Case No: C1/2014/0748

Neutral Citation Number: [2015] EWCA Civ 12
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
The Rt Hon Lord Justice Moses
CO/4904/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 20th January 2015

Before:

THE RT HON LORD JUSTICE BURNETT
THE HON MR JUSTICE NEWEY
and
THE RT HON DAME JANET SMITH DBE

- - - - - - - - - - - - - - - - - - - -

Between:

R on the application of McCarthy	**Appellant**
- and -	
(1) The Visitors to the Inns of Court	**Respondents**
(2) The Bar Standards Board	

- - - - - - -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- - - - - - -

David Reade QC & Chris Quinn (instructed by **Weightmans LLP**) for the **Appellant**
Paul Nicholls QC & Tom Cross (instructed by **Berrymans Lace Mawer**) for The Bar Standards Board

Hearing date: Tuesday 9 December 2014

- - - - - - -

Judgment

Lord Justice Burnett:

Introduction

1. The issue in this appeal is whether the decision of the Visitors to the Inns of Court ("the Visitors") dismissing Mr McCarthy's appeal from the Bar Disciplinary Tribunal ("the Tribunal") should be quashed with a view to the underlying matter being remitted to the Tribunal. The Tribunal disbarred Mr McCarthy ("Counsel") following a finding that after a dispute had arisen he had fabricated letters setting out his terms of work to a client for whom he acted under direct access provisions, rather than before the work was done. At the relevant time, Rule 6 of the Public Access Rules required a client care letter to be sent in advance in respect of each piece of work detailing the terms of work and fees. These are known as "Rule 6 letters".

2. Counsel's appeal to the Visitors was pursued on a number of grounds, all bar one of which have fallen away. The live ground of appeal was that there had been unfairness by the Bar Standards Board ("the BSB"), which prosecutes disciplinary cases against barristers, in failing to disclose a statement of the principal witness against him. The witness provided two statements but only the second was disclosed. By a majority of two to one that ground failed before the Visitors and the appeal was dismissed. The decision was challenged in judicial review proceedings heard by Moses LJ sitting at first instance on a rolled-up hearing. By an order dated 25 October 2013 he dismissed the claim for judicial review. However, he concluded that the failure of the BSB to disclose the statement was a breach of the rules governing proceedings in the Tribunal and also that the failure was procedurally unfair. Rule 7 of the Disciplinary Tribunals Regulations requires the BSB as soon as practicable to supply the barrister concerned with a copy of the evidence of each witness intended to be called and with a list of documents to be relied upon. The Tribunal was unaware of the failure at the time of its determination but it formed one of the grounds of appeal before the Visitors. The Visitors were highly critical of the conduct of the BSB. Moses LJ concluded that the Visitors should have subjected the undisclosed evidence to analysis by comparing it with the evidence found in the statement from the witness which was disclosed in the course of the Tribunal proceedings. He concluded that the unfairness was carried into the hearing before the Visitors.

3. The question then arose whether to quash the decision of the Visitors. Moses LJ concluded that the outcome of the Tribunal hearing could not possibly have been different even if leading counsel then appearing had been able to cross-examine the witness on the undisclosed statement. In those circumstances he granted permission to apply for judicial review, but refused to quash the Visitors' decision. However, he declined to award the BSB its costs.

4. Counsel's case is that Moses LJ should have quashed the decision of the Visitors given the unfairness identified. None of his conclusions relating to fairness or breach of the relevant procedural regulations has been challenged by the BSB in this Court. The respondent's notice takes issue with the costs order. By way of cross appeal, the BSB suggests that Moses LJ should have ordered Counsel to pay its costs.

The Facts in Outline

5. There were six charges before the Tribunal, all of which arose out of Counsel's representation of an employee of an investment bank in Employment Tribunal proceedings. She has been referred to as ST throughout the various proceedings. Her husband, who was the witness whose first statement was not disclosed, was referred to as TA. Charges three, five and six related to poor record keeping and were admitted by Counsel. Charge four alleged discourtesy in the way in which he dealt with the complaint from the client. The Tribunal found that proved and it is not suggested that the unfairness found by Moses LJ had any bearing upon this finding. Charge one alleged that Counsel produced four Rule 6 client care letters in response to a request from the BSB after the complaint had been made which he falsely asserted were sent in compliance with rule 6, when they were in fact recent creations. This is a charge of fabrication or forgery. Charge two alleged a failure promptly to send a Rule 6 letter.

6. Counsel disputed the first two charges on the simple basis that the letters he had produced to the BSB were indeed proper Rule 6 letters sent before the pieces of work to which each referred was done. A failure to send a Rule 6 would undoubtedly be viewed as serious misconduct; but it was the allegation of subsequent fabrication which took this case into the realms of misconduct which justified Counsel being disbarred.

7. The dealings between Counsel and TA and ST were cordial to begin with. TA first approached him on 16 May 2008. The client and her husband paid for two conferences, various preparation work, the brief fee and refreshers. However, there was immediate confusion about whether there had been an overpayment, whether VAT had been paid and thus how much Counsel was due to rebate to ST. It was TA who had dealt with Counsel on his wife's behalf throughout and he who conducted the email correspondence thereafter trying to sort out the problems. Acrimony developed resulting in mistrust and eventually allegations of bad faith, including financial bad faith on the part of Counsel. ST thought Counsel had been overpaid and that he was avoiding his obligation to make a refund. It was that which led ST to make her complaint to the BSB. I pause to note that the complaint originally made by ST suggested that the case had been settled without her knowledge or instructions, but somehow unilaterally on the instructions of her husband. That allegation melted away.

8. At the outset of the dealings there was an exchange of emails which discussed fees. A conference took place on 13 June. Counsel quoted a fee of £175 per hour plus VAT. On 9 June Counsel estimated that the fee for the conference would be £612 plus VAT, making a total of £719.18. That represented three and a half hours' work. It was paid by TA on 11 June 2008. The email in which that information was communicated by Counsel referred to the need for him to provide a Rule 6 letter for ST's signature and return. In due course, when TA and ST disclosed into the disciplinary proceedings the extensive email exchanges they had with Counsel, that email was missing. On Counsel's behalf it was suggested that this was not accidental but a deliberate withholding of evidence which was inconsistent with their account that no such letter was sent.

9. Following the conference there were exchanges of emails and telephone calls which identified a further five hours work for which £1,028 (£875 plus VAT of £153) was

paid. On 10 July emails suggested that the five hours had been almost used. TA agreed to make a further payment for the next stage. There was a dispute about whether there was an agreement by TA to pay a further £5,000 plus VAT, although not about whether there was a discussion to that effect. On 16 or 17 July (the email is undated) TA recorded that the Employment Tribunal hearing was due to start on 28 July and that he would drop off a cheque for £5,000 at Counsel's chambers. Counsel protested that he had expected £5,000 to go into his bank account on 10 July and that this money was separate from the brief fee, which would be another £5,000. A case management hearing was also listed. The email exchanges show that by this stage there was at the least confusion over the sums due to be paid to Counsel. TA dropped off another cheque for £5,000 but the bank transfer also went through. In an email of 23 July Counsel raised a query over VAT and suggested that as a result he owed ST and TA £900 but indicated that he would soon be due another £4,000 plus VAT to cover the expected four refreshers at £1,000 a day. It is common ground that the hearing was listed for a total of five days: 28 July to 1 August inclusive. ST paid a further £4,700 on 24 July.

10. The Employment Tribunal heard evidence over four days and reconvened on the fifth to give its decision and deal with remedy. The conclusion was that ST had been unfairly dismissed but a claim for racial discrimination was dismissed. The monetary award was settled between the bank and ST without a determination from the Employment Tribunal.

11. As soon as the proceedings were over Counsel promised to reconcile the fee payments with a view to making a refund of whatever was due. He failed to do so and was chased by both ST and TA. On 5 September Counsel emailed ST saying that he thought £179 was the sum he owed. By 12 December he was offering to repay £4,700. On 12 January 2009 TA suggested that the refund due was £9,125. Throughout this period Counsel had made no reference to the Rule 6 letters but rather, from time to time, was asking the client's help to establish precisely what was agreed and what was paid. On 30 January 2009 Counsel sent an email saying that he had provided a letter setting out his fees, which was thereafter amended, but that no signed copy was ever returned. The overall position as Counsel saw it was that the client was due a refund of £5,000 less VAT.

12. On 3 February 2009 TA responded by saying that no such letter was ever provided. He asked for a copy. He also engaged in a detailed explanation of how much he thought was due. The email exchanges continued. On 16 February Counsel suggested he had sent all the papers back to ST but that he was "certain" he had kept a copy of the letter. She too said that no such letter had been provided. On 19 February TA made his first allegation directly to Counsel that he had fabricated his account of sending a Rule 6 letter. On the same day ST made her complaint to the BSB. Counsel was not notified of that by the BSB until 20 April 2009. In the meantime there were continuing email exchanges. On 20 February Counsel said he would search for the letter. He also threatened to make a complaint to the Financial Services Authority about TA's conduct. TA, who is himself a barrister, worked for the FSA. On 27 March he wrote asking whether TA had found it. On 30 March TA replied saying he had not found it because it did not exist. He asked Counsel for it again in an email dated 8 April.

13. On 29 April 2009 the BSB asked Counsel for his comments upon the complaint. He provided them on 22 May. He enclosed no Rule 6 letter. The BSB asked for the letter. That prompted Counsel to send the four Rule 6 letters which became the subject of charges one and two.

The Letters

14. In June 2004 the General Council of the Bar made available a model Rule 6 letter designed to act as a template which could be adapted to suit the circumstances arising. The four Rule 6 letters in issue in the disciplinary proceedings are undated and do not bear the name and address of the client. Neither do they identify Counsel by name. Instead, each appears to be a photocopy of that model which was then subject to handwritten amendments. For example, the model contemplates the barrister thanking the client for a "letter of [insert date]" or "phone call on [insert date]". In the letters produced by Counsel one or other is struck through and sometimes a reference to "emails" added, albeit with no indication of the date of any communication from the client. Paragraph 4 contemplates the barrister identifying the work he has agreed to undertake. The fee section of the letter gives three suggested options. The first is for a fixed fee for advisory and drafting work; the second for attending a hearing and the third an hourly rate in respect of work which cannot be quantified in advance. Counsel gave evidence to the Tribunal of the dates upon which he says he sent them. In summary, they provide:

    i) The first letter refers to "Preparation and advice in conference" which has been hand written in paragraph 4. The model has an option which reads "My fee for the advisory and drafting work described in paragraph … will be a fixed fee of £ … plus VAT". The number "4" has been inserted in the first space together with 719.18 after the pound sign. That is the total for a fee of £675 plus VAT at the rate applicable at the time. The hand written amendments suggest it was provided in response to an undated telephone call. Counsel's evidence was that this was sent on 11 June 2008;

    ii) The second letter was amended to thank the client for "emails and phone calls". In paragraph 4 it identified the work as "preparation for and advice in conference". The monetary sum inserted was "1028" although once again this was a VAT inclusive figure for five hours work. Counsel's evidence was that this letter was sent on 13 June 2008;

    iii) The third letter apparently responded to "emails". Five pieces of work were identified in paragraph 4 namely "(1) advice and drafting of witness statements, (2) advice on procedure and bundles, (3) prep for CMD, (4) advice and representation on WP docs, (5) advice on issues." The fee inserted was "5,000". Counsel's evidence was that this was sent on 16 or 17 July. The "CMD" was the case management hearing and the "WP docs" referred to an issue resolved by the Employment Tribunal on written representations whether certain documents headed "without prejudice" should go into the hearing bundle.

    iv) The fourth letter responded to "emails and phone calls". It identified the work as "representation at Central London ET (28 – 31 July 2008)". The fees section of the model was completed as follows:

> "**Option 1:** My fee for the advisory and drafting work described in paragraph 4 will be a fixed fee of £* plus VAT. You and I agree that I will not send to you the work you have instructed me to draft until you have paid the fee.
>
> * Brief: (£5,000) Refresher: £1,000 per day."

In this fourth letter Counsel adapted the same Option 1 as he had for the others, even though the use of Option 2 would have been more appropriate.

The Tribunal Proceedings

15. Counsel provided his response to the complaint which in turn was sent to ST for comment. The BSB then made preparations for the hearing itself. No statement was ever taken from ST but TA provided a 49 paragraph statement in June 2010. He did not sign or date it but a decision was taken by the BSB not to disclose it. The reason was candidly stated in a letter to ST dated 27 July 2010:

> "We have decided that we will not disclose Tim's witness statement until shortly before the hearing date. This will remove the possibility of Mr McCarthy fitting his case around that statement."

The point was repeated in another letter of 26 August 2010. Instead, directions were agreed which enabled the 'prosecution' case to be presented in a bundle of documents (i.e. the complaint, the responses and the disclosed emails etc) with ST and TA attending for cross-examination, but with provision for the BSB to serve further evidence in advance of the hearing. Counsel was required to serve statements and any documents on which he relied by 31 July 2010.

16. It was in those circumstances that Counsel served his detailed statement and bundle without sight of TA's first statement. TA was then provided with a copy of Counsel's statement and bundle. TA's second witness statement of 158 paragraphs dated 29 October is an amalgam of evidence properly so called, comment and argument intended to demolish Counsel's defence to the charges, rather than to provide unvarnished evidence. It was this document that stood as TA's evidence in chief. The first statement remained undisclosed.

17. What happened was extraordinary. A conscious decision was taken by an official at the BSB which had the effect of subverting the rules which provide for disclosure and furthermore suggested that he was blind to any sense of fairness in the conduct of a disciplinary prosecution. To my mind, that was compounded by inviting a witness to assume the role of surrogate prosecutor by producing a statement of the sort I have described. Moses LJ drew an analogy between disciplinary proceedings of this nature and criminal proceedings. To my mind that is entirely apt, if not exact, and supports the suggestion that scrupulous standards are required of the BSB acting as prosecutor. This Tribunal was concerned with very serious allegations which had the potential to destroy a professional reputation and bring to an end a professional career, even though its decision could not result in a criminal conviction.

18. The decision of the Tribunal was drafted by His Honour Crawford Lindsay QC, its chairman. He recounted the evidence given by TA, including his explanation for omitting to disclose the email of 11 June referring to the need for a Rule 6 letter (and

others). Both he and ST had made allegations of dishonesty against witnesses in the Employment Tribunal proceedings but both denied that they were apt to make such allegations whenever they were in dispute with someone. ST could not explain why the email had been omitted from the documents she and TA produced. Both gave unequivocal evidence that they had not received the Rule 6 letters. Counsel was cross-examined about the content of the Rule 6 letters. He explained that he chose to send versions of the model letter amended by hand because he was not computer literate. He observed that if they had been forgeries he might have made a better job of them by inserting names, dates and avoiding confusion over the VAT element of the fees. He accepted that he made no reference to them as the dispute about fees evolved after the end of the Employment Tribunal proceedings and that when he first made a reference to Rule 6 it was to "a letter", rather than multiple letters. He accepted that the fourth letter's reference to a four day hearing was a mistake but was one that he made at the time. He explained how and where he had found the letters, after being unable to locate them initially.

19. The conclusion of the majority of the Tribunal was recorded as follows:

> "41. There is no avoiding the fact that on charges 1 and 2 the Tribunal has to decide whether [TA] and his wife or Mr McCarthy have told the truth. The Tribunal has reached the conclusion that [TA and ST] were truthful and that Mr McCarthy was untruthful.
>
> 42. Mr MacPherson QC submitted that [TA] was an unreliable witness and made a number of complaints about his behaviour consistent with the terms of his cross-examination.
>
> 43. The Tribunal has considered these criticisms in detail and rejects them. [TA] was not a particularly appealing witness and he came across as controlling and obsessive. Nevertheless, he was fastidious and precise on issues of detail and was anxious to ensure that he gave evidence that was accurate and consistent with the relevant documents.
>
> 44. It is not necessary for the Tribunal to resolve many of the factual disputes between him and Mr McCarthy. It may also be the case that [TA] was on occasions prone to make allegations in relation to his wife's proceedings … which were not supported by cogent evidence. Nevertheless Mr McCarthy had been overpaid and it was entirely clear that [TA] wanted to resolve the financial disputes between them. In his evidence he made concessions about the lack of authority, which he accepted was an unfair point, and he maintained that he did not deliberately fail to disclose the unhelpful e-mails. The Tribunal does not accept that there was any deliberate withholding of unhelpful e-mails by [TA]."

The Tribunal later accepted that when Counsel referred to the need to send Rule 6 letters in an email not produced by TA he may well have intended to do so. Nonetheless it concluded that none was sent and those later produced to the BSB were forgeries.

The Judgment of Moses LJ

20. Moses LJ noted that there was "a clear difference between the account given by TA in his draft statement as to what his wife thought he was paying for at different stages and the account given in the subsequent signed statement." He considered that the differences between the two statements "might reasonably be considered *capable* of undermining the [BSB's] case in that it might have an impact upon the witnesses' accuracy and credibility." (paragraph 20 - original emphasis). He noted that the Tribunal considered TA's accuracy and fastidiousness were relevant features of his evidence. Having found that the BSB failed to comply with the relevant regulation relating to disclosure and were guilty of common law procedural unfairness (which also infected the hearing of the appeal before the Visitors) the judge then identified the question which would deliver the answer to whether the decision of the Visitors should be quashed:

> "But there still remains the question whether the loss of the opportunity to test TA's evidence by comparing the draft statement …with the statement of 29 October and of challenging TA about the comparison could possibly have made any difference to the result. I deliberately put the test higher than that used by the Visitors. They took the view that the evidence against Mr McCarthy was "extremely powerful". I would attach the higher test in the light of the unfairness I have identified. Unless it can be said that there was no real possibility of any alternative result then in my view the decision of the Visitors ought to be quashed." (paragraph 35)

21. With reluctance, Moses LJ concluded that that there could be no alternative result. There was no rational explanation for the failure to refer to or rely upon the Rule 6 letters in the course of the exchanges which followed the development of the confusion and then disagreement about fees after the conclusion of the Employment Tribunal proceedings. He considered Counsel's explanation that he had not searched for them early on and then only found them in his "Bar Council box" to be incredible.

Argument and Discussion

22. Mr Reade QC submitted on behalf of Counsel that the unfairness was such that Moses LJ was obliged to quash the decision of the Visitors. The failure to disclose TA's first statement amounted to a violation of article 6 of the European Convention on Human Rights, as well as a breach of rule 7 of the Disciplinary Hearing Rules and procedural unfairness at Common Law. He submitted that the Strasbourg Court would require a rehearing in those circumstances, having found a violation of article 6 based upon a failure in disclosure. Moses LJ applied the wrong test in the passage from his judgment quoted above. Mr Nicholls QC supported the approach of the judge and submitted that he came to the correct conclusion.

23. There is no difficulty in accepting the proposition that the civil limb of article 6 applies to professional disciplinary proceedings including those prosecuted by the BSB: see *Le Compte, Van Leuven and de Meyere v Belgium* (1982) 4 EHRR 1; *P (A Barrister) v General Council of the Bar* [2005] 1 WLR 3019. However, the claim for judicial review was not argued on the basis of article 6. Neither was any argument developed before us on the precise content of article 6 in the context of disciplinary proceedings relating to disclosure of draft statements. For my part, in those

circumstances I would not wish to determine the question whether the breach of rule 7 and procedural unfairness found by Moses LJ also amounted to a violation of article 6. Furthermore it is unnecessary to do so.

24. In my judgment the question whether a finding of non-disclosure in disciplinary proceedings calls for a rehearing is answered in the same way whether it is approached via the common law or article 6.

25. The ultimate question is whether the proceedings as a whole were fair. The significance of an infringement of article 6, or procedural impropriety of the sort which occurred in this case, depends upon the factual circumstances. In criminal cases involving article 6 the test was settled by the Supreme Court in *McInnes v Her Majesty's Advocate* [2010] UKSC 7, relying upon earlier domestic authority which in turn took full account of Strasbourg jurisprudence. In paragraphs [19] and [20] of his judgment Lord Hope identified two questions that fall to be considered in disclosure cases. The first is whether the material under consideration should have been disclosed. The second is the consequence of any failure to disclose. As to the second he said,

> "The test that should be applied is whether, taking all the circumstances of the trial into account, there is a real possibility that the jury would have arrived at a different verdict."

Both Lord Walker and Lord Kerr agreed with Lord Hope. Lord Rodger at paragraph [30] and Lord Brown at paragraph [35] expressed the test in slightly different terms, but to the same effect.

26. There is no reason to apply a different test in disciplinary proceedings when it is established that there has been material non-disclosure. Is there a real possibility that that the Tribunal would have come to a different conclusion had the disclosure been made? That involves a consideration not only of the content of the undisclosed material but also an evaluation of the various ways in which its disclosure might have affected the course of the proceedings. In substance Moses LJ applied this test. The question is whether his conclusion was correct.

27. The standard of proof required in the Tribunal proceedings was the criminal standard. Its members had to be sure before finding the charges proved. Mr Nicholls QC submitted that the Rule 6 letters themselves, when seen in the light of the email exchanges between Counsel and TA, establish conclusively that they were late fabrications. He did not shy away from the logical consequence of that submission, namely that it had been unnecessary to call either TA or ST in support of charges one and two. These were charges which could be established whatever Counsel might say about them. In short, Mr Nicholls QC relied upon the two VAT-inclusive figures inserted into the first and second Rule 6 letters, rather than net of VAT, as demonstrating that they were created later because the relevant sums had by then been paid. That was why Counsel had them in mind rather than the net figures. He submitted that the reference in the fourth letter to a hearing in the Employment Tribunal between 28 and 31 July similarly shows conclusively that it was written after the event because the substance of the hearing did indeed last only four days rather than five. He relied upon the absence of any reference to the letters as events unfolded and the eventual mention of "a letter" on 30 January 2009, rather than

"letters". For completeness I note that in his second statement TA subjected the letters to detailed analysis and argument in the light of email exchanges and his recollection of his dealings with Counsel to support the conclusion that all four were forged. Additional points were made by TA beyond those advanced by Mr Nicholls QC.

28. The BSB does not challenge the conclusion of Moses LJ that the first statement was capable of undermining TA's credibility and thus the BSB's case before the Tribunal. The Tribunal itself regarded TA's credibility as a significant feature of the case. One of the members of this specialist Tribunal was not satisfied that the account of TA and ST should be preferred over that of Counsel. The first statement, as Moses LJ recognised, was different as regards aspects of the detail. As importantly, the Tribunal found TA "fastidious and precise" in circumstances where he had the opportunity to study the detail of the evidence produced by Counsel before producing his second statement. His first statement was less comprehensive so the Tribunal was denied the opportunity to consider that finding in the light of additional relevant material.

29. These circumstances lead to the following conclusion. In the light of the central place TA's credibility occupied in the Tribunal hearing, that one member of the Tribunal would anyway have dismissed charges one and two, and that cross-examination on the first statement was capable of undermining TA's credibility given the differences between the two statements, there was in my judgment a real possibility that the Tribunal would have come to a different conclusion had disclosure been made.

30. That is not to deny that there was a strong case against Counsel. It was not the forensic points on the letters relied upon by Mr Nicholls QC that Moses LJ identified, but the absence of reference to the letters for so long after the dispute arose and then a wrong allusion to a single, rather than multiple letters. Those were undoubtedly powerful points independent of the conflict of evidence between Counsel and TA. Some of the forensic points relied upon by Mr Nicholls QC arising from the letters themselves may not be so powerful. The letters, whether written as they should have been before work was undertaken or fabricated later, are scrappy and inadequate. They do not suggest an author who was concerned to impress with neatness or accuracy. Whenever the first two were written, gross rather than net figures were inserted in the blank space for fees, an admitted error which of itself may say little about timing. The fourth letter referred to a four day hearing in the Employment Tribunal when on any view there was expected to be a fifth day, and there was in fact a hearing on the fifth day. Once again, that error may say little about when the letter was written. But all of these points will be for consideration in any rehearing by a Tribunal as fact-finders untrammelled by these observations or those of Moses LJ.

31. I would allow the appeal and invite submissions in writing on the appropriate form of order.

The Cross Appeal on Costs

32. It is unnecessary to consider the cross appeal in detail in view of my conclusion on the appeal. It is sufficient to observe that, had I come to the contrary opinion on the appeal, I would have dismissed the cross appeal. Before the High Court the BSB sought to maintain that its failure to disclose the statement did not breach the

procedural rules and did not amount to unfairness. Those arguments failed. They were maintained in the face of guidance issued by the BSB itself which required disclosure. The BSB lost on the substance of the claim for judicial review. Although he dismissed the claim for judicial review, as a matter of discretion, Moses LJ could have made a declaration in favour of Counsel without quashing the decision of the Visitors. It was well within the scope of his powers when considering costs to decline to make Counsel pay the BSB's costs and make no order.

Mr Justice Newey

33. I agree.

Dame Janet Smith

34. I also agree.