Note added by the Bar Standards Board

(not part of the judgment)

On 17th August 2012, Ms Daphne Evadne Portia O'Connor successfully appealed against a decision of the Disciplinary Tribunal. Any reference to findings in the judgment of the Disciplinary Tribunal should be read in the context that these were overturned on appeal unanimously by the Visitors to the Inns of Court.

IN THE HIGH COURT OF JUSTICE
THE VISITORS TO THE INNS OF COURT
ON APPEAL FROM THE DISCIPLINARY TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 17th August 2012

Before:

SIR ANDREW COLLINS
MR MARK MULLEN
and
MRS KATE WARNOCK-SMITH

- -

Between:

DAPHNE PORTIA O'CONNOR	**Appellant**
- and -	
THE BAR STANDARDS BOARD	**Respondent**

- -

Digital Transcription by Marten Walsh Cherer Ltd.,
1st Floor, Quality House, 6-9 Quality Court
Chancery Lane, London WC2A 1HP.
Tel No: 020 7067 2900, Fax No: 020 7831 6864, DX: 410 LDE
Email: info@martenwalshcherer.com
Website: www.martenwalshcherer.com

- -

Mr Marc Beaumont (instructed by **Messrs Collyer Bristow**)
for the **Appellant**.
Mr Alisdair Smith (instructed by the **Bar Standards Board**)
for the **Respondent**.

- -

Approved Judgment

- -

Sir Andrew Collins :

1. On 23rd May 2011, the Appellant, Miss O'Connor, was convicted on five counts alleging against her conduct which was in breach of her obligations as a barrister, in that she had been guilty of professional misconduct. Charges 1 to 4 each alleged that she had signed a statement of truth on behalf of her clients in litigation that was being conducted.

2. Charge 5 alleged that she engaged in conduct discreditable to a barrister by committing an offence under section 70(8) of the Courts and Legal Services Act 1990, in that, as a member of an unregulated limited liability partnership ("LLP"), she had "filed" – that is the word used, but in fact it should have been "sent" – a copy of the defence and counterclaim which had been filed in the case to the solicitors on the other side.

3. Charges 1 and 2 were committed whilst the Appellant was instructed by a solicitor in the course of litigation, what one might call normal, old fashioned practice as a barrister instructed by a solicitor. Charges 3 and 4 related to a case in which the Appellant was instructed directly, subject to direct access. The same applied as a matter of fact in connection with Charge 5. All the offences were committed, if they were, between April and September 2009. They took a long time to be heard by the Tribunal below and there has been an unfortunate delay in the matter being dealt with on appeal.

4. The Appellant herself was at one time in practice on her own and at another time, on the basis of the material before us, as head of a chambers which included two others. It perhaps matters not what the precise situation was; suffice it to say that she decided that she would take direct access clients and undertook the necessary training programme to enable her to qualify for that. There is no suggestion other than that she was perfectly entitled and she went through all the proper steps to enable her to undertake direct access cases.

5. The Appellant decided to set up the LLP as a result, it would seem, of taking advice from an accountant and being informed of the tax advantage that that would create. That LLP was known as Pegasus Legal Research. She said she chose Pegasus because effectively it was a name that appealed to her. There is nothing in that. There is no suggestion that setting up the LLP was in any way in itself something which she should not have done. It is simply, on the charge that was established before the tribunal below, that she had, it was said, used that vehicle to take part in something which she should not have taken part in, namely the conduct of litigation.

6. A number of issues have been raised on this appeal relating to the propriety of the Tribunal below being presided over by a Queen's Counsel who was not a practising Queen's Counsel. In fact, Ms Wright, who had been the Director of the Serious Fraud Office and was a qualified lawyer, had been granted the status of Queens Counsel *Honoris Causa*. There is an argument that Queens Counsel appointed *Honoris Causa* are not qualified to act as chair persons of tribunals which deal with the discipline of Members of the Bar.

7. In addition, there are arguments which were dealt with to a considerable extent in a

previous case involving the Bar Standards Board ("BSB") called Russell by Singh J.

We do not need to go into this in any detail. It is said that there had not been proper appointments of a number of lay members and legal members of the tribunal.

8. Sir Anthony May has directed that those matters should not be dealt with before us, because, as I say, subject only to the additional point relating to Ms Wright's status as a non-practising Queen's Counsel, they have essentially been dealt with by the decision of Singh J. That is not strictly binding, in the sense that it is a decision that we would be required to follow, but we would follow it unless we were persuaded that it was clearly wrong. However, it has been sensible to consider the merits of the matter because, if we are in the Appellant's favour on the merits, then the competence of the tribunal below to sit is immaterial.

9. Two furthers points were taken as to the procedure below. The Appellant represented herself. Counsel representing the BSB opened the case against her, but no positive evidence was called. It was not necessary to do so because she admitted signing, as indeed was clearly the case, the statements of truth, the subjects of the allegations in charges 1 to 4 and there was no need to hear evidence on the matters in charge 5 because, again, it was common ground that the letter enclosing the defence and counterclaim had been sent through the LLP.

10. The Appellant then gave evidence on her own behalf and was cross-examined by counsel for the BSB. Following the conclusion of his cross-examination, the tribunal adjourned for lunch. When they returned, the chairman announced that the charges 1 to 5 had been proved. There was a further charge 6, which was not established and we need not say anything about it. The Appellant then expressed surprise that she had not been permitted to make final submissions and to comment on the evidence as a whole. It is said on her behalf that there was in those circumstances unfairness because it was a breach of what are compendiously called the rules of natural justice to have failed to grant her the right to comment.

11. *Prima facie* there is considerable force in that submission. One only has to remind oneself of the decision of the Court of Appeal, which is now of some antiquity, in R v Deputy Industrial Injuries Commissioner, *ex parte* Moore [1965] 1 QB 465. The observations of Diplock LJ at page 490 make it clear that it is a general requirement of natural justice and fairness before a tribunal that the parties should have the opportunity of commenting upon the evidence that has been given. That, of course, will include comment by a party after evidence has been given by that party, if that party represents him or herself. *Prima facie*, therefore, there was strong reason to believe that the Tribunal was guilty of unfairness in that regard. We say *prima facie* because, for reasons which will become apparent, we have not found it necessary to hear argument on the point from Mr Smith on behalf of the BSB, which seeks to suggest that there was not in the circumstances any such unfairness.

12. The second point raised relates to the alleged lack of reasons which were given by the Tribunal. There is an obligation under the rules for the Tribunal to give reasons for its decision. Without going into any detail, we are bound to say that the reasoning is singularly unimpressive. *Prima facie*, there is, in our view, considerable force in the submission that the reasons in this case were defective. Again, we have not gone into that in any detail because, in our view, it has not been necessary to do so. The reason

why we say that is because, even if we were persuaded that our *prima facie* view was indeed correct, we are hearing the matter anew. We consider the charges on their

merits and will reach a conclusion based upon their merits. This is not a review, as was made abundantly clear by the Court of Appeal in R v Visitors to the Inns of Court, *ex parte* Calder [1994] QB 1. That involved an appeal from a judicial review of a decision of the Visitors. In that case, the Visitors had approached the matter on the basis that their responsibility was to review rather than consider the appeal on its merits. It is clear now that we do consider the matter entirely on its merits. In the course of his judgment in *ex parte* Calder, Stuart Smith LJ made it clear that we as Visitors, since we are able to hear the matter entirely on its merits, will give the necessary protection to an appellant and it is not necessary for the matter to be remitted for a further consideration by the tribunal which was either in breach of fairness or failed to give proper reasons. That follows from the decision of the House of Lords in Lloyd v McMahon [1997] AC 625.

13. It is for those reasons that we have decided that we do not need to go further into the issues of breach of natural justice or failure to give proper reasons. We merely put up a marker that we hope that we will not see a repetition in any subsequent decision of the sort of matters that may have gone wrong in this case.

14. We come then to the merits. Each of the first four charges depend upon it being suggested and established that to sign a statement of truth was not permitted to a Member of the Bar who had not been given the status of a litigator. To conduct litigation when one is not given the necessary status to do so by a professional body is to commit a criminal offence. The professional body in this case is the Bar Council. There is no question but that the Appellant was not given the status of a litigator. The question, therefore, is whether it has been established that for a Member of the Bar to sign a statement of truth in a statement of case is "the conduct of litigation" and so not permitted.

15. The Civil Procedure Rules deal with a signing of the statement of truth. One of the innovations in the Procedure Rules was that a statement of truth was required to be appended to any statement of case; and of course a statement of case includes a defence and a counterclaim. The relevant CPR is 22.1 and that provides, by subparagraph (1):

> "(1) The following documents must be verified by a statement of truth –
>
> (a) a statement of case …"

16. Then one finds in subparagraph (6):

> "The statement of truth must be signed by –
>
> (a) in the case of a statement of case, a response or an application –
>
> (i) the party or litigation friend; or
>
> (ii) the legal representative on behalf of the party or

litigation friend …”

"Legal representative" is defined in Part 2.3 as including a barrister.

17. If one goes then to the Practice Direction under Part 22, paragraph 3 deals with who may sign the statement of truth. It refers back to 22.1.6 and, at 3.7, it is provided:

> "Where a party is legally represented, the legal representative may sign the statement of truth on his behalf. The statement signed by the legal representative will refer to the client's belief, not his own. In signing he must state the capacity in which he signs and the name of his firm where appropriate."

We should say that there is no suggestion that the Appellant did not comply with that formula.

18. Then in 3.8, it is provided that:

> "Where a legal representative has signed a statement of truth, his signature will be taken by the court as his statement:
>
> (1) that the client on whose behalf he has signed had authorised him to do so,
>
> (2) that before signing he had explained to the client that in signing the statement of truth he would be confirming the client's belief that the facts stated in the document were true, and
>
> (3) that before signing he had informed the client of the possible consequences to the client if it should subsequently appear that the client did not have an honest belief in the truth of those facts …"

19. Thus it is clear that the Civil Procedure Rules entitle a Member of the Bar representing a litigant to sign the statement of truth on that litigant's behalf. There is no distinction drawn. Indeed, when CPR 22 was enacted, there was no question of direct access. This was a Member of the Bar instructed in the usual way through a solicitor. We have no information as to how often Members of the Bar did sign statements of truth. It may be that it occurred but rarely, but that it was permitted by the law (the law being in this case the CPR) there can be no doubt. Why then was it said that the Appellant breached the law by doing what she did?

20. The answer would appear to lie in the guidance given by the Bar in the form which then was in force. The Guidance for Barristers was issued in June 2004 in relation to public access work, but was regarded, it seems, as covering all sorts of litigation, whether traditional or public access. Under the heading "Conducting Litigation" in paragraph 24, this is said:

> 'The most significant restriction under the general law on the work that barristers may do concerns the conduct of litigation. The right to conduct litigation is limited by the Courts and

Legal Services Act 1990 to litigants themselves and to

> solicitors and other persons authorised under the Act ("authorised litigators"). Barristers in self-employed practice are **not** authorised litigators and a barrister who does any act in the purported exercise of a right to conduct litigation will be guilty of a criminal offence. **It is therefore crucial that barristers ensure that they do not conduct litigation**.'

21. Attention is then drawn to section 119 of the Courts and Legal Services Act, which simply says:

> "The right to conduct litigation is the right:
>
> (a) to issue proceedings before any court; and
>
> (b) to perform any ancillary functions in relation to proceedings (such as entering appearances to actions)."

That is of course singularly unhelpful in determining what functions are covered.

22. Then in paragraph 26 of the Guidance, this is said:

> "While the Bar Council cannot give definitive advice on the interpretation of the law, it is clear to us that undertaking the following work is likely to amount to conducting litigation:
>
> (1) issuing proceedings;
>
> (2) acknowledging service of proceedings;
>
> (3) giving the barrister's address as the address for service of the party for whom the barrister is acting;
>
> (4) signing a statement of truth on behalf of a client;
>
> (5) issuing applications and taking other formal steps in proceedings;
>
> (6) issuing notices of appeal."

23. And in 27:

> "There is nothing to prevent a barrister from providing drafts of documents required to be issued by a litigant and advising a litigant as to formal steps which need to be taken in proceedings … But the formal steps … themselves must be taken either by the litigant personally or by an authorised litigator on behalf of the litigant; a barrister must not take or assume responsibility for taking such steps."

24. It is submitted by the BSB that the Appellant should have appreciated that having regard to that (albeit not definitive) advice she should not have signed the statement of

truth.

25. The difficulty is that to adhere to that advice is to ignore the terms of the CPR. We have to ask ourselves whether, even assuming that this was put on the basis of a positive prohibition rather than merely that it was "likely" to be regarded as the conduct of litigation, it would be open to the BSB to have prohibited a barrister from doing what the Rules of the Court specifically enable him or her to do. But we do not need to decide that in terms. Suffice it to say that it is clear to us that the guidance there given cannot be regarded as in any way a prohibition. It is equally clear to us that it is wrong to say that the signing of a statement of truth on behalf of a client is to be regarded as conduct of litigation in the way in which that has to be construed, having regard to the approach to public access. We say that because the purpose behind opening the Bar to direct access was to enable costs to be saved and to enable the barrister to do no more than he would have been able to do before direct access. The difficulty is in determining what can properly be regarded as "ancillary functions in relation to proceedings", which is the wording used in the Act of Parliament. After all, much of the work done traditionally by the barrister would, we think, by most be regarded as ancillary functions in relation to proceedings: advocacy, signing of pleadings of one sort or another, even advising clients in the course of litigation. All, on one view, could be regarded as ancillary functions in relation to proceedings.

26. This is not a matter as simple as taking any lay person's view of the language of the relevant legislation. One has to look to the history and have regard to what traditionally and as the two professions developed solicitors and barristers were expected to do and, more importantly, what barristers were expected not to do. The question for us is whether it could be properly regarded as something which barristers could not do, namely the signing of a statement of truth. That, of course, was something which was introduced relatively recently into the requirements of the documentation to be put before a court in litigation.

27. It seems to us quite impossible to say that the CPR can effectively be put to one side. Those responsible for the CPR have clearly taken the view, and took the view from the outset, that it was not the conduct of litigation and thus was not an offence under the 1990 Act for a Member of the Bar to sign a statement of truth. In our view, that was a correct consideration. It is clear that there is a degree of artificiality in some respects in relation to what does fall within the prohibition under the 1990 Act when applied to a Member of the Bar. One does have, as we say, to look to what can properly be regarded as matters that a barrister could do. It has been suggested that there is no difference in principle between the drafting of a case, the signing of a claim form by a barrister and the additional signing of the statement of truth which is a part of that form. Certainly, if a Member of the Bar put his name to a pleading, then the Court would regard that as an indication that the barrister took the view that what was being presented was clearly arguable. It would indeed have been misconduct by a Member of the Bar to put forward a claim which he did not believe to be arguable. The client's belief in the truth of the matters alleged which go into the statement of truth perhaps goes a little further, but not much, because it is merely belief; and the barrister who has a detailed conference with the client is in just as good a position as the solicitor to decide for himself whether he can properly put his name to the client's belief in the truth of the matters alleged. That is more the case in direct access perhaps than with the traditional form of practice because, in direct access cases, the barrister will have had direct discussion with the client and thus been informed

directly of the matters which were to be put on the client's behalf.

28. Strictly, all that we have to decide is whether it has been proved (and the standard is the criminal one, beyond reasonable doubt) that for the Appellant to have signed the statement of truth in the four cases did amount to "conduct of litigation" and thus misconduct. We are clear that it is not proved, but, as is we think apparent from what we have just said, we are satisfied that it is not to be regarded as the conduct of litigation. It is to be noted that in 2010 the advice was amended and note was taken of a case to which we shall refer shortly, Agassi v Robinson [2005] EWCA Civ 1507, in which the Court of Appeal considered ancillary functions in the context of correspondence and decided that conducting correspondence with the other side was not in itself within the definition of "conduct of litigation" because it was not an ancillary function. It is a decision which we note caused some surprise to both sides of the profession.

29. What the Court went on to say was commented upon in a report of the BSB in May 2011. Under the heading "Conduct of Litigation" this is said:

> "The BSB's rule changes, which came into effect on 1st April 2010, relaxed restrictions on self-employed barristers conducting correspondence, collecting evidence and conducting interviews at police stations. Whilst rule 401 still prevents self-employed barristers from 'conducting litigation', in effect there are very few litigation tasks which they are unable to do. One respondent to the consultation said '… the distinction between the services barristers currently offer and those which the law would classify as conducting litigation is outdated and artificial'."

It goes on thus:

> "The remaining restrictions for self-employed barristers identified in the consultation paper are: issuing any claim or process or application notice; signing off on a list of disclosure; instructing expert witnesses on behalf of a lay client; accepting liability for the payment of expert witnesses; and any other 'formal steps' in the litigation of a sort that are currently required to be taken either by the client personally or by the solicitor on the record."

30. It is in those circumstances, in our view, somewhat strange that the BSB decided to persist in the prosecution of the Appellant for doing what their current guidance (and it was then current when these proceedings were brought before the Tribunal) recognised not to be covered by "the conduct of litigation". Be that as it may, we are entirely satisfied that the BSB has now got it right and that the signing of the statement of truth, provided of course that it is done in the proper fashion and in accordance with the provisions of CPR 22, is not to be regarded as professional misconduct.

31. That leaves charge 5. That alleged that, in or about September 2009, the Appellant engaged in conduct discreditable to a barrister by committing an offence under section 70(8) of the Courts and Legal Services Act 1990 as a member of an unregulated LLP,

Pegasus Legal Research LLP, which at that time filed a defence and counterclaim

with the claimant's solicitor in the case of Blackhorse Limited v Allen, thereby unlawfully conducting litigation. The word "filed" is inappropriate, because what in fact happened was that from the LLP a letter was sent to the solicitors representing the other party in the relevant litigation, sent not by the Appellant but by an individual described as "the client services manager" in the LLP. The letter itself said:

> "We enclose herewith a copy of the defence and counterclaim which we have filed with the Court today. A hard copy will follow in the post."

32. It appears that the charge was brought largely as a result of what is contained in paragraph 401 of the relevant code dealing with self-employed barrister. Paragraph 401 states:

> "A self-employed barrister, whether or not he is acting for a fee
>
> …
>
> (b) must not in the course of his practice …
>
> …
>
> (ii) conduct litigation or inter partes work, for example the conduct of correspondence with an opposite party, instructing any expert witness or other person on behalf of his lay client or accepting personal liability for the payment of any such person."

33. The problem with that was that it had not caught up with the decision of the Court of Appeal in Agassi v Robinson, which was decided in 2005 and which made it clear that the conduct of correspondence with an opposite party was not to be regarded as something which a self-employed barrister should not do, because it was not to be regarded as the conduct of litigation. When one thinks of it, it seems somewhat absurd that to send a copy of a statement of case, which is to be lodged or indeed which has been lodged with the Court, to the other side is to be regarded as conduct of litigation and so forbidden to the barrister dealing with direct access.

34. It is submitted by Mr Smith on behalf of the BSB that there really is little to distinguish the filing of a statement of case with the Court and the sending of a copy to the other side. We do not accept that submission. There is all the difference between the courtesy to the other side of notifying them of what is coming in correspondence and the act of filing with the Court, which is undoubtedly part of the conduct of litigation and which the self-employed barrister still may not do. That being so, there is no question that this was not the commission of an offence under section 70(8). Accordingly charge 5 must also disappear.

35. Argument was raised that it was not in any event discreditable conduct even if there was a technical breach in what had been done by the Appellant. Reliance has been placed upon observations of Mr John Hendy QC in BSB v

36. Sivanandan on 13th January 2012. What Mr Hendy there said was:

> "The juxtaposition of dishonesty and discreditableness is, in our view, significant. We do not think that the word discreditable has to be construed, as the lawyers would say, *ejusdem generis*, but we do think that the gravity of the conduct takes colour from the fact that the first description of the untoward conduct is dishonest … anything short of serious professional misconduct is not intended to be within the description of discreditable.
>
> We do not accept Mr Aylwin's submission that anything discreditable suffices. The word is in the context of professional misconduct which is by definition serious enough to warrant a charge and a public hearing at which the barrister's career may be at stake. The juxtaposition, as I said, with dishonesty, which is a serious matter for anyone but could not be more serious for a barrister found guilty of it, fortifies out view."

37. We see no reason to dissent from that approach, but suffice to say in the context of this case we doubt if anyone looking at this case would take the view that, even assuming the sending of that letter was something which the Appellant should not have done, it could be regarded as discreditable in any way. Quite the contrary, because it is, as we say, showing courtesy to the other side by giving advance information of the formal document which is to be acknowledged.

38. In those circumstances, we have no doubt that none of these charges can stand and, accordingly, this appeal is allowed.

- -