the Disciplinary Tribunal had erred in "not first considering whether the allegation amounted to 'professional misconduct' and by not then concluding that his actions did not reach that threshold" (para 14). The Divisional Court (The President of the Queen's Bench Division and Swift J) rejected this submission, observing that:

> "15. …What is or is not professional misconduct depends on the rules of the scheme that applies to the profession in hand. Some schemes may describe prohibited conduct by reference to the phrase 'professional misconduct' or other similar words…In such cases the relevant regulator or tribunal does have to decide whether the conduct alleged can be described as professional misconduct. But other schemes for regulation may not be formulated in this way; they may describe prohibited conduct in other ways. Where that is so, the only question for the relevant regulator or tribunal is whether or not such conduct has occurred and if so, what penalty should be imposed…"

51. The Divisional Court pointed out that the authorities cited – *R (Remedy UK Limited) v General Medical Council* [2010] EWHC 1245 (Admin) and *Mohammed Lone v Secretary of State for Education* [2019] EWHC 531 (Admin) - concerned different regulatory schemes which expressly defined the relevant disciplinary offences by reference to "misconduct" (paras 19 – 20). The Court did not need to form a view on whether the approach taken in *Howd* was correct, but it was noted that the BSB Handbook only used the notion of "professional misconduct" to distinguish between conduct that could be addressed by the BSB imposing an "administrative sanction" and conduct that had to be the subject of proceedings before the Bar Disciplinary Tribunal; and that accordingly "that scheme has been formulated without need for any free-standing notion of 'professional misconduct'" (para 21).

52. The Divisional Court concluded that there was "no free-standing requirement that the Solicitors Disciplinary Tribunal must first decide whether the conduct amounts to 'professional misconduct' before going on to consider the application of any of the principles set out in the Handbook" (para 22); and consequently the Tribunal had not erred in not asking a free-standing question to that effect (para 24).

53. There is at least some difference in emphasis between *Howd* and *Khan* (on the one hand) and para 21 of *Beckwith* (on the other), in terms of whether conduct that would otherwise breach a BSB Handbook core duty is also required to amount to "professional misconduct". It is not clear whether *Walker* or *Khan* was cited in *Beckwith*. The judgment in *Beckwith* was primarily concerned with the SRA Handbook and with addressing the particular submission made in that case, namely that there was a *prior free-standing threshold* to be satisfied. In *Howd*, as I have explained, the conduct did not amount to a breach of CD3 or CD5 in any event. I asked Mr Ruffell to clarify the BSB's position. He said it was that there was no free-standing requirement for the Disciplinary Tribunal to make a finding in each and every case that the conduct in question was "professional misconduct" and that in the majority of cases it would be clear from the conduct itself, if found proven, that it was of sufficient seriousness. However, if the issue was raised in the particular case or it was apparent that there was some question mark over the severity of the behaviour in question, then the Tribunal

must be satisfied that it was sufficiently serious to amount to professional misconduct, even though there was no explicit regulatory requirement in the BSB Handbook to that effect. In his skeleton argument, Mr Ruffell submitted that "professional misconduct" in the context of the BSB meant "a serious departure from the standards of behaviour and conduct expected of a barrister".

54. For present purposes I will proceed on the basis identified by Mr Ruffell, namely that if the issue is raised on the evidence in a particular case then the Tribunal must be satisfied that the behaviour is sufficiently reprehensible or morally culpable to constitute professional misconduct in the sense he has identified. As this was and is the BSB's position, it would be unfair to the Appellant if I were to conclude that anything less was required. I also note that the charges themselves were expressed to be instances of "professional misconduct" (paras 9 - 10 above). This may be a topic that would benefit from a greater degree of clarity in a subsequent edition of the BSB Handbook.

Article 8 ECHR and private life

55. Article 8 ECHR provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

56. In *Diggins v Bar Standards Board* [2020] EWHC 467 (Admin) ("*Diggins*") Mr Diggins appealed unsuccessfully against a finding that one of his Tweets had breached CD5. During the course of his analysis, Warby J identified in para 74 the applicable framework where Articles 8 and/or 10 ECHR were engaged:

> "(1) The BSB and the Panel are both public authorities for the purposes of the Human Rights Act 1998 (HRA). They are therefore subject to the duty imposed on all public authorities by s 6(1) of the HRA, not to act incompatibly with the Convention Rights. (This Court is under the same duty, of course).
>
> (2) The appellant's Tweet is speech protected by Article 10(1)…
>
> (3) The imposition of a sanction also represents an interference with the appellant's Convention rights under Article 8(1)…Mr Diggins is right to say that his conduct in posting [the Tweet] was an aspect of his private life, respect for which is guaranteed by Article 8(1). The interference requires justification pursuant to Article 8(2).

> (4) An interference can only be justified if it is prescribed by law, and pursues a legitimate aim, and it is convincingly established that the measure in question is necessary and proportionate in pursuit of that aim. The legitimate aims specified in Articles 8(2) and 10(2) are to be construed strictly. 'Necessary' does not mean indispensable, but nor is it to be treated as synonymous with 'useful', 'reasonable' or 'desirable'. And the test of necessity requires the party charged with the interference to persuade the court that the measure at issue corresponds, and is proportionate, to a 'pressing social need'."

57. In setting out this framework Warby J referred to his earlier judgment in *Khan*, including the passage at para 63 where he said:

> "In my judgment a, if not, the, central function of the BSB's regulatory regime is 'the protection of the reputation and rights of others'. Core duty 5…is expressly aimed at maintaining public confidence in barristers and the profession generally. That is a reputational matter. Other barristers have a proper and legitimate interest in ensuring that their reputations are not tarnished by association with those who misconduct themselves professionally…"

58. In light of the existence of this legitimate aim, he observed that the essential issue where a barrister faced disciplinary proceedings over speech would usually be those of necessity and proportionality (para 75). In *Khan* Warby J concluded that there was a compelling justification for the disciplinary process against Mr Khan (arising from things he had said to others in a court robing room) as it served "an important purpose by making clear to Mr Khan and to others in the profession and the public at large that disclosures of the kind in question were not an acceptable way to make use of sensitive personal information" (para 65).

59. Earlier in his judgment, Warby J had rejected the proposition that there was a 'bright line' to be drawn between "that which falls purely within the private realm and that which is sufficiently public to engage the disciplinary jurisdiction of the BSB…In my view this is a false point" (para 72). He went on to give the example of a barrister who committed a number of rapes on occasions wholly unrelated to his professional practice and then concluded:

> "72. …Ultimately, the question for the Panel in a case under CD5 is whether the conduct admitted or proved is likely to undermine the trust and confidence in an individual barrister (as a barrister) or the profession. That is a question for assessment on the basis of the facts of the individual case. The range of factual scenarios that could properly raise such a question has no theoretical limits. Some public conduct may be too trivial to satisfy the requirement. Some private conduct may clearly cross the line…"

60. In *Beckwith* (para 50 above) the Divisional Court considered the extent to which Principle 2 and Principle 6 applied to aspects of a solicitor's private life and the impact

of Article 8 ECHR. The Court accepted that the duty to act with integrity extended beyond a requirement to act honestly (paras 28). Having cited paras 95 – 103 of Rupert Jackson LJ's well-known judgment in *Solicitors Regulation Authority v Wingate* [2018] 1 WLR 3969 ("*Wingate*") on the meaning of integrity, the Court identified three points of principle: (i) that there is an association between the notion of having integrity and adherence to the ethical standards of the profession; (ii) that on matters touching on their professional standing, there is an expectation that professionals may be held to a higher standard than those that would apply to those outside the profession; and (iii) a regulatory obligation to act with integrity does not "require persons to be paragons of virtue" (para 30). The Court emphasised that the requirement to act with integrity "must comprise identifiable standards. There is no free-standing legal notion of integrity in the manner of the received standard of dishonesty; no off-the-shelf standard that can be readily known by the profession and predictably applied by the Tribunal" and that in these circumstances the obligation to act with integrity must be drawn from and informed by the contents of the SRA Handbook (para 33). As regards dishonesty, the Court said that *Wingate* established that the Handbook imported the well-known legal definition of what is dishonest (para 33). When the complaint concerns behaviour which is not dishonest, the Tribunal's task was to identify by reference to the contents of the Handbook, the ethical standards relevant to the alleged misconduct (para 35). Applying that approach, the Court found that Mr Beckwith's conduct was not capable of being characterised as showing a lack of integrity (para 36).

61. The Divisional Court held that a similar approach applied when determining the scope of Principle 6; so that the line between personal opprobrium, on the one hand, and harm to the standing of the person as a provider of legal services or harm to the profession, on the other hand, would depend on a proper understanding of the standards contained in the Handbook (para 43). The line had not been crossed on the particular facts (para 45).

62. The Divisional Court then turned to Article 8, observing that the requirement for legal certainty was important "but it is to be applied pragmatically. There is and could be no requirement that a set of rules of general application be formulated with absolute precision" (para 48). The Court expressed its conclusions as follows:

> "53. For the reasons we have already set out, neither Principle 2 nor Principle 6 has unfettered application across all aspects of a solicitor's private life. So far as concerns the requirement of legal certainty, because the requirements of each Principle are to be determined by reference to the contents of the Handbook…there is no reasonable scope for argument that either Principle 2 or Principle 6 fails to meet the standard required for legal certainty…
>
> 54. There can be no hard and fast rule either that regulation under the Handbook may never be directed to the regulated person's private life, or that any/every aspect of her private life is liable to scrutiny. But Principle 2 or Principle 6 may reach into private life only when conduct that is part of a person's private life realistically touches on her practise of the profession (Principle 2) or the standing of the profession (Principle 6). Any such conduct must be qualitatively relevant. It must, in a way

> that is demonstrably relevant, engage one or other of the standards of behaviour which are set out in or necessarily implicit from the Handbook. In this way, the required fair balance is properly struck between the right to respect to private life and the public interest in the regulation of the solicitor's profession. Regulators will do well to recognise that it is all too easy to be dogmatic without knowing it; popular outcry is not proof that a particular set of events give rise to any matter falling within a regulator's remit."

Sanction

63. In relation to an appeal against sanction, it is well-established that whilst considerable respect should be paid to the sentencing decision of the Disciplinary Tribunal, the Court would interfere when satisfied that the sanction imposed was "clearly inappropriate": *Salsbury v Law Society* [2008] EWCA Civ 1285; [2009] 1 WLR 1286 per Jackson LJ at para 30.

64. The parties were not agreed as to whether version 4 or version 5 of the BTAS Sanctions Guidance was applicable in this case. However, it is unnecessary for me to resolve this, as counsel confirmed that there was no material difference between the two versions for present purposes. I will refer to the contents of version 5, which is dated 15 October 2019, as this was the version referred to in the Panel's decision. The Sanctions Guidance uses "professional misconduct" as a global term to indicate instances where a Disciplinary Tribunal has found a breach of the BSB Handbook.

65. The Introduction states that the Guidance is intended to promote "proportionality, consistency and transparency", but is not intended to interfere with decision makers' powers to impose whatever sanctions are appropriate in the circumstances of individual cases (para 1.3). The purposes of applying sanctions are identified as: (a) protecting the public and consumers of legal services; (b) maintaining high standards of behaviour and performance at the Bar; and (c) promoting public and professional confidence in the complaints and disciplinary process (para 3.1). As regards deterrence the text says:

> "3.3 In some cases, the sanction imposed may be necessary to act as a deterrent to other members of the profession. Therefore, when considering a sanction, it may be necessary not only to deter the individual barrister…from repeating the behaviour, but also to send a signal to the profession and the public that the particular behaviour will not be tolerated. A deterrent sanction would be most applicable where there is evidence that the behaviour in question seems to be prevalent in relation to numbers of barristers within the profession."

66. The Guidance states that the decision maker should ensure that a sanction is proportionate, weighing the interests of the public with those of the practitioner or authorised body (para 3.4). The potential sanctions are listed in para 5.4. The most serious is disbarment, which may only be imposed by a five-person Tribunal. Disbarment "should be reserved for cases where the need to protect the public or the need to maintain the confidence of the profession is such that the barrister should be removed from the profession" (para 6.3). The paragraph lists examples of where

disbarment may be appropriate, including where: "the barrister has engaged in a serious and/or persistent departure…from professional standards"; where "serious harm has been caused to…the reputation of the Bar or any person including the individual complainant and there is a continuing risk to the public or the reputation of the profession" if the barrister continues in practice; where the barrister has been convicted of a serious criminal offence involving (amongst others) a sexual offence; and/or where the barrister has acted dishonestly.

67. In relation to dishonesty the Guidance says:

> "6.2 Any dishonesty on the part of a member of the Bar, in whatever circumstances it may occur, is a matter of great seriousness. It damages the reputation of the profession as a whole, quite apart from its effect on the reputation of the individual barrister. Dishonesty is incompatible with the duties placed on barristers to safeguard the interests of their clients and their overriding duty to the court. Public interest requires, and the general public expects, that members of the Bar are completely honest and are of the highest integrity. Therefore, in cases where it has been proved that a barrister has been dishonest, even where no criminal offence has been committed, disbarment will almost always have to be considered…"

68. The Guidance states that suspension from practice is a serious matter, to be reserved for "cases where the barrister represents a risk to the public which requires that he/she be unable to practise for period of time and/or the behaviour is so serious as to undermine public confidence in the profession and therefore a signal needs to be sent to the barrister, the profession and the public that the behaviour in question is unacceptable" (para 6.5). Relevant factors to consider include: the seriousness of the breach, abuse of position, a lack of insight and/or a lack of integrity that is not so serious as to warrant disbarment (para 6.6). The Guidance says that if a suspension of more than three years is considered appropriate, serious consideration should be given to disbarment (para 6.7).

69. The Guidance indicates that a separate sanction should be imposed for each charge, in case a finding on one charge is overturned on appeal (para 7.6).

70. Part II of the document provides guidance in the form of starting points in respect of the most common breaches of the Handbook. It makes clear that it is not intended to represent a tariff and that Tribunals must decide each case on its own facts (para 4). In assessing the appropriate sanction any aggravating or mitigating factors may cause the sanction to be increased or decreased. Non-exhaustive examples of such factors are listed in Annex 1. In addition, the individual tables relating to particular breaches provide examples of aggravating and mitigating factors likely to arise in relation to those breaches (para 6). A table indicates that a short suspension is one of up to three months; a medium suspension is over three months and up to six months; and a long suspension is over six months and up to three years.

71. Misconduct of a sexual nature is addressed at B7, which says:

> "Misconduct of a sexual nature is likely to be a breach of Core duty 3 and/or Core Duty 5…
>
> The guidance below is also applicable to charges relating to a range of circumstances ranging from inappropriate sexual conduct in a professional context (e.g. between a supervisor and their pupil) through to convictions for sexual offences.
>
> …..
>
> The starting point for minor offences of inappropriate sexual conduct in a professional context should normally be a reprimand and a medium level fine. Where a conviction results in a custodial sentence, the general starting point should be disbarment unless there are clear mitigating factors that indicate such a sanction is not warranted. Listed below are common circumstances in which breaches might occur set out according to severity."

72. Three categories of possible circumstances, with applicable starting points, are then set out as follows:

a.	Inappropriate sexual conduct in a professional context	Reprimand and medium level fine to a short suspension
b.	A conviction for a sexual offence	A medium level suspension
c.	A conviction for a serious sexual offence	Disbarment (or in exceptional circumstances, a long suspension)

73. Potential aggravating factors are listed as: previous criminal convictions; lack of cooperation with police; involvement of a young or vulnerable victim; premeditation; lack of remorse; and effect on the victim. Potential mitigating factors are listed as: isolated incident in difficult and unusual circumstances; and cooperation with the investigation.

74. Dishonesty is addressed at B5. The text says that dishonesty is not compatible with practice in a profession which requires exceptional levels of integrity; and that the general starting point should be disbarment unless there are clear mitigating circumstances indicating that such a sanction is not warranted. The mitigating factors that are then identified are: clear evidence that the behaviour was out of character and the consequences were not intended; and behaviour "limited to personal life and no evidence of dishonesty in professional life".

The Amended Grounds

75. The Amended Grounds comprise 20 paragraphs of criticisms that are not grouped into numbered grounds of appeal. In summary, the points raised are:

i) The Panel erred in law and/or there was a material irregularity in that it failed to consider the discrete issue of seriousness in the context of the clinical evidence as to the cause of the conduct underpinning Charge 1. The Appellant's drunken misbehaviour was a reaction to his medical condition and the facts failed to reach a threshold whereby the Panel could properly find that there was "professional misconduct". The Panel erred in law in failing to accept that the position in *Howd* applied by analogy, as the Appellant's conduct and excessive consumption of alcohol were a response to his medical conditions and a trigger event for which he was not responsible. The Panel erred in disregarding or giving too little weight to the medical evidence which was not challenged by the BSB;

ii) The Panel erred in law in treating the text messages that were the subject of Charges 2 and 3 as properly capable of being the subject of disciplinary investigation, as the correspondence was private and personal and so engaged the Appellant's rights under Article 8(1) ECHR. There was no member of the public who had a legitimate interest in the correspondence. On the Panel's findings the messages were to enable the Appellant to tell a "white lie" to his partner and they were at worst a matter of personal morality rather than professional ethics. The Panel erred in failing to tie the broad and abstract concepts in CD5 and/or rC8 to particular rules or guidance in the Handbook, as required by *Beckwith* and in violation of the principle of legal certainty;

iii) Further or alternatively, as under Charge 1, the Panel erred in not determining that Charges 2 and 3 failed to reach the threshold of seriousness required for a finding of "professional misconduct". The Panel erred in disregarding the medical evidence to the effect that the Appellant was "incapable of clear and rational thought" as a consequence of his medical conditions. Although this argument appeared in paras 12 – 13 of the Amended Grounds, in his oral submissions Mr Beaumont clarified that he did not argue that the conduct did not amount to professional misconduct (if his Article 8 ground was rejected) and he said that the Panel's rejection of the medical evidence was "not at the forefront" of his submissions;

iv) The Panel's judgment was tainted by apparent bias in the form of pre-determination, as paras 29 – 30 of the written reasons considered sanctions before deciding whether the charges were proved. This approach was also irrational and indicative of a material irregularity;

v) The sanction of disbarment was manifestly excessive and clearly inappropriate. The events were caused or substantially contributed to by the Appellant's medical conditions; there was no empirical basis for the Panel imposing a deterrent sentence; the text messages concerned "a white lie"; and "the recuring theme of similar recent cases is that the appropriate penalty is suspension" and the Panel had erred in failing to have regard to them. The sentence imposed on Charge 1 should be set aside and replaced with a medium length suspension;

> and the sentences on Charges 2 and 3 replaced with a reprimand and/or fine. The meaning of a "serious sexual offence" in the Sanctions Guidance was unclear and the doubt should be resolved in favour of the Appellant. In any event, there was exceptionally powerful mitigation in this case.

76. The Amended Grounds also included reference to remarks made by Mr Ruffell in his opening to an alleged incident at Grand Night in March 2019. He said that the Appellant had behaved in a way that made A uncomfortable, but he was "not trying to make something of that. All I am trying to say is that the complainant felt that she would like a third person present" when she went with him to the night club. At the appeal hearing Mr Beaumont accepted that the Panel's reasons made no reference to the Grand Night incident and that he was not in a position to show that it had been taken into account. In these circumstances and given the very limited terms in which Mr Ruffell referred to this matter, in my judgment it is clear that it does not give rise to any viable ground of appeal.

77. The Amended Grounds also alleged that there was a material irregularity / error of law in that the dissenting member of the Panel was not required to provide reasons for the dissent; and a breach of Article 6 ECHR in the failure to identify the dissenting member. During his oral submissions, Mr Beaumont accepted that these matters did not give rise to a free-standing ground of appeal, but he invited the Court to provide guidance on these matters. I address this topic after I have considered the grounds of appeal.

Conclusions

Alleged appearance of bias

78. The test to be applied 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": *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, per Lord Hope at para 102.

79. Mr Beaumont submits that the Panel showed pre-determination in considering the question of sanction before finding that the charges were proved. The submission rests on a passage in the Panel's written reasons which appears between a reference to the interim suspension order imposed in April 2021 (para 27) and an indication the Panel accepts that the Appellant has no memory of his behaviour at the nightclub (para 31). These paragraphs are within a section of the document which, broadly, sets out a narrative of the events, including some factual findings, albeit matters are not always addressed chronologically. The next section of the document headed "Findings" addresses the majority findings that the charges were proved between paras 33 – 38 and then in paras 39 – 42 summarises evidence relating to sanction. The Panel's conclusions on sanction are then set out in the next section between paras 43 – 45 under the heading "Sanction and Reasons". The passage that Mr Beaumont relies upon does appear out of sequence. It says:

> "29. Guidance in the BSB Handbook Sanctions Guidance Version 5 states that on a conviction for serious sexual offence where there is a custodial sentence the starting point is disbarment unless there are clear mitigating factors which indicate that such a sanction is not warranted. Otherwise, where

> there is a conviction for a sexual offence the starting point is a medium level suspension that being 3 to 6 months. For inappropriate sexual conduct in a professional context the starting point is a medium level fine to a short suspension. There are none of the listed aggravating factors in this case and there is the mitigating factor of cooperation with the investigation.
>
> 30. The Sanctions Guidance states at Part 1 Section 3 under Purpose and principles of sanctions that: 3.1 The purpose of applying sanctions for professional misconduct are: a. To protect the public and consumers of legal services; b. To maintain high standards of behaviour and performance at the Bar: c. To promote public and professional confidence in the complaints and disciplinary process."

80. With all due respect to those involved, the written reasons are not well-structured and give the impression of having been completed in some haste, no doubt for the laudable reason of providing the completed document swiftly. In all likelihood these passages appear out of place because they were largely cut and pasted from an earlier decision. Aside from the last sentence of para 29, they comprise generic references to aspects of the Sanctions Guidance. When the document was finalised it appears that the misplacement of these paragraphs slipped through the proofreading net. It hardly needs be said that this is liable to give a poor impression, but it is not indicative of bias.

81. The fair-minded and informed observer would have been aware of the course of the hearing. As I have described earlier, the Chairman announced the decision that the charges were found proven (by a majority of 4 – 1), before submissions were heard on sanctions and before the Panel separately adjourned to consider that issue. The written reasons are dated the next day. Accordingly, the misplaced paragraphs do not indicate that the Panel considered sanction before deciding that the charges were proved. For the same reason there is no merit in the suggestion that there was irrationality in the Panel's decision-making.

82. In his submissions Mr Beaumont relied on an additional matter that was not referenced in the Amended Grounds. He advanced it as a supporting point, rather than a free-standing ground. He submitted that the Panel taking the unusual course of permitting the Appellant to be recalled and further questioned by Mr Ruffell during the sanction stage of the proceedings, indicated a pre-disposition in favour of the BSB. I do not agree. Mr Beaumont accepted that nothing emerged during this questioning that was detrimental to the Appellant; and the reason for permitting this was to give the Appellant an opportunity to answer points raised by Mr Ruffell that were not put to him earlier (para 35 above). As such, it was as likely to benefit Mr Farquharson as it was the BSB.

Charge 1: finding that the charge was proved

Setting aside the Appellant's admission

83. As I indicated earlier, Mr Beaumont accepted during his oral submissions that he would have to show that the Appellant's admission to Charge 1 should be set aside, before the

Court could consider the substantive ground of appeal that he wished to pursue. Accordingly, I will address this question first.

84. Mr Beaumont relied upon the approach applied in *Khan* at paras 16 - 24, namely that the situation was governed by principles analogous to those concerning when a guilty plea may be withdrawn in criminal proceedings. Mr Ruffell did not disagree with this and I will follow it. If a criminal court proceeds to sentence on a plea that is ambiguous or equivocal, then the conviction should be set aside: *R v Ingleson* [1915] 1 KB 512. However, where a defendant has entered an unambiguous and deliberately intended plea of guilty, he cannot generally appeal against the conviction. Lord Hughes explained in *R v Asiedu* [2015] EWCA Crim 714 that this was:

> "for the simple reason that there is nothing unsafe about a conviction based on the defendant's own voluntary confession in open court. A defendant will not normally be permitted in this court to say that he has changed his mind and now wishes to deny what he has previously thus admitted in the Crown Court."

85. Lord Hughes went on identify two circumstances where a plea of guilty was not a bar to quashing the conviction. Firstly, where the guilty plea was compelled by a matter of law in consequence of an adverse ruling by the trial judge which left no arguable defence to be advanced. Secondly, where even if on the admitted or assumed facts the defendant was guilty, there was a legal obstacle to him or her being tried for the offence, for example where there were grounds to stay the proceedings. In *M Najib & Sons Ltd v Crown Prosecution Service* [2018] EWCA Crim 909 at para 19, Leggatt LJ identified a situation analogous to the first of those circumstances:

> "This is not a case in which an appellant is now, by challenging the conviction, by implication seeking to deny facts which have previously been admitted. The appellant is seeking only to argue that, on the facts which it has admitted (once and for all), it is not as a matter of law guilty of the offence. If that argument is correct, the conviction is unsafe. The short point is that a conviction is unsafe if the facts admitted by the defendant do not in law amount to a criminal offence."

86. Mr Beaumont advanced two arguments. He submitted that the Appellant's plea was equivocal; or, alternatively, if his plea was unambiguous, then the facts that were admitted did not in law amount to Charge 1 because they did not constitute professional misconduct. I will consider these in turn.

87. I do not accept the proposition that Mr Farquharson's plea was equivocal. I have summarised the course of the proceedings before the Panel at paras 29 – 34 above. Firstly, the Appellant admitted Charge 1 without qualification when it was put to him at the start of the hearing. In contrast to his response to Charges 2 and 3, he made no reference to his medical evidence (para 29 above). Secondly, when the Chairman then announced that Charge 1 was found proved on the basis of the admission, Mr Farquharson did not demur. Thirdly, this was entirely consistent with the indication that the Appellant had given in his written response to the charges in advance of the hearing, wherein he had indicated that Charge 1 was admitted, whereas Charges 2 and 3 were disputed on the basis of the medical evidence (paras 27 - 28 above). Moreover, this

unambiguous indication was given by the Appellant in circumstances where he was plainly aware of both the medical evidence and the *Howd* decision, which he had referred to in his earlier correspondence with the BSB (para 26 above). Fourthly, the focus of the Appellant's submissions and evidence to the Panel was consistent with this position, even after Mr Williams' interventions. In answer to questions from Mr Williams he said in terms that "the mental health element is purely mitigation" (para 32 above). Following further exchanges, the Appellant indicated that he relied on the medical evidence in disputing the District Judge's characterisation of his behaviour as "predatory" (para 32 above), a point that plainly went to mitigation. Fifthly, the approach taken by the Appellant was consistent with his earlier guilty plea to the criminal charge of sexual assault (at a time when he was legally represented).

88. The circumstances in which the Panel arrived at a majority (4 – 1) decision in relation to Charge 1, are somewhat unclear. As I have indicated, after the pleas were taken, the Chairman announced that Charge 1 had been found proved on Mr Farquharson's admission. This appeared to be a unanimous position. However, after the Panel had retired, ostensibly to consider whether Charges 2 and 3 were proved, the Chairman announced that all three charges were found proved by a majority of 4 – 1. It appears that during the Panel's retirement one of the Panel members expressed the view that the medical evidence indicated that the circumstances were analogous to *Howd*. However, when the topic had been raised with the Appellant during the hearing, he had not accepted the invitation (in so far as it was an invitation) to change his plea on Charge 1 or to advance the medical evidence *as a defence*. Accordingly, I do not accept Mr Beaumont's submission that the dissenting view is itself an indication that the plea was equivocal.

89. The Appellant was plainly alive to the *Howd* decision. He made an assessment and decided to admit Charge 1 and (understandably) expected to receive credit for this. He hoped that given the mitigation he could advance he would be suspended, rather than disbarred. It is not in the interests of the public, the regulator or finality to afford a disciplined barrister an opportunity to change tack on appeal and contest a previously admitted charge, save where the plea was genuinely equivocal or the circumstances are within one of the other recognised situations where a guilty plea does not preclude an appeal against conviction. As Warby J observed in *Diggins* at para 84 "it seems to me that the appellant is seeking unjustifiably to have two bites at the cherry, pursuing on appeal a case which is wholly different from the case advanced below".

90. I do not consider that the second way in which Mr Beaumont advances this submission improves his position. The charge explicitly included reference to "professional misconduct" and Mr Farquharson's unequivocal admission of the charge extended to this aspect and thus to the entirety of the disciplinary offence.

91. In the circumstances, the Appellant's admission of Charge 1 precludes this aspect of his appeal, which therefore fails.

<u>The substantive contention</u>

92. However, I will proceed to consider the substantive appeal contention in case I am thought to be wrong in this conclusion. I have summarised the ground of appeal at para 75i) above. Mr Beaumont contends that in light of the medical evidence his conduct was not of sufficient severity to constitute professional misconduct. As I have indicated

earlier, I will proceed on the basis that there is a threshold of serious misconduct that must be satisfied, but that a Disciplinary Tribunal is not required to address this as a discrete issue where the seriousness is evident from the factual findings made (para 54 above).

93. I do not consider that there is anything in the complaint that the Panel failed to consider the medical evidence, in so far as that is advanced as a free-standing issue. Given the 4 – 1 split within the Panel, it is evident that the medical evidence was considered and discussed and this is reflected in paras 32 – 33 of the Panel's written reasons. Furthermore, the Panel accepted that the Appellant suffered from the conditions identified.

94. Turning to the medical evidence itself, Mr Beaumont accepted, consistent with this Court's appellate role, that it was not sufficient for him to persuade me that another Tribunal on another day might have taken a different view of this, rather he needed to show that the circumstances *were not capable of amounting to professional misconduct* to succeed on this part of the appeal.

95. Mr Beaumont submitted that the medical evidence (which I have described in the Confidential Annex) showed that the impact of Mr Farquharson's medical conditions, exacerbated by recent events and his consumption of alcohol (itself a self-administered palliative consequent upon those matters) caused him to be in a dissociative state at the time of the sexual assault and, as such, his conduct was not sufficiently reprehensible or culpable to be professional misconduct.

96. When considering whether the Appellant's behaviour was sufficiently serious to amount to professional misconduct, it is important to keep in mind the following:

    i) He pleaded guilty to a criminal offence, the mens rea of which entails intentional touching and an absence of reasonable belief that the complainant was consenting;

    ii) The District Judge, who was aware of the medical evidence, found that the custody threshold was met in relation to the offence;

    iii) Mr Howd was not prosecuted or convicted of a criminal offence. Mrs Justice Lang found that the medical evidence indicated his conduct "lacked *any* reprehensible or morally culpable quality" (my emphasis) and that "it was caused by factors beyond his control" (para 49 above). By contrast, it is a somewhat surprising proposition that conduct amounting to a criminal sexual assault punishable by imprisonment is not sufficiently serious to amount to professional misconduct;

    iv) The link between the Appellant's medical conditions and his conduct in committing the sexual assault is said to be via the consumption of alcohol, however, as Mr Ruffell points out, Mr Farquharson was already aware that he had a propensity to drink alcohol to excess. He accepted that he had experienced black outs and memory loss as a result of excessive consumption in the past (para 33 above). On 23 September 2019, a few days before the incident, he had messaged Z in relation to plans for the evening, saying: "Don't mean to be a party pooper but when I'm out it never ends well…That said, I don't intend to

head off very early, and might still stay until 11 – 12 and get a taxi". In one of his texts to A on 29 September 2019 the Appellant said: "I really can't remember much at all, which happens when I drink too much whisky…". Mr Stubbs' report said the Appellant indicated he used to drink whisky at home on Friday evenings and had concerns about the amount he sometimes consumed. The Panel who had the benefit of hearing his evidence, concluded that the Appellant had insight into how alcohol might affect him at the time (para 44 of the written reasons).

97. Furthermore, I do not accept that the Panel's conclusion at para 33 that the Appellant's behaviour "was the direct result of his excessive consumption of alcohol and over-familiarity with a much younger barrister" was "wrong" in the sense I identified earlier, whether this assessment is categorised as a finding of fact, or as one involving an evaluative judgment (paras 45 – 46 above). The Panel understood Lang J's reasoning in *Howd*, as is shown by the summary at para 32 of the written reasons. Furthermore, in this paragraph the Panel quoted directly from para 55 of *Howd* and thus appreciated that they were addressing whether the medical evidence was such that the behaviour did not amount to professional misconduct. Accordingly, there was no misdirection of law.

98. I do not consider that the position comes close to one where I could conclude that no reasonable Panel could have reached the same decision or that there was no evidential basis for this conclusion. The Appellant agreed that he had drunk a great deal of alcohol that evening; and Mr Beaumont rightly accepts that the Panel was not obliged to adopt the medical experts' assessment. Plainly the *weight* to be attached to the medical evidence was a matter for the Panel.

99. Whilst Mr Beaumont emphasises that the BSB did not adduce their own expert evidence or require the Appellant's experts to attend for cross-examination, I accept, as Mr Ruffell says, that this has to be seen in a context where the Appellant had indicated prior to the hearing that he admitted Charge 1. Similarly, Mr Ruffell did not address the Panel on the medical evidence concerning events at the night club, as he understood that the Appellant had admitted the charge and the Panel had found it proved upon that admission.

100. It appears to me that there were a significant number of factors capable of impacting on the weight to be given to the opinions expressed in the medical evidence, in particular:

i) These were the assessments of treating practitioners and although of potential value, they cannot be equated to an independent expert's assessment of the kind contemplated by CPR 35. Mr Stubbs considered that prosecution of the Appellant would "compound the injustice" he had experienced; and Dr Tew described her role in her second report as being "to advocate on his behalf";

ii) Professor Turnbull and Dr Tew made no reference to the witness statements obtained by police for the criminal proceedings or to the internal investigation by the Appellant's chambers. Phrases used in the reports suggest that their opinions were based on Mr Farquharson's summary of events. Mr Stubbs had read at least some of these materials by the time of his short addendum report. It follows that, in the main, the authors of the report did not have a full account of the Appellant's actions during the relevant period or how he was perceived by those present. On the face of it, this would be relevant to a consideration of

whether he was in a dissociative state at the time. Mr Beaumont suggested that this did not matter as the Appellant did not dispute A's account of events. However, as he did not recall the events himself, he could not provide them with a detailed account and the statements made by A, Sam, the night club staff and police were the only means of obtaining a clear and detailed picture of what had occurred;

iii) None of the reports include an account of what the authors understood had occurred during the 27 – 28 September 2019 events, so the factual basis upon which they were asked to give their opinions is unclear;

iv) The reports did not consider alternative hypothesises in any detail. Professor Turnbull and Mr Stubbs both said that they did not think that the Appellant was simply drunk. They relied heavily upon his inability to recognise his driving licence or phone or to give his home address outside the night club as evidence he was in a dissociative state, but, on the face of it, as this could also be consistent with extreme drunkenness, it called for closer examination, with reference to the witness evidence. In addition to PC Hewitt's account, which I have already summarised, Sam, who spent a significant amount of time with the Appellant in the club described him as "very drunk"; and

v) The degree of confidence expressed by the report writers. Mr Stubbs only "suspected" that the Appellant was in dissociative state at the time.

101. I reject Mr Beaumont's submission that the points made in the previous paragraph could not be advanced in the absence of a Respondent's Notice. Firstly, no application for permission to rely on the Amended Grounds was made in advance of the hearing. Secondly, in order to consider the submission that it was *not open* to the Panel to reject aspects of the medical evidence, it is necessary to consider all the available evidence and the weight that was capable of attaching to it. Thirdly, there was no prejudice to the Appellant; Mr Beaumont was able to address these matters in his oral submissions.

102. Accordingly, I reject the proposition that the Panel erred in law or arrived at a wrong conclusion or one flawed by procedural irregularity in the majority finding expressed at para 33 of the written reasons. The appeal in relation to Charge 1 fails.

Charges 2 and 3: finding that the charges were proved

103. I will firstly address the point raised in respect of the medical evidence. As I have already mentioned (para 75 iii)) whilst he did not withdraw this ground of appeal, Mr Beaumont did not advance it at the hearing.

104. It is plainly incorrect to suggest that the Panel disregarded the medical evidence in relation to the sending of the text messages. At paras 18 - 19 of the written reasons, the Panel explained why it rejected the opinion that the Appellant was incapable of rational thought when he sent the texts (para 39 above). This was a view expressed by Dr Tew. Mr Stubbs' opinion did not appear to go that far. Professor Turnbull did not express a view on this issue.

105. In my judgment, the Panel's reasoning and conclusion on this point was clearly open to it. I have already identified a number of general points relating to the weight of the

medical evidence when considering Charge 1. There is no indication that A's account of this part of the events was made available to the report writers. The Appellant recalled sending the text messages and accepted that he was not drunk at the time (para 33 above). He also accepted that he knew his partner was furious with him. The text to A was sent at 1.46 hours on 29 September 2019 and the text to Z was sent in the evening, so there were opportunities for reflection between the two. In my judgment the Panel was entitled to conclude that the Appellant's actions indicated a degree of forethought and calculation. Dr Tew's reports did not address or explain the points I have just highlighted. I also bear in mind that the Panel had the advantage of hearing the Appellant's evidence on this issue.

106. Accordingly, the Panel was entitled to find that the Appellant knew what he was doing in sending the two text messages.

107. In turn, a majority of the Panel found that his actions indicated "a lack of integrity and an element of dishonesty" (para 36 of the written reasons). Whilst no free-standing complaint was raised about the finding of dishonesty in the Amended Grounds, at the hearing Mr Beaumont submitted that a finding of dishonesty could only be made if the barrister had been given advance notice of the allegation of dishonesty, which he said had not occurred in this instance. He relied upon *Singleton v The Law Society* [2005] EWHC 2915 (Admin). In that case Mr Singleton had faced charges of "conduct unbefitting a solicitor" which could be committed with or without an element of dishonesty (para 11). The Divisional Court accepted that dishonesty was a very serious matter and that the failure to expressly allege or particularise it in advance of the hearing was a procedural flaw (para 13). The Court said that in bringing disciplinary charges against a solicitor the Law Society was "under an obligation to give timely notice of an allegation of dishonesty with relevant particulars when appropriate unless it is obvious from the nature of the charge" (para 13). I do not consider that a meaningful parallel can be drawn with the present case. Charge 2 alleged in terms that the Appellant had asked A to give an account that was not truthful and Charge 3 alleged that he had asked Z to lie about the events. Accordingly, unlike in *Singleton*, there was no doubt that dishonest conduct was alleged. Mr Ruffell opened the case on the basis that there was an element of dishonesty (para 30 above) and when he was questioned the Appellant accepted that he asked A to give a false impression (para 33 above).

108. In the circumstances, the Panel was entitled to arrive at its finding that there was an element of dishonesty in the Appellant's conduct. It also follows, as Mr Beaumont accepted at the hearing, that subject to the Article 8 issue which I will next consider, there can be no free-standing complaint that the Appellant's conduct was not of sufficient severity to amount to professional misconduct.

109. I have summarised the heart of the appeal in relation to Charges 2 and 3 at para 75 ii) above. There is no reference to Article 8 ECHR in the written reasons. During the appeal hearing Mr Ruffell frankly and fairly accepted that Article 8(1) was engaged; that the Panel's attention was not drawn to this; that the authorities which identify the approach to be adopted were not cited; and that this should have occurred. The Panel made no finding that the interference with the Appellant's right to respect for his private life and his correspondence was in pursuit of a legitimate aim and necessary and proportionate. I make clear that criticism should not attach to Mr Ruffell personally in this regard; the transcript indicates that he was instructed to appear at very short notice in circumstances where he was abroad and did not have time to source a suit to wear.

However, the fact remains that the Appellant's earlier correspondence with the BSB had flagged the private life issue (paras 26 - 27 above) and the Panel ought to have been alerted to this, particularly as Mr Farquharson was unrepresented.

110. It therefore follows that the Panel erred in law in relation to Charges 2 and 3.

111. Counsel were not agreed on the consequence of this conclusion. Mr Beaumont submitted that the Panel's findings that Charges 2 and 3 were proved should be set aside and I should remit the matter to the Panel or leave it for the BSB to decide whether to bring further proceedings. Mr Ruffell, on the other hand, said that if the Panel had considered Article 8 they would have come to the same conclusion as they did and I should determine the issue given I was in as good a position as the Panel to evaluate the matters; I had the relevant material and the benefit of the Panel's findings of fact and there was little dispute about the material events. In the circumstances I agree with Mr Ruffell's submission; I accept that it is within the powers conferred by CPR 52.21(4) and 52.20(2) (para 44 above) for me to decide whether the interference with the Appellant's Article 8(1) rights was justified under Article 8(2).

112. I accept that the disciplinary charges were in pursuit of a legitimate aim, namely "the rights and freedoms of others". In *Khan* Warby J identified as a legitimate aim the protection of the reputation and rights of the profession and thus of other barristers (para 57 above). Whilst his reasoning rested in part on the different wording of Article 10(2) ("the protection of the reputation and rights of others") it appears he considered that a comparable legitimate aim could exist in respect of the rights of other members of the profession under Article 8 and I find that is the case. An additional or related legitimate aim is the maintenance of standards of honesty and integrity in the profession, which in turn impacts upon the rights of consumers of the profession's services. It is evident that the engagement of Article 8 cannot provide an absolute protection for a barrister's personal activities or correspondence, however dishonest or potentially damaging they might be. In *Beckwith,* the Court accepted that "the requirements to act with integrity and to act so as to maintain public trust in the provision of legal services, are requirements which will, on occasion require the SRA or the Tribunal to adjudicate on a professional person's private life" (para 50).

113. Furthermore, in this particular instance, A's private life rights were also in play in respect of Charge 2. She described how the impact upon her as the victim of a sexual assault by Mr Farquharson was compounded by his actions the next day in repeatedly contacting her, "trying to control the story" and asking her to protect him by giving an untruthful account (para 18 above).

114. In terms of the requirement for sufficient (not absolute) legal certainty, as I indicated during the hearing, I have some concerns from the submissions made to me that the BSB has yet to fully grapple with the implications of the *Beckwith* decision and the importance of obligations to act with integrity and without damaging the public's trust and confidence in the profession being drawn from, informed by and/or tethered to the contents of the BSB Handbook or to standards which are necessarily implicit from its contents (paras 60 - 62 above).

115. However, it is perfectly plain that the regulator's reach may extend into a barrister's behaviour in their private life and that there is no barrier or bright line drawn between

professional and private conduct: see *Beckwith* at para 54 (para 62 above); and *Diggins* at para 72 (para 59 above).

116. Moreover, as the Divisional Court recognised in *Beckwith*, where the conduct relied upon involves dishonesty, the applicable ethical standard is sufficiently clear (para 60 above). It follows that the "according to law" requirement of Article 8(2) is met in such circumstances (para 62 above). In turn, it is plain that dishonest conduct engages the standards of behaviour set out in the BSB Handbook in CD3 and rC8. It is also reflected in the publicly available Sanctions Guidance, which emphasises that dishonest conduct by a member of the Bar damages the reputation of the profession as a whole and is incompatible with the duties placed on barristers (paras 67 and 74 above).

117. Nonetheless, it remains to be considered whether a finding that Charges 2 and 3 were established, was necessary and proportionate in this particular case. Whilst there may be cases where a "white lie" that is not directly related to practice as a barrister will not meet these requirements, this is not such a case. Indeed, I reject Mr Beaumont's characterisation of the Appellant's behaviour as a "white lie" to his partner, in particular given:

    i) The considerable distress that this conduct caused to A, as she eloquently explained in her BSB statement (para 18 above) and as the chambers' investigation and the Panel found (paras 21 and 23 above). The Appellant was asking the victim of his prolonged sexual assault, after she had told him what had occurred, to help "dig me out of this hole" with his partner (para 19 above) by providing an untruthful account of his movements at the time of the assault and in circumstances where he seemed unconcerned about the impact upon her. This was a significantly aggravating factor to the sexual offending;

    ii) Both A and Z were barristers and colleagues, who were being asked to lie by the Appellant and thereby compromise their own integrity. It is apparent from their statements that neither of them were happy about doing so. The Appellant's conduct put them in a very difficult position. As the Panel found in para 36 of the written reasons, the Appellant was seeking to use his fellow barristers to misrepresent the facts;

    iii) The Appellant accepted when he was questioned before the Panel not only that what he had done was shameful, but that it did not reflect well upon the Bar (para 33 above); and

    iv) It follows from the Panel's findings that the Appellant knew what he was doing, and nonetheless repeated his dishonest actions some hours later, despite the intervening period affording time for reflection.

118. In the circumstances I conclude that the finding that Charges 2 and 3 were made out was necessary and proportionate given the seriousness of the conduct involved and the importance of making clear to the Appellant, to others in the profession and to the public at large that behaviour of this kind is not acceptable by a barrister. In so concluding, I do not accept Mr Ruffell's additional proposition that the Appellant was relying on the fact that A and Z were members of the Bar to give an enhanced credibility to the story he was telling his partner; there is no evidence of this and on the face of it, he asked them to lie because they were the people he was with during the relevant evening.

119. Accordingly, although I accept that the Panel fell into error in not addressing Article 8 ECHR, this part of the appeal fails because I have concluded that the interference with the Appellant's Article 8(1) rights was justified in the circumstances.

Charge 1: sanction

120. Both counsel accepted that if I concluded that the sanction imposed by the Panel was clearly inappropriate in relation to all or any of the charges, then I should re-determine the appropriate sanction myself.

121. The point of real substance raised by Mr Beaumont relates to the wording of Part II B7 of the Sanctions Guidance (paras 71 - 72 above). The table identifies a starting point of disbarment in respect of a conviction for a "serious sexual offence", save "in exceptional circumstances". The only indication that the text gives as to what may amount to a "serious" offence for these purposes is the sentence above the table: "Where a conviction results in a custodial sentence, the general starting point should be disbarment unless there are clear mitigating factors that indicate that such a sanction is not warranted." This tends to suggest that a "serious" offence is one that results in the imposition of a custodial sentence (immediate or suspended). However, if that is the correct approach, there is a contrast between the reference here to "clear mitigating factors" and the reference in the table to disbarment save where there are "exceptional circumstances". I accept Mr Beaumont's point that this is not simply semantics; the two concepts do not appear to be the same, clear mitigating factors may exist without circumstances being exceptional. Mr Ruffell accepted that there was a "lack of clarity" in this aspect of the Guidance. As Mr Beaumont submitted, where there is ambiguity in the Sanctions Guidance fairness indicates that it should be interpreted in the Appellant's favour.

122. Whilst it may be said that the Guidance is no more than that, the fact remains that the Panel applied this part of the B7 table, finding that as this was a serious sexual offence, the starting point was disbarment and as there were no exceptional circumstances, this was the appropriate sanction (para 43 above).

123. I accept that the sexual assault in this case was rightly characterised as serious, given the District Judge's evaluation that the custody threshold had been passed, the Panel's findings as to the prolonged nature of the same and the Appellant's persistence in the face of repeated requests by A that he stop. However, given that the Appellant is entitled to be treated in accordance with the more favourable interpretation of the Guidance, I consider that the Panel's approach was "clearly inappropriate" (albeit understandable in light of the ambiguity) in looking to see if there were "exceptional circumstances", rather than identifying whether there were "clear mitigating factors" sufficient to depart from a starting point of disbarment.

124. I refer in more detail to the mitigating factors that were present when I address the appropriate sanction below, but it is apparent from para 44 of the Panel's written reasons (para 43 above) that they accepted that a significant number of substantial mitigating features were present. In my judgment the mitigating features present in this case were sufficient to amount to "clear mitigating factors". Accordingly, I will set aside the penalty of disbarment imposed in relation to Charge 1 and substitute it with the sanction I arrive at after applying this part of the Guidance. Before doing so, I will address some additional points raised by Mr Beaumont.

125. I accept that the concern I have just highlighted is reinforced by the fact that the Panel's reasoning did not at any stage explain why they considered that a suspension was not an appropriate penalty; this is significant given the need for the sanction imposed to be proportionate. The absence of any such reasoning underscores that the Panel were focused upon looking for exceptionality.

126. I do not consider that any free-standing ground arises from the Panel's reference in para 43 of the written reasons to "the need for deterrence" (para 43 above). Whilst it would have been desirable for the Panel to have been clearer as to the extent to which, if at all, this impacted upon the sanction that was imposed, I do not accept Mr Beaumont's submission that the Panel was required to be satisfied by empirical evidence as to the prevalence of sexual assaults by barristers before taking deterrence into account. Paragraph 3.3. of the Sanctions Guidance does not require this (para 65 above) and I can see nothing unlawful in this aspect of the Guidance. As Mr Beaumont fairly acknowledged at the hearing, there was a degree of inconsistency between this submission and his reliance upon a number of recent decisions by BTAS Disciplinary Tribunals as to sanction in sexual misconduct cases (see below). Indeed I note that in one of these cases decided at a similar time to the instant case, the Tribunal chaired by HHJ Jonathan Carroll also referred to deterrence when explaining the sanction it considered appropriate: *Maxwell-Stewart v BSB* (September 2021) at para 44.

127. I reject Mr Beaumont's submission that there was inconsistency between the approach of the District Judge, who was prepared to suspend the prison sentence he imposed and the decision of the Panel, who did not impose a suspension. There is no meaningful equivalence to be drawn between a suspended sentence of imprisonment and a suspension from practice at the Bar. The two are different kinds of penalties that are imposed in entirely different proceedings in pursuit of different aims. The objectives identified in the Sanctions Guidance (para 65 above) are distinct from those of the criminal courts.

128. I also reject Mr Beaumont's contention that the Panel erred in law in not referring to the sanctions imposed by other BTAS Disciplinary Tribunals in recent cases of sexual misconduct or that they provide meaningful assistance in terms of the appropriate sanction to apply in this case. The Sanctions Guidance is intended to ensure a measure of consistency between Tribunals' decisions; it will not usually be necessary for Tribunals to be referred to decisions made in other cases. Those decisions will inevitably be highly fact specific and the danger is that advocates will cherry-pick parts of the decisions that appear helpful to their case. This is illustrated in this instance. Mr Beaumont submitted that the cases he referred to were examples of comparable, or in some instances, more serious misconduct than in the Appellant's case, such that the sanction of disbarment in his case was "a complete outlier". However, he omitted to mention that: in *Woolard v BSB* (January 2021) where a reprimand and mid-level fine was imposed, there was no criminal conviction and the conduct was placed within category a. of the B7 table; in *Tipper v BSB* (February 2021) the facts were also placed within category a.; in *Maxwell-Stewart v BSB* where 12 month concurrent suspensions were imposed, the conduct was placed in category b.; in *Timson-Hunt v BSB* (December 2020) the conduct was also placed in that category; and in *Ahmed v BSB* (March 2020) the conduct was dealt with under the B2 guidance for convictions for assault and violent acts, rather than under B7. In other words, none of these cases concerned a conviction for a serious sexual offence so it is hardly surprising that disbarment was not the

sanction imposed in these instances. I also reject Mr Beaumont's submission that in *Maxwell-Stewart* HHJ Jonathan Carroll laid down a tariff or bracket to be applied in other cases; the reasoning at para 42 – 45 is plainly specific to the facts of the particular case.

129. I therefore turn to the appropriate sanction in this case. I have borne in mind the passages in the Sanction Guidance which I have already set out in paras 65 – 68 above. Whilst, as I have indicated, I do not consider that the Panel erred in law in taking into account an element of deterrence, I will not do so, given it appears to me that it would make little if any difference to my decision.

130. In terms of aggravating features and having regard to the non-exhaustive list in Annex 1 of the Sanctions Guidance, I identify the following:

i) Persistent conduct (in the context of the offence in question);

ii) Effect on the complainant, which was plainly very substantial, as I have already described;

iii) The conduct in Charge 2 which significantly exacerbated A's distress, as I have explained;

iv) There was an imbalance in age and seniority between the Appellant and A and a consequential imbalance in power. I note and accept that there is no evidence that the Appellant consciously abused this, but this feature undoubtedly made the situation more difficult for A, as she described in her various statements, including agonising over whether to report his conduct to the police and to chambers in the aftermath; and

v) Undermining the profession in the eyes of the public.

None of the aggravating factors listed in Part II B7 of the Sanctions Guidance (para 73 above) apply.

131. In terms of mitigating features and having regard to the non-exhaustive list in Annex 1, I identify the following:

i) The Appellant admitted Charge 1 and did not require A to give evidence and face questioning. He also pleaded guilty in the criminal proceedings;

ii) His previous good character and entirely clean disciplinary record;

iii) His co-operation with the investigations undertaken by the police, by his chambers and by the BSB. This included self-reporting to the BSB;

iv) This was a single incident (albeit a serious one);

v) The references from those with whom he had worked. In line with paras 7.1 and 7.2 of the Sanctions Guidance, Annex 1 provides that good references are "only of limited applicability and very much dependent on the nature of the offence and the role and identity of the referee". I take into account on the plus side, the substantial number of very positive testimonials from barristers, solicitors and

other professionals who the Appellant had worked with, many of whom are women. They appear to know Mr Farquharson reasonably well and they express considerable surprise at his conduct and how out of character it was. However, this was a serious breach involving a sexual offence and arising in a context (drunken behaviour in a night club) outside of the referees' usual dealings with the Appellant. Accordingly, in the words of para 7.2, I consider that "some weight" should be given to this evidence, but that it should not "unduly affect the sanction imposed";

vi) As the Panel found, the Appellant had expressed genuine remorse, he had apologised and he was genuinely ashamed of his behaviour;

vii) He had taken very substantial steps voluntarily to address his conduct and to prevent reoccurrence. As the Panel found, he had given up alcohol after the September 2019 events and had remained teetotal ever since;

viii) Furthermore, he had undergone extensive steps to address his medical conditions. As the Panel found, he had attended all recommended sessions with Professor Turnbull, Mr Stubbs and Dr Tew, despite finding some of them gruelling both physically and emotionally. He had attended over 100 sessions in all, the vast majority at his own expense;

ix) There had already been a considerable impact upon him. He had not practised as a barrister since 2 October 2020 and had experienced the consequential loss of income. His relationship with his long-term partner and mother of his children had broken down; and

x) The delay since the incident occurred.

132. There are two points advanced by way of mitigation that I need to address in a little more detail. Firstly, the impact of the medical evidence. Mr Beaumont submitted that even if it did not excuse or explain the Appellant's behaviour to the extent that he had not committed professional misconduct, it nonetheless showed that his medical conditions combined with the particular stresses he had experienced in the preceding week and his related use of alcohol was a contributory factor to his behaviour. I have already concluded that the Panel was entitled to find that the Appellant's actions in respect of the sexual assault were the result of him consuming excess alcohol and not due to his medical conditions. Accordingly, that undisturbed finding must also form the basis for my consideration of sanction. However, the Panel's reasoning in respect of sanction does not make it clear whether the Appellant's medical conditions were regarded as a mitigating feature at all. Accordingly, I have made my own assessment to this limited degree. In light of the Panel's undisturbed findings, I do not accept that, in the words of Annex 1 of the Sanctions Guidance, there was "a reasonable explanation for his behaviour". Nonetheless, I consider that some, limited allowance should be made for the Appellant's underlying conditions identified in the medical evidence, viewed in light of the particular difficulties he experienced in the week immediately prior to the events and I have duly done so. I accept this can fairly be described as "an isolated incident in difficult and unusual circumstances" as per B7 of the Sanctions Guidance.

133. An unsatisfactory and concerning feature of the mitigation advanced on the Appellant's behalf was the suggestion in Mr Beaumont's skeleton argument that "events were not all one way" as regards A; and the indication in his oral submissions that he did not accept there was a power imbalance between the Appellant and A. The former appears to be primarily a reference to the fact that at one point during the prolonged sexual assault A said that the Appellant could touch her bottom. As the chambers' investigation found this was "an attempt to prevent escalation rather than a statement which could have led to a reasonable belief on KF's part that she was consenting to him touching her buttocks". As regards the latter, when I asked Mr Beaumont if he was disputing A's account of the distress and confusion she had gone through, for example, in deciding whether to report Mr Farquharson's conduct, he said he was "querying it". He confirmed that he was doing so on instructions. Before the Panel, Mr Farquharson did not challenge any aspect of A's account and he received the credit he was entitled to in consequence. Had he raised these matters then it is quite possible that he would not have received that full credit and indeed he would have risked this being regarded as an aggravating factor. I can see no valid basis for raising these points at this late stage and no sensible or credible reason has been advanced for querying any aspect of A's account. Whilst I will not treat this as an aggravating feature, inevitably, it does cause me to question whether the Appellant has yet developed the full insight into his behaviour that he claims. He may wish to reflect on this.

134. The Probation Service found that the Appellant did not pose a risk to the public. I accept that there is no / minimal risk of repetition in light of the extensive steps that the Appellant has taken since the incident. I have already explained why I consider that this was a serious sexual offence. I have accepted that there are clear mitigating factors, which I have identified. In all the circumstances I conclude that a long suspension is the appropriate and proportionate sanction, bearing in mind the guidance and objectives which I have already identified. This in itself is a very serious sanction, second only to disbarment. I do not consider that disbarment is necessary for the protection of the public or in order to maintain public confidence in the profession in all the circumstances.

135. Accordingly, the substituted sentence in respect of Charge 1 will be a suspension of two years.

Charges 2 and 3: sanction

136. I also conclude that the sentence of disbarment imposed in respect of Charges 2 and 3 was clearly inappropriate. The Panel's written decision contains no separate reasoning in respect of this; although para 3.6 of the Sanctions Guidance indicates that reasons must be given for the sanction imposed. Whilst dishonesty was involved, for reasons that I have already indicated, both of the mitigating features identified at Part II B5 of the Sanctions Guidance were present, namely the behaviour occurred in the Appellant's personal life and it was out of character. The Panel did not address this and in the circumstances the sanctions imposed in relation to these charges were manifestly excessive.

137. In addition to the B5 factors, the mitigation that I have already identified in relation to Charge 1 above largely applies, save that the Appellant denied the charges, albeit he did not dispute A's account of the relevant events. Additionally, and for reasons that I have indicated earlier (para 105 above), the medical evidence in respect of the

Appellant's conduct in sending the text messages was unsatisfactory and I proceed on the basis of the Panel's undisturbed finding that he was capable of rational thought and knew what he was doing when he sent the texts. I have also explained earlier why this conduct is not appropriately described as telling a "white lie" to a partner (para 117); it is significantly more serious than that.

138. In terms of aggravating factors, there was the undermining of the profession in the eyes of the public and, in relation to Charge 2, the impact on A, as she described. There is no evidence that Z was particularly affected. I also bear in mind that I have already treated the Charge 2 conduct as an aggravating feature in relation to the most serious charge, Charge 1.

139. In all the circumstances I consider that the appropriate and proportionate sanction in relation to Charge 2 is suspension for a period of 4 months; and in relation to Charge 3 is a suspension for a period of 2 months. All periods of suspension that I have imposed will run concurrent to each other.

The dissent

140. In terms of the procedural rules in the BSB Handbook, the Disciplinary Tribunal must indicate if a decision is unanimous or by a majority, but there is no specific requirement to provide details of the dissenting view. The rules provide as follows. At the end of the hearing the Disciplinary Tribunal must record in writing its finding on each charge and its reasons (rE199); and "If members of the Disciplinary Tribunal do not agree on any charge or application, the finding to be recorded on that charge or application must be that of the majority" (rE200). With all findings, if the Tribunal members are equally divided, then the finding to be recorded is that which is most favourable to the respondent. The Chair of the Tribunal must announce the Tribunal's findings on the charge(s) and state whether each finding was unanimous or by a majority (rE201). As regards sanction, this must be recorded in writing, together with the Tribunal's reasons (rE204). If members of the Tribunal do not agree on sanction, the sanction to be recorded must be that decided by the majority (rE205); and the Chair must announce the Tribunal's decision on sanction, indicating whether the decision was unanimous or by a majority (rE206).

141. In *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 WLR 2409 giving the judgment of the Court, Lord Phillips MR reviewed the common law cases and the Article 6 ECHR authorities concerning the content of the duty to give reasons for judicial decisions. In relation to Article 6, Lord Phillips summarised the position as follows:

> "12. …It requires that a judgment contains reasons that are sufficient to demonstrate that the essential issues that have been raised by the parties have been addressed by the domestic court and how those issues have been resolved. It does not seem to us that the Strasbourg jurisprudence goes further and requires a judgment to explain why one contention, or piece of evidence, has been preferred to another."

142. As regards the common law position, Lord Phillips said that justice would not be done if it was not apparent to the parties why one has won and the other has lost (para 16);

that the adequacy of reasons will depend upon the nature of the case, but they need not be elaborate and did not need to address every argument presented by counsel in support of the case (para 17); and that the issues that are vital to the resolution of the case should be identified and the manner in which they have been resolved explained (para 19). Earlier at para 6 Lord Phillips had cited Henry LJ's judgment in *Flannery v Halifax Estate Agencies Ltd (trading as Colleys Professional Services)* [2000] 1 WLR 377 at 381 that fairness required the parties to understand why they had won or lost "since without reasons the losing party will not know…whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case".

143. Mr Beaumont's submissions, which I have summarised at para 75 v) above, must be evaluated against these requirements. Ultimately it is the reasoning of the majority that is important because it is this conclusion that forms the Tribunal's finding, as rE200 recognises. However, in order to meet these requirements, a short summary of the dissenting view, with an explanation as to why the majority have reached a different conclusion, may be necessary, depending upon the circumstances and the centrality of the particular point. It would certainly be good practice to do so, both in the interests of transparency and because the formulation of reasons is recognised as a helpful way of focusing decision-making. I cannot see any downside of doing this and none was suggested by Mr Ruffell.

144. That said, I do not consider that either the common law or Article 6 goes as far as Mr Beaumont suggests, I was not shown any authority that indicates that the duty to give reasons requires that a dissenting judgment be provided or that the dissenting member must be identified. I am aware that practices vary in different jurisdictions. I was told that majority, as opposed to unanimous, decisions by the Bar Disciplinary Tribunal are very rare.

145. In this particular instance, the Panel's written reasons did identify, albeit briefly, the issue on which the Panel disagreed in relation to Charge 1, namely that the majority rejected the *Howd* analogy favoured by the minority because they concluded that the Appellant's behaviour was the direct result of his excessive alcohol consumption and over-familiarity with A (para 40 above). The position is addressed with less clarity in relation to Charges 2 and 3, but paras 18. 19 and 36 of the written reasons, taken together, appear to indicate that the majority found that the acts in question were the deliberate actions of the Appellant and were dishonest, whereas the minority accepted the medical evidence that he was not capable of rational thought at the time. Whilst a clearer articulation of this would have been helpful, Mr Beaumont accepts that it does not give rise to a ground of appeal.

Conclusion

146. For the reasons I have given, I dismiss the appeal against the Panel's findings that Charges 1, 2 and 3 were proved. However, I allow the appeal against the sanction of disbarment in respect of each of the charges and I substitute the following: a two year suspension order in respect of Charge 1; a four month and a two month suspension order, in respect of Charges 2 and 3 respectively, concurrent to each other and to the suspension on Charge 1.

147. Following circulation of a draft of this judgment to the parties, I received written submissions as to the date when the suspensions should commence. The Respondent

contended that the suspensions should start to run from the date when this judgment was handed down. The Appellant submitted that they should run from: the date when he voluntarily self-suspended (2 October 2020); or the date when the interim suspension order was imposed (26 April 2021); or, failing that, the date of the Panel's decision (21 October 2021). I agree that the suspensions should start to run from a time no later than the date of the Panel's decision, rather than from the hand down of this judgment. There is no reason why the Appellant should be disadvantaged by the fact that the Panel erred when it came to the question of sanction; the sanctions which I have determined to be appropriate should have been the penalties imposed in October 2021. I also accept that the impact of the interim suspension order should be taken into account by one means or another and I note that was the view expressed in the 26 April 2021 decision of the BTAS Tribunal. However, I have already borne in mind the lengthy period during which the Appellant has not practised as a barrister when I identified the mitigating features in this case (para 131 ix) above). Accordingly, I do not propose to double count that feature in the Appellant's favour. The suspensions will run from 21 October 2021.

Costs

148. After circulation of the draft of this judgment, I also received written submissions from the parties on costs. The Appellant submitted that I should make no order as to costs; but also contended that I should set aside the costs order requiring him to pay £2,100 made by the Panel. The Respondent argued that the Appellant should pay the £2,100 costs below and a proportion of the appeal costs, namely £2,650.

149. In terms of the outcome of the appeal, broadly, the Respondent has succeeded in upholding the Panel's findings that the charges were proved and the Appellant has succeeded in overturning the sanctions imposed in relation to each charge. Neither party succeeded in all the supporting arguments they deployed in the areas where they obtained overall success. Both parties accept, albeit to different degrees, that a greater proportion of the appeal costs concerned the conviction appeals. Furthermore, the hearing before the Panel would have been considerably shorter if the only disputed issue had been sanction; and self-evidently the need for the hearing arose from the Appellant's misconduct. The Appellant submits that this appeal could have been comprised by negotiation as the sanctions imposed were clearly inappropriate. In that regard, it appears to me that there is force in the Respondent's position that the determination of sanction is for the Disciplinary Tribunal (and then for this Court on appeal), not for the parties to negotiate over. Of course, the Respondent could have decided not to contest the appeal against the sanctions, but it can also be said that the Appellant could have confined the appeal to those issues; the attempted appeal against Charge 1 being particularly weak in light of his earlier admission.

150. Having regard to all of these circumstances, I conclude that the just course to take is to make no order in respect of the costs of this appeal and to leave undisturbed the costs order made by the Panel.