CO/2860/2016

Neutral Citation Number: [2016] EWHC 3015 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday 3 November 2016

B e f o r e:

MR JUSTICE COLLINS

Between:

SMITH

Appellant

v

BAR STANDARDS BOARD

Respondent

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(Official Shorthand Writers to the Court)

Mr Gregory Treverton-Jones QC and **Mr Marc Beaumont** (instructed by Weightmans) appeared on behalf of the Appellant

Mr John Wilson QC (instructed by Bar Standards Board) appeared on behalf of the Respondent

J U D G M E N T
(Approved)

1. MR JUSTICE COLLINS: The appellant, a barrister, appeals against the decision of a disciplinary tribunal of the Bar Tribunals and Adjudication Service that he was guilty of two charges alleging serious professional misconduct. The decision was made following a five-day hearing in March and May 2016.

2. The charges arose from a Family Dispute Resolution hearing at the Milton Keynes County Court on 31 August 2010. The appellant represented the husband, Mr Ashby. He negotiated a final financial settlement with Mrs Ashby's representative which included, as would be expected, provisions in relation to future maintenance for Mr Ashby's wife. The first charge against him arose from what was found to have been, following his failure to negotiate a clean break which was what Mr Ashby had wanted, informing Mr Ashby and his instructing solicitor that a clean break had been achieved and that the consent order which Mrs Ashby's solicitor and he had agreed and she had drafted included such a provision. The second charge was based on the manner in which he had dealt with the complaint raised by his instructing solicitor that he had not included a clean break.

3. The tribunal decided that his responses were rude, discourteous and unhelpful and so amounted to serious professional misconduct. He was fined £1,000 on each charge.

4. There was, as is apparent, an inordinate delay in bringing the charges before the tribunal. The formal complaint made by the solicitors on behalf of Mr Ashby was sent to the Bar Standards Board ("BSB") on 30 November 2010. On 6 October 2010, pursuant to Part 6 of the Legal Services Act 2007, the Legal Ombudsman Scheme had come into effect. This required the BSB to refer the complaint to the Ombudsman. If he considered that there was a prima facie case that there had been a breach, he should refer it back to the BSB who would then carry out such investigations as were required and decide whether or not to bring charges. Regrettably, the Ombudsman did nothing. It was not until 23 May 2012 that the Ombudsman referred the matter back to the BSB having made no finding but continued to consider what recommendation should be made to the BSB.

5. On 12 September 2012 the ombudsman’s investigating officer reported that he would recommend to the ombudsman that no remedy be provided as, on the balance of probabilities, he had found no poor service on the part of the appellant. As is obvious, the BSB decided nonetheless that the charges should be brought.

6. An application was made that the charges should be struck out. That application came before Mr Justice Spencer who ruled on it on 8 November 2013. He cited the observations of the ombudsman's representative, and I should also cite them. The relevant intations are as follows:

i. "25 .....

ii. 'I do believe that the firm did ask Mr Smith for an assurance that the draft order did include a clean break at 65.'"

2. (That is when Mr Ashby reached the age of 65 which would have been in fact the end of December 2027.)

    i. "'I also consider it is most likely that Mr Smith gave some form of a conditional answer such as, 'effectively yes' or, 'to all intents and purposes, yes.' At the end of a long and stressful day it is perhaps a possibility that Mr A[shby] and his solicitors heard the yes and not the condition. As such I believe, on the balance of probabilities that this is fundamentally a misunderstanding at the end of a busy stressful day and a mistake rather than any deliberate intent to deceive on the part of Mr Smith or, indeed, the firm.'"

3. The representative went on:

    i. "27 .....

    ii. 'My decision therefore is that I cannot attribute any concerns about the precise wording of the consent order to any shortcomings in the service provided by Mr Smith and will not therefore be directing him to provide Mr A[shby] with any remedy ..... '"

4. He then went on to deal with the issues about clean breaks and whether nominal sums were or were not in certain circumstances equally beneficial.

7. The ombudsman had expressed some confusion as to whether the complaint was made by Mr Ashby or by his solicitors. It was made clear that the solicitors were bringing it on behalf of Mr Ashby. He was concerned that contrary to his understanding and wishes no clean break of maintenance had been made included in the order. The BSB should, accordingly, have appreciated that there was a potential conflict of interest in that the solicitors were vulnerable to an allegation of negligence against them, particularly since a partner of the firm had attended court with Mr Smith and had been able to see the proposed consent order. There was no doubt that at the very least the solicitor had had it

read over to him clause by clause. Thus, it was in the solicitors' interest to put any blame on Mr Smith rather than on themselves.

8. It follows in my view that the BSB were seriously at fault in permitting the solicitors to continue to act on Mr Ashby's behalf in pursuing the case and, in particular, in producing Mr Ashby's statement. In fact, there were two statements but the second one merely confirmed the accuracy of the first which supported, in particular, the account given by the solicitor who attended on 31 August, Mr Douglas. He was a partner in the firm. The importance of this will become clear in due course.

9. The decision to prefer charges was made on 27 February 2013. Mr Smith was informed on 1 March 2013.

5. The two charges read as follows. They are preferred in the same form as would apply to an indictment before the Crown Court. In the first, the statement of offence is said to be -

    i. "Professional misconduct contrary to paragraph 701 (a) and pursuant to paragraph 901.5 of the Code of Conduct of the Bar of England and Wales (8th Edition)."

6. Particulars of offence were that -

    i. "[Mr] Smith whilst engaged in professional activities on 31 August 2010 at Milton Keynes County Court failed to act with reasonable competence in that he informed his client Mr A that his ex-wife by her solicitor had agreed that Mr A should have a clean break on maintenance when Mr A attained age 65, and later on the same day he assured Mr A and/or his instructing solicitor that such a clean break had been incorporated in a manuscript draft consent order, whereas in fact no such clean break had been agreed, and no clean break was incorporated in the draft order.

    ii. Such behaviour was contrary to paragraph 701 (a) of the Code of Conduct and was serious and therefore constitutes professional misconduct pursuant to paragraph 901.5 of the Code of Conduct by virtue of its nature and/or extent and/or as it was combined with another failure to comply with the Code as set out in charge two of this charge sheet."

7. Charge 2 was in the following terms, the statement of offence being -

    i. "Professional misconduct contrary to paragraph 403.5 (d) (i) and pursuant to paragraph 901.5 of the Code of Conduct of the Bar of England and Wales (8th Edition)"

8. The particulars were as follows:

    i. "Julian Smith failed to deal with complaints made to him promptly, courteously and in a manner that addressed the issues raised, contrary to paragraph 405.3 (5) (d) (i), in that from on about 15 September 2010 he -

    ii. Failed to respond promptly to communications to him from Messrs Jennings, Solicitors, his instructing solicitors, dated 15 September 2010, 27 September 2010 and 8 October 2010;

    iii. Was discourteous in an e.mail from him to Messrs Jennings Solicitors dated 7 October 2010;

    iv. Failed to deal with the issue raised, namely whether he had agreed a clean break with his opponent, in communications from him dated 27 September 2010, 7 October 2010 (2), and 11 November 2011 [that is a mistake for 2010] (by his chambers administrator).

    i. Such behaviour was serious and therefore constitutes professional misconduct pursuant to paragraph 901.5 of the Code of Conduct by virtue of its nature and/or extent and/or as it was combined with another failure to comply with the Code as set out in charge one of this charge sheet."

9. The delay of three years before the tribunal hearing resulted largely from the need to deal

first with an application to strike out the charges which I have already mentioned and then a directions hearing which included an application that legal professional privilege be waived by Mr Ashby. There was a hearing before and full judgment given by Mr Justice Spencer on the strike out application on 8 November 2013. That was pursued to a review, and it was not until November 2014 that the application was dismissed by the reviewing panel. Directions were given by Mrs Justice Proudman in March 2015 and a hearing commenced in March 2016.

10. Before setting out as far as necessary the factual background, I should refer to the relevant provisions in the Code of Conduct which the appellant was alleged to have breached. Paragraph 701A, which is in a part of the Code which is headed 'Conduct of Work by Practising Barristers', provides:

    i. "A barrister must in all his professional activities be courteous and act promptly, conscientiously, diligently and with reasonable competence and take all reasonable and practicable steps to avoid unnecessary expense or waste of the court's time and to ensure professional engagements are fulfilled."

11. I move on to Part 9 which is headed "Compliance". Paragraph 901.1, so far as material, provides:

    i. "Any failure by a barrister to comply with the provisions of [a number of paragraphs, including 701,] shall render him liable to a written warning from the Bar Standards Board and/or the imposition of a fixed financial penalty of £300 or such other sum as may be prescribed by the Bar Standards Board from time to time."

12. Paragraph 901.5 (1) provides:

    i. "(1) Any serious failure to comply with provisions of the Code referred to in paragraph 901.1 above shall constitute professional misconduct.

    ii. (2) A failure to comply with those provisions may be a serious failure (a) due to the nature of the failure, or (b) to the extent of the failure, or (c) because the failure in question is combined with a failure to comply with any other provision of the Code whether or

not that provision is mentioned in paragraph 901.1."

13. Thus, for charge 1 it had to be proved to the criminal standard, which, according to the relevant regulations, is the standard that has to be applied, that what he was proved to have done at the Milton Keynes County Court showed a serious lack of reasonable competence.

14. In relation to charge 2, there was an added reference to paragraph 403.5 (d) (i). This provides that a self-employed barrister must deal with all complaints made to him promptly, courteously and in a manner which addresses the issues raised. It is to be noted that paragraph 901 is a general requirement to behave in a satisfactory manner but paragraph 403.5 (b) (i) deals specifically with the way in which a barrister should deal with complaints made. It follows that unless and until a complaint is made the provisions of paragraph 403.5 (b) (i) are not material. So there was argument as to when a complaint could properly be said to have been made. Where concerns are raised whether by a professional or lay client and explanations are sought that does not amount to a complaint until it is made clear that the matter is going to be pursued.

15. Mr Justice Spencer was asked to deal - and did - with the question when a complaint in the circumstances of this case could properly be said to have been initiated. He made the point, which is clearly right, that there is no need for a formal complaint to be lodged provided it is made clear that there is a complaint and it will be pursued. The date that Mr Justice Spencer indicated was the correct date was the result of a telephone message on 7 October 2010 from the solicitors and an e-mail on 8 October. Thus the 15 September and the 27 September were deleted from paragraph (i) of Charge 2. There has been argument in this case that that was in fact too early and when one looks at the correspondence it should not have been until 22 October. The relevance of that is centred on the word "promptly" because the response, whether it be 7 or 8 October, was not until eleven days later. I do not, for reasons that will become apparent, propose to go into the details beyond indicating that unfortunately Mr Smith in September and early October 2010 appears to have been away from work on holiday but he was unable to remember precisely, when he gave his evidence before the tribunal, when he had been away.

16. If this case turned on whether there had been prompt answers to the complaint, I very much doubt whether it could possibly have been said that it was proved that he had not acted promptly. But that was only one. The whole case really turned on whether he had acted in a discourteous manner.

17. In dealing with this appeal, I must apply the approach which is set out in CPR 52.11. This means that the appeal is limited to a review of the tribunal's decision. CPR 52.11 (3) provides:

i. "(3) The appeal court will allow the appeal where the decision of the lower court was -

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

ii. (4) The appeal court may draw any inference of fact which it considers justified on the evidence."

18. Mr Treverton-Jones QC, who appeared for the appellant, relies on both aspects of CPR 52.11 (3), submitting that the decision was wrong in that the tribunal should not have found on the evidence before it that either charge was proved. The negligence which is charged was, he submitted, not established and even if it was would not be regarded as constituting serious professional misconduct. The manner in which the appellant had dealt with the complaint did not breach the Code and any shortcomings, if they existed, again could not be regarded as serious.

19. Further, there was an attack on some of the findings of fact and in particular on the judgment of the tribunal in accepting the evidence of the solicitors against that of the appellant.

20. I am of course aware that in respect of this last attack it is rare for an appellate court to overturn a factual finding based upon the tribunal having seen and heard the relevant witnesses. Nonetheless, if any finding is in all the circumstances unreasonable it cannot stand. But the hurdle to be surmounted by an appellant who seeks to show that a finding of fact made by the tribunal or court which has heard and seen the witnesses on either side is a high one.

21. The solicitors instructing the appellant were Jennings Solicitors who operated in Milton Keynes. There were two partners, Mrs Jennings and her son Matthew Douglas. Mr Douglas explained in his evidence that his mother was the senior matrimonial lawyer, but she was unfortunately undergoing some chemotherapy at the time. His experience was mainly conveyancing and personal injury. But he did have conduct of the Ashby case

through his mother. He said his role was more to assist Mr Ashby in understanding what was going on. His attention was drawn to Mr Ashby's statement which said that he understood that the appellant was representing him and that Mr Douglas was not, and he was there simply as a note-taker or, as the statement actually reads, "sitting behalf counsel" (it is obvious "behalf" should have read "behind").

22. Mr Douglas said that his role as a matrimonial solicitor was, as he put it, in its infancy. He did, he said, take notes but they no longer existed since he later drafted an attendance note and the original notes must have been thrown away. Much time was spent on this issue and Mr Smith was concerned that the original notes had never been disclosed. It was asserted that the attendance note, to which I shall have to refer in due course, was produced later for the purpose of pursuing the case against him.

23. The instructions to the appellant conveniently set out Mr Ashby's circumstances and what counsel was requested to achieve in the negotiations he was to conduct at the county court.

24. Mr and Mrs Ashby had married in 1992, having lived together for a number of years. Both were 47 years old. There were three children, all over 18. They had separated in February 2009 and a decree nisi had been pronounced in May 2010. Mr Ashby worked as a warehouseman with Coca Cola, earning some £36,000 a year by dint of much overtime working. He had a pension with Coca Cola, the current value of which was some £128,000 odd. He also had shares in Coca Cola which he valued at some £20,000. His wife asserted that the proper value should have been £30,000. His wife was living in the former matrimonial home which was worth about £170,000. There was a mortgage of some £74,500 so that the equity amounted to about £90,000. It was agreed that the matrimonial home would have to be sold. It had been put to Mrs Ashby's solicitors that she should receive £75,000 from the sale of the matrimonial home and the shares. Mr Ashby was willing that she should have forty per cent of his pension. This, it was said "would be on the basis of a clean break".

25. The suggestion made in the instructions was that the former matrimonial home be sold and the net proceeds be divided as to sixty-five per cent to the wife and thirty-five per cent to the husband, that the shares be sold and the proceeds divided between them and that the wife should have a forty per cent share of her husband's pension. The appellant was informed that "instructing solicitors would be grateful if counsel would not move significantly from that position".

26. An important additional factor was that Mrs Ashby was not working since she was said to suffer from stress and was in receipt of jobseeker's allowance. Mr Ashby apparently thought that his wife was unlikely to obtain any full-time employment.

27. Mr Ashby did not attend the tribunal hearing but the tribunal allowed his statements to be admitted as hearsay evidence.

28. The Disciplinary Tribunal Regulations of 2014 apply and deal with the procedure to be followed at a hearing. So far as material, they provide by paragraph rE144 as follows:

    i. "rE144 The rules of natural justice apply to proceedings of a Disciplinary Tribunal. Subject to those, the Tribunal may:

    ii. .1 (subject to rE145 below) admit any evidence, whether oral or written, whether given in person, or over the telephone, or by video link, or by such other means as the Tribunal may deem appropriate whether direct or hearsay, and whether or not it would be admissible in a court of law.

    iii. .2 give such directions with regard to the conduct of, and procedure at, the hearing, and, with

    iv. regard to the admission of evidence at the hearing, as it considers appropriate for securing that a

    v. defendant has a proper opportunity of answering the charge(s) and/or application(s) made against

    vi. him, or otherwise as shall be just;

    vii. .3 exclude any hearsay evidence if it is not satisfied that reasonable steps have been taken to obtain direct evidence of the facts sought to be proved by the hearsay evidence."

29. This, as is apparent, gives a general discretion to admit any evidence in whatever form and by whatever means. But there is a discretion to exclude hearsay under sub-paragraph (3). Furthermore, it is made clear in sub-paragraph (2) which follows the requirement to apply the rules of natural justice that a defendant must be given a proper opportunity of answering the charges against him.

30. The BSB had not been involved at all with Mr Ashby but had left it to Jennings Solicitors to produce his statements. This was a clear failure to act properly since, as I have said

and as Mr Douglas recognised when questioned at the hearing, there was a potential conflict of interest, it being clearly in Jennings' interest to place any blame for the failure to include a clean break, which Mr Ashby says he thought had been included, on the appellant. There can be no doubt that to allow Jennings Solicitors to be responsible for producing the statements was a serious error by the BSB.

31. Mrs Jennings accepted that she had supervised the individual in the firm (a legal secretary) who had obtained statements from Mr Ashby. It was of obvious importance to the appellant that Mr Ashy should attend to give evidence since there was a highly material, indeed crucial, issue of fact to be determined, namely what the appellant had actually said to Mr Ashby and what Mr Ashby had understood at the hearing in the county court.

32. Further, it would have been necessary to discover what Mr Ashby had been told by his solicitors which may have influenced him in what the statement contained. I have already noted that Mr Ashby's statement referred to Mr Douglas not representing him but being there simply as a note-taker, a role which seems somewhat strange for a partner in the firm. He says that he was absolutely clear from the beginning of the proceedings that he wanted an eventual clean break but that was not put to the appellant at the commencement of the negotiations, nor was it contained in the instructions in that form. All that Mr Smith was informed in his instructions was that Mr Ashby wanted a clean break. But if the overall result was in Mr Smith's view sufficiently favourable, that clean break may well not have been required. That was not in the instructions. That was clearly in my view a reasonable approach that Mr Smith could have taken.

33. Mr Ashby says in his statement:

    i. "Mr Smith absolutely one-hundred per cent assured me that there would be a clean break at 65."

34. Mr Ashby felt he had already given up more capital and a larger share of his pension. It was known to the tribunal that Mr Smith denied that he had given any such assurance and that, as charge 1 made clear, the assertion that he had was the basis of the charge.

35. On 13 October 2015 Mr Burn, who was dealing with the matter on behalf of the BSB, received a telephone call from Mrs Jennings in which he was told that Mr Ashby would not be attending. Mr Burn's note reads:

    i. "Does not want to be involved, would not be able to give any useful evidence in any event as the lay client."

36. That was an extraordinary observation which led, when Mrs Jennings was cross-examined at the tribunal, to thoroughly unsatisfactory answers being given by her. Mr Burn did nothing; he took no steps to procure or seek to procure Mr Ashby's attendances. At the very least he clearly should have written a letter because he had already been in gross breach of his duty in allowing statements to be taken by Jennings Solicitors and not by a representative of the BSB.

37. Further, it seems that Mr Burn informed Mrs Jennings that it was not vital that Mr Ashby should attend provided that she or Mr Douglas did. If he did so inform Mrs Jennings, that was equally a serious dereliction of duty by him.

38. There followed in January 2016 an e-mail from Mr Ashby to Mrs Jennings which she passed on to Mr Burn. This read as follows:

    i. *" ..... where has this come from? I find it hard to comprehend that it has taken 3 years to get to the position you are now stating.*

    ii. So my input is this. I would like to thank you both for the work you have done in the past. However, I have now moved on with my life, I have a good relationship with my ex-wife which I would not change. I see my children and grandchildren regularly and they mean the world to me. I am not rich financially, but I can pay my bills through working hard, I do a job I am happy in and in a company that appreciates my efforts. I am in a good place.

    iii. Although I still stand by my feelings at the time and of being let down by the barrister, I bear no malice, time has taken that away. I and yourselves know the truth that a clean break was asked for at the time. It has not happened. So be it, there are more important things in life than money. As I stated earlier, I am in a good place right now and am not prepared to go through the stresses of reliving it all again.

    iv. I have accepted 'my lot' for what it is and am comfortable with life again.

v. I know you both feel strongly about this situation and are challenging the morals of the barrister who could agree something different to what was verbally agreed and then not accept the error and support a change.

vi. However, I cannot carry on with this. I will not be attending the hearing and wish you both luck in your efforts for the correct outcome. I know this is not the response you were probably hoping for, however, my health and happiness has to come first and I am not prepared to jeopardise this in any way.

vii. I wish you every success in your mission to fight for justice.

viii. Regards Keith."

39. Thus no steps were taken to obtain direct evidence of the matters sought to be proved by Mr Ashby's statement.

40. Mr Wilson sought to argue that the evidence of Mr Douglas provided that direct evidence so Mr Ashby's statements could properly be admitted. But that ignores the overriding provision in paragraph rE144 that the rules of natural justice apply. And so the tribunal must be astute to ensure fairness. It is to be noted that a finding of serious professional misconduct is so damaging to a practising barrister that the criminal standard of proof must be applied in deciding on charges of serious professional misconduct. That is laid down in paragraph rE143 of the regulations.

41. It is in my view proper to draw an analogy with the admission of hearsay in criminal cases. The statute and the law makes clear that it is essential that reasonable steps are taken to ensure the attendance of the witness who is to give the evidence even if he is not the only witness who deals with the particular issue. It was all the more necessary in the interests of fairness that Mr Ashby should attend since there were inevitably concerns that his statement may have been influenced by what Mrs Jennings and Mr Douglas wanted him to say, and evidence from the complainant who was independent of his solicitors was essential. The reasons given for admitting the statement are not only jejune but do not meet the facts. The tribunal noted that no steps had been taken by the BSB to

write to Mr Ashby or to issue a witness summons. He had at no time been seen by anyone on behalf of the BSB.

42. In giving reasons for admitting the statements as hearsay, this was said, so far as material, by the Tribunal:

    i. "In relation to the steps which had been taken by the Bar Standards Board, it is fair to say that we think that the Board may have perhaps taken further steps by writing a further letter to Mr Ashby inviting him to attend. But within the context of the e-mail that he sent to Jennings Solicitors it is inevitable, it seems, that the response would have been that he would not have been attending today. So even if we thought the Bar Standards Board had not taken reasonable steps - and we do not take that view (the rules of discretion) - it does not say that we should exclude it if the Bar Standards Board had not taken reasonable steps.

    ii. Looking at the rule itself, we are satisfied that we have jurisdiction to admit the evidence of Mr Ashby, and we do so. We are conscious that he will not be here to be cross-examined but this will go to the weight of the evidence, and it may be, at the end of the day when we consider the matter as a whole, that we will attach no weight to Mr Ashby's evidence. That is a matter for us once we have heard the evidence."

43. That reasoning is truly extraordinary. To say that the view was not taken that the BSB had not taken reasonable steps is clearly perverse. It had taken no steps. It is hardly possible to believe that to take no steps is to take reasonable steps. Further, to say that the weight of his evidence was in effect all that mattered was equally perverse in that it ignored the obvious unfairness which would result and equally ignored the fact that Jennings had an interest in procuring a statement which exonerated them and blamed Mr Smith.

44. It is worth noting that in the present approach to litigation involving the drafting and redrafting of statements of witnesses, the latest of which is submitted as his or her evidence, it is often shown in cross-examination that the witness statement does not in truth fully or properly reflect his true evidence. This does not mean that there has been deliberate invention but it is all too easy to persuade a witness that he should put his evidence in a particular way which may turn out not to be entirely accurate.

45. It follows that I have no doubt that the appellant did not receive a fair hearing. The tribunal chose to accept the evidence of Mrs Jennings and Mr Douglas and, further, to accept Mr Ashby's statement because it coincided with their evidence. Cross-examination of Mr Ashby might have shown that the solicitors' account was not reliable. If so, it would have been difficult for the tribunal to have justified their conclusion that Mr Smith's account was to be rejected because the allegation against him would not have been proved to the criminal standard.

46. Thus, this appeal must be allowed on that ground alone.

47. What had to be proved to establish charge 1 was set out by Mr Justice Spencer in the course of his judgment. What he said was as follows:

    i. "33 To establish charge 1 the BSB must prove -

        (1) that no clean break was in fact agreed between Mr Smith and the solicitor representing Mrs A[shby]

        (2) that Mr Smith informed Mr A[shby] that Mrs A[shby], by her solicitor, had agreed to a clean break at age 65

        (3) that Mr Smith assured Mr A[shby] and/or his instructing solicitor that such a clean break had been incorporated in the manuscript draft consent order

        (4) that Mr Smith's conduct amounted to a failure to act with reasonable competence

        (5) that Mr Smith's conduct amounted to a serious failure to act with reasonable competence, due to the nature and/or extent of the failure and/or because the failure was combined with the failure to comply with the code as set out in charge 2."

48. It is to be noted that Mr Ashby's statement records that his wife said she had believed a clean break had been agreed. But it is not disputed that her solicitor at the court had refused to accept a clean break as opposed to nominal periodical payments.

49. It is apparent from his judgment in refusing to strike out that Mr Justice Spencer assumed that it was being alleged that the appellant had deliberately decided to give the wrong information to his client. (That appears from paragraph 53 of his judgment.) But as was made clear at the hearing before the tribunal, that was not alleged. It was said that he had been negligent in giving the wrong information.

50. It is necessary to refer to the relevant parts of the consent order. This was drafted by Mrs Ashby's solicitor, but with the agreement of Mr Smith. Paragraphs 1 and 3 deal with the matrimonial home and provide that Mrs Ashby should transfer her interest in it to Mr Ashby and that she would receive £80,000. It is not necessary to go into further detail.

51. Paragraph 4 provides for a pension-sharing order and the annex to the agreed order provides that Mrs Ashby should receive forty per cent of the pension.

52. Paragraph 5 is the important paragraph which deals with maintenance or periodical payments. It provides:

    i. "The respondent husband shall pay periodical payments to the applicant wife.

    ii. Payments shall be at the rate of £425 per month in advance and shall be paid on the 1st of every month. Payment shall start 14 days after the applicant wife commences full time employment.

    iii. They will end on:

        (a) the death of either the applicant wife or the respondent husband; or

        (b) the applicant wife's remarriage;

(c) 28 December 2022 whereupon the periodical payments shall stand automatically varied to nominal periodical payments;

(d) a further order terminating payment."

53. December 2022 is when Mr Ashby reaches his 60th birthday. On the face of it, there is a slightly curious provision contained in the paragraph dealing with maintenance payments because it is said they should only start if the wife commenced full time employment. That was from Mr Smith's point of view a most important aspect of the agreed order.

54. Paragraph 6 effectively dismissed all claims by either party which were inconsistent with everything that was in relation to what I can call capital matters.

55. Paragraph 9 provided as follows:

i. "9 Upon cessation of the periodical payments in paragraph 5 above, the applicant wife shall not be entitled on the death of the respondent husband to apply for an order for provision out of his estate."

56. That is perhaps not entirely satisfactory drafting. But the only cessation that could have been material for the purposes of paragraph 9 is that contained in 5(a), namely the death of the respondent. That precluded his wife from having any claim to his estate.

57. It must have been obvious to anyone reading the draft order that it did not provide for a clean break but for nominal maintenance only after Mr Ashby reached the age of 60. Thus, the deferment of any obligation to pay the £425 per month to his wife until she obtained full time employment was of considerable benefit to Mr Ashby, particularly as it was then his view that she would be highly unlikely to obtain any full time employment. Thus, he would receive an enormous benefit from that in financial terms.

58. So far as nominal maintenance as opposed to a clean break is concerned, she would have had the right to seek to re-open maintenance but it would only be in exceptional circumstances - for example, if Mr Ashby won the pools or the lottery and received a

substantial sum as a result - that she would be likely to persuade the court that it was appropriate to re-open the matter. Thus, it was Mr Smith's view that looked at overall the deferment of any obligation to pay immediate maintenance was such a benefit to Mr Ashby as justified him in agreeing only nominal maintenance as opposed to a clean break. That was particularly so because the alternative, since the wife's solicitor was not willing to agree to a clean break, was that if negotiations were not successful the matter would have to go to the court with added costs to be incurred. And Mr Smith took the view that if it did go to court Mr Ashby was unlikely to do any better, and indeed the court might look again at the deferment provision in relation to maintenance.

59. It seems to me that that view formed by Mr Smith cannot properly be regarded as incompetent or in any way negligent. His view was that Mr Ashby's position was properly protected. This was central to Mr Smith's case. But the tribunal did not in terms, when giving its reasons for finding against him, refer to this.

60. The case then turned upon the allegation that he had told both Mr Ashby and Mr Douglas that the draft order did contain a clean break. It was said that he referred to paragraph 9 of the order. The reality is, as the appellant said, it would have been absurd for him to have told the solicitor and the client what he is alleged to have told them. Mr Douglas was a qualified solicitor. He could have and indeed did have the opportunity of seeing the draft, and Mr Smith had read through the provisions. Mr Smith says in his statement that he may well have said that the consent order gave Mr Ashby what was effectively a clean break, but since Mrs Ashby's solicitor would not agree to a clean break and Mr Smith believed that if the applications failed and his case had to be fought, apart from the expense of costs, a better deal could not have been achieved.

61. It seems to me to be clear beyond any doubt that the appellant's account is more probable since to have asserted that there was a clean break in the consent order - which Mr Douglas could, and did, hear and see - would have been ridiculous. In any event, in judging his competence, the tribunal ought to have regard to the full picture and to the overall reasonableness to Mr Ashby of the order. This it failed to do.

62. There was considerable focus on the attendance note that Mr Douglas said that he had produced from the notes that he made at court. There was an issue raised on Mr Smith's behalf as to whether that attendance note was indeed based on contemporaneous notes which had disappeared or had been brought into existence later. But it is perhaps instructive to refer to certain parts of it. First, it does not anywhere say that the assurance alleged was given either to Mr Ashby or Mr Douglas. It refers to the negotiations. It says that the bottom-line figure would be £350 (that is current maintenance). Mr Douglas suggested that it should be a term of maintenance, and suggesting that the cut-off point should be 60 for substantive maintenance whereby it would revert to a nominal order

until 65 at which point all claims against each other should be dismissed.

63. The other side went with that although they were still maintaining it would like more than he was prepared to offer. This was said to be the full amount. That cannot be right if it was to be a total clean break for maintenance. There was however a clean break for everything else. It may be that that is what is to be preferred.

64. Mr Douglas then put a figure of £325 per month as the figure that was in reality to be applied. That is clearly an error for £425. The suggestion was made that it may have been a typing error. He concludes as follows:

    i. "Discussing matters with Mr Ashby outside the court, what had happened and what the implications were, and he said he was happy that it was finally all over and felt he could live with the £325 [it should be £425] a month spousal maintenance. MD [Mr Douglas] saying that from their point of view it was a disastrous day because they had to have such a significant climb down on what their stated position was and undoubtedly his wife would be extremely upset about the fact that she would have to go and get full-time employment before the maintenance even kicked in. Mr Ashby said that he felt she would be seeking full time employment. But obviously it is not as easy as just wanting to have a job. There needed to be a suitable position available."

65. So it was clearly Mr Douglas's view, just as it was Mr Smith's, that the deferment of maintenance until his wife obtained full time employment was a really important benefit to Mr Ashby. It has been said it would not have helped her to receive maintenance while she was on benefit because all that would have happened was that her benefit would be pro rata reduced. Whether or not that is correct, the fact is, from Mr Ashby's point of view, it was important because it meant that he had to pay nothing. So it was a real benefit to him.

66. It is to be noted that Mr Douglas's attendance note concludes:

    i. "In court 30 minutes. Discussions with client, 2 hours; negotiations 1 hour."

67. That is, no doubt, to form the basis of costs to be claimed from the client in relation to his attendance. Thus, for him to say "I was not in any way involved in any negotiations" simply does not accord with what he says in that attendance note. That is a point that was

not specifically taken up before the tribunal. But it is clear beyond any question.

68. It seems to me that what I have indicated casts real doubt on the validity of the adverse findings on charge 1.

69. I do not need to deal with the arguments about whether the tribunal were correct to accept the solicitors' evidence against the appellant's, relying on their respective demeanour and the content of their evidence. Suffice it to say, for the reasons already set out, I am clearly of the view that to accept their accounts does not accord with a sensible view of what had taken place at the county court. There are also questions to be raised about the attendance note of Mr Douglas and the evidence that he gave.

70. Further, the absence of Mr Ashby made all those findings wholly unsatisfactory. I suspect that it may well be that the appellant might not have made as clear as he should have done to Mr Ashby that, albeit there was no clean break, the overall agreement was so obviously favourable to him that that created no difficulty. It is apparent Mr Ashby thought he had had a clean break, and when he raised this with his solicitors they were undoubtedly concerned that they might face a claim from him. Thus, they indicated to Mr Smith that they wanted an explanation from him and that a complaint was likely to be made.

71. Mr Justice Spencer made the point that it was possible in deciding whether serious misconduct was established to look at both the charges since, albeit they dealt with different matters, they arose from the same basic circumstances.

72. There have been detailed arguments based on the correspondence between Mrs Jennings and Mr Smith. One problem was that Mr Smith was on holiday during at least part of the period in September and early October 2010 when Mr Douglas was raising concerns and seeking from Mr Smith to know whether he had agreed that there should be a clean break, so the consent order was wrong. The e.mail of 7 October is from Mr Smith to Mr Douglas. It deals with letters which had been sent on 27 September and 6 October.

73. The letter of 27 September arose because there had been a suggestion or rather an attempt to persuade Mrs Ashby's solicitors to amend two matters in the order: one was an obvious typing error in relation to the amount from the matrimonial home (it was said to be £10,000 and should have been £80,000) and there was difficulty about that; the other was to seek to obtain their agreement to include a clean break at the age of 65. That of course they were unwilling to do. In the letter of 27 September Mrs Jennings asked Mr Smith whether he recalled confirming to her and her partner Matthew that there would be a clean break after 65, as had been discussed with Mr Ashby. It went on:

    i. "Do you recall your discussion with my partner Matthew after the

order was drafted asking you to confirm that there was a clean-break provision after 65? Matthew really specifically asking you if the order did contain such a provision and you confirming it did and on this basis Mr Ashby signed the order believing it to have a clean break at 65. Obviously the way we proceed will depend on your answers to these questions."

74. There was a follow-up letter when no response had been received on 6 October.

75. There were two e-mails on 7 October, the first of which said:

i. "Dear Mr Douglas

ii. Thank you for your letters dated 6 October and 27 September, the first of which was answered from on holiday, the second of which I have only recently received upon my return .....

iii. I note these are sent via chambers' external clerks; our direct address is as below, as indicated previously.

iv. I further note you have apparently not obtained a copy of the original draft order from the court as advised by me; seemingly accepting any mistake was ours.

v. So far as I recall, the order as issued is substantively as agreed on the day and I have no issue with it in any event; and I repeat my previous comments.

vi. My position could not be clearer.

vii. I am afraid I simply cannot assist further and I also note my fee note is still outstanding."

76. The second e-mail later that day refers to a message from Mrs Jennings which indicated that "this matter will not go away". He said:

i. " ..... you merely need to know (a) that there was a conversation about a clean break; (b) there was not a conversation ..... "

77. or he did not recall. He said:

i. "I am happy to indicate (a) [that is there was a conversation]. Needless to say, even without the so-called 'mistake' the order would not amount to the same!

ii. Now perhaps you'll settle my outstanding fee.

iii. And can I ask that you do not contact me about this matter, or indeed any other matter, again."

78. The response by Mrs Jennings was that she intended to take this matter up through his chambers' complaints procedure and she found his response offensive and not in accordance with the standards one would expect from a member of the Bar. She asked him for a straight answer to the question:

i. "'Did you agree with the representative of Purcell [solicitors on behalf of Mrs Ashby] that there was to be a clean break when Mr Ashby reached 65?' I cannot see how I can make the question any more straightforward than this. Either you agreed a clean break ..... or you did not."

79. It is clear that Mr Smith did not deal with the correspondence as sensibly as he should have done. It was and has always been his case that the draft order properly reflected what had been agreed and that he had never asserted, either to Mr Douglas or to Mr Ashby, that it contained a clean break in relation to maintenance. It did of course contain a clean break in respect of everything else and nominal payments in respect of

maintenance. His conduct might well properly have been regarded as breaching paragraph 701, and not such was to be expected from a barrister acting as he should have done. But in my view, looked at on its own, it could not reasonably have been regarded as justifying a finding of serious professional misconduct.

80. No doubt Mr Smith was upset that it appeared to be suggested that he had misled his lay client Mr Ashby, and that allegations were being made against him which had no substance whereas he had obtained for Mr Ashby what was, overall, a very beneficial order. But that feeling, which obviously intensified (it is very clear) when he gave evidence at the tribunal, should not have led him to deal with the complaint in the manner that he did. It would have been so easy for him to have given a straight answer to the question albeit he did make clear that the consent order was what had been agreed.

81. In allowing this appeal, it is to be left to the BSB to decide whether a fresh hearing should take place.

82. I think I have made clear my view that charge 1 could not be proved. And, in any event, at this late stage to require Mr Ashby to give evidence would not be in his interests or in the interests of ensuring that barristers' behaviour is in accordance with the Code. I have, therefore, no hesitation in recommending that no further action be taken against Mr Smith, particularly as the BSB has seriously mishandled this case throughout the proceedings against Mr Smith.

83. MR JUSTICE COLLINS: Mr Beaumont, I have received a note about costs. There is no problem about an order that you have the costs of the appeal or your client has the costs of the appeal, to be the subject of assessment if not agreed. Were there any costs orders made by Mr Justice Spencer at the Court of Appeal? Obviously, they will have to be offset? One would imagine that he did make an order for costs.

84. MR BEAUMONT: It was not the Court of Appeal. I was going to mention two factual errors that I ought to correct whilst I am here. The first is that the hearing before Sir Maurice Kay was not in the Court of Appeal. He was sitting, effectively as a directions judge with, I think, a lay member of the Panel.

85. MR JUSTICE COLLINS: I will correct that.

86. MR BEAUMONT: Under the old Code there was an internal review procedure. It is not a CPR procedure.

87. MR JUSTICE COLLINS: I had assumed wrongly. I will correct that.

88. MR BEAUMONT: There was a second point relating to charge 2. That is that we did not fail wholly before Mr Justice Spencer. I did manage to get two parts - - - - -

89. MR JUSTICE COLLINS: Yes. You got a reduction or rather a postponement or removal of some of the dates.

90. MR BEAUMONT: Two of the alleged complaints were removed under the first limb.

91. MR JUSTICE COLLINS: Obviously - at least I imagine - Mr Justice Spencer must have made some order, or been asked to make some order, in relation to costs. I think you ought, between you, to investigate that.

92. MR BEAUMONT: My impromptu answer is that I do not think he did. I would have to check. The decision is at the back of the second bundle.

93. MR JUSTICE COLLINS: I have a transcript but I do not think it deals in any way with costs, does it?

94. MR BEAUMONT: I do not think so. The BSB would not have had any costs; that is the first point. So no costs to pursue. I do not think a costs order would have been made. Certainly, it would not have been made in favour of the BSB.

95. MR JUSTICE COLLINS: No. I saw that. On the other hand, it may be thought that, looking at the position overall, to some extent if Mr Justice Spencer made no order I should at least take account of those costs as to whether you ought to be able to recover those.

96. MR BEAUMONT: It is envisaged and agreed between leading counsel that the costs below should be subject to written submissions. That is a point that could be swept up in those.

97. MR JUSTICE COLLINS: Could you? Because I think that is also an aspect that ought to be taken into account. There is no question of setoff but it may be that consideration should be given - and certainly the BSB should be entitled to consider whether they want to raise any arguments - as to whether you should be entitled to any costs of those hearings, both before Mr Justice Spencer and Sir Maurice Kay.

98. MR BEAUMONT: Yes. And, as I understand, the central defect under count 1 as found by your Lordship relates to the short-term events at trial.

99. MR JUSTICE COLLINS: Yes.

100. MR BEAUMONT: Namely, the Ashby statement being held to be admissible.

101. We are asking your Lordship, as you have seen from leading counsel's note, to make an order that reflects the appeal costs and also an interim order (payment on

account). I think you have seen the schedule attached to the - - - - -

102. MR JUSTICE COLLINS: Yes. I have. This is one of the dreadful things about this case. The costs are enormous. I am not suggesting they are unreasonable for the work done necessarily but they are appallingly high.

103. MR BEAUMONT: The insurer, certainly so far as the barristers are concerned, imposes hourly rates that are far below market rates actually. So in fact, in that sense, the costs could be even worse.

104. MR JUSTICE COLLINS: I am not criticising the amounts. All I am saying is that when one looks at the overall costs it is appalling because I think if the full circumstances had been known it might well be that the sensible thing would have been to follow the recommendation of the ombudsman. The BSB comes out of this frankly with egg all over their faces.

105. MR BEAUMONT: Yes.

106. MR JUSTICE COLLINS: It has not been handled - I said it in the judgment - as it should have been. Equally, I am afraid that the tribunal decision is a very poor one - but there we are. I am surprised because the chairman or chairwoman obviously has considerable repute. There we are.

107. What about this interim payment?

108. MR BEAUMONT: Exactly. The figure envisaged by Mr Treverton-Jones in his note is £40,000.

109. MR JUSTICE COLLINS: This is for the solicitors, is it not? This is for the insurers?

110. MR BEAUMONT: Yes, essentially.

111. MR JUSTICE COLLINS: I see no reason why I should make an immediate order. That can be included in the matters to be raised in written submissions.

112. MR BEAUMONT: I suppose the insurers would say in response to that is that this is a cost that falls on the Bar at large.

113. MR JUSTICE COLLINS: I follow that but we are talking about fourteen days, twenty-one days.

114. MR BEAUMONT: Yes.

115. MR JUSTICE COLLINS: I think it is probably more reasonable to wait and see what can be agreed, if anything, on that aspect. That may have some bearing, I suppose, on whether the costs of the hearing before Mr Justice Spencer and Sir Maurice Kay can be - - - - -

116. MR BEAUMONT: Stripped out.

117. MR JUSTICE COLLINS: - - - - - recovered, stripped out.

118. MR BEAUMONT: Yes.

119. MR JUSTICE COLLINS: So how long do you think will be needed?

120. MR BEAUMONT: In the note the suggested direction was actually very tight.

121. MR JUSTICE COLLINS: I do not think it needs to be quite as tight as that.

122. MR BEAUMONT: I thought I read seven days somewhere.

123. MR JUSTICE COLLINS: It does say seven days.

124. MR BEAUMONT: May be we should say fourteen.

125. MR JUSTICE COLLINS: I think fourteen. Fourteen plus fourteen.

126. MR BEAUMONT: Yes. You never know what might intercede in life generally.

127. MR JUSTICE COLLINS: Obviously, it can be done a bit more quickly. But I do not think that will overburden the Bar. Reply seven days after. So effectively the maximum is five weeks. Obviously, it must be before the end of term.

128. MR BEAUMONT: Yes. Seven days will expire on 8 December - I think that is just within.

129. MR JUSTICE COLLINS: That is fine. We will leave it at that. Thank you for your assistance.

130. MR BEAUMONT: I am most grateful.

131. MR JUSTICE COLLINS: This was obviously not an easy case to have to deal with.