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Case No: CO/4904/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/2013

Before:

LORD JUSTICE MOSES

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Between:

Damian McCarthy	**Claimant**
- and -	
Visitors to the Inns of Court	**Defendant**
- and -	
Bar Standards Board	**Interested Party**

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- -

Mr Chris Quinn (instructed by **Weightmans Solicitors**) for the **Claimant**
The Defendant was not represented
Mr Paul Nicholls QC and Mr Tom Cross (instructed by **Berrymans Lace Mawer**) for the **Interested Party**

Hearing date: 30th July, 2013

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Approved Judgment

Lord Justice Moses:

1. The claimant was a barrister. On 4 March 2011 he was found guilty of producing forged documents and subsequently disbarred. By a decision dated 25 January 2012 that decision was upheld by the Visitors to the Inns of Court. He now seeks judicial review of the Visitors' decision.

2. It is unnecessary for the purposes of this judgment to provide detail of the facts found by the Disciplinary Tribunal and by the Visitors. The allegations of disciplinary offences arose out of a case in which a lay client had engaged this claimant by "Direct Access". By Rule 6 of the Rules relating to the engagement of a barrister in Direct Access, the claimant was required to send to the client a letter setting out the terms and fees on the basis of which he was prepared to be engaged in respect of each piece of work. The claimant was accused of providing legal services under the Direct Access scheme without sending a Rule 6 letter. When complaint was made to the Bar Standards Board he contended that he had done so, contrary to the allegation of his client, and produced four letters which he asserted were Rule 6 letters sent, as required, at the time.

3. The Disciplinary Tribunal presided over by His Honour Judge Crawford Lindsay QC heard evidence from the claimant's client and her husband and from the claimant. They disbelieved the claimant. They concluded that the documents said to have been sent were forged in the sense that they had been created subsequently. The Visitors, on a detailed review of the contemporaneous e-mails between claimant and client concluded, by a majority, that the decision of the Disciplinary Tribunal should be upheld. One member of the Visitors, however, took the view that so grave a breach of natural justice had occurred that it was "fair and reasonable to order a re-hearing". No reasoned decision was given by the minority. But it is on that very basis, breach of natural justice, that this application is brought. These defects in procedure were considered by the Visitors; they concluded that whilst the procedure adopted by the Board was, as they put it, "unacceptable", it did not lead to unfairness.

4. Prior to the hearing of the charges, the Bar Standards Board was required to serve a copy of the evidence of each witness intended to be called in support of the charges (Regulation 7(1)(a) of the Disciplinary Tribunal's Regulations 2009). The Bar Standards Board made a decision not to comply with that Regulation. By letter dated 27 July 2010 a senior case officer wrote to the claimant's former client who had complained about a number of matters including the absence of Rule 6 letters. The case officer sought to keep her up to date as to the progress of the complaint. Amongst other things he wrote:-

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

The reference to Tim was to the complainant's husband, himself a barrister, who had been heavily involved in the complainant's case and in the subsequent complaint. I shall refer to him as TA since there is every reason why he shall remain anonymous. He is in no position to protect himself. The letter's reference to "Tim's witness statement" was a reference to an unsigned witness statement containing 49 paragraphs

detailing the history of engagement and in particular the detail of the process by which the complainant's husband paid Mr McCarthy. There is a note on the witness statement that it was a draft "as at 4 June 2010".

5. By letter dated 26 August 2010 the senior case officer again referred to the complainant's husband's witness statement:-

> "Your husband's witness statement is yet to be signed and served, but we do not anticipate doing so until 28 days prior to the substantive hearing date so as to remove the possibility of Mr McCarthy doctoring his evidence to suit."

6. The claimant was assisted in the disciplinary proceedings by solicitors. On his behalf, they had agreed directions on 30 June 2010. In particular, they had agreed that the complainant and TA need not put in statements but should attend at the substantive hearing for the purposes of cross-examination. That agreement was reached on the basis that both were to assert that they had never received any Rule 6 letters. It was an agreement made on the part of the claimant's solicitors in ignorance of the fact that by that time a full statement had been obtained from the TA even though it had not been signed and was described only as a draft. The directions provided that 28 days before the substantive hearing, the Bar Standards Board should file and serve any additional evidence upon which it proposed to rely and that Mr McCarthy should himself, by 31 July 2010, provide to the Bar Standards Board copies of statements and documents upon which he wished to rely.

7. In obedience to that agreement Mr McCarthy filed what the Tribunal described as a substantial witness statement with exhibits detailing his account of his dealings with the complainant and TA. As a result of the agreement, after Mr McCarthy's statement of 158 paragraphs had been served, TA served a signed statement dated 29 October 2010. A number of those paragraphs responded in detail to matters referred to by Mr McCarthy in his witness statement.

8. In the Tribunal, where the claimant was not represented by Mr Quinn (who represented him before me), cross-examination was particularly focussed on e-mails passing between Mr McCarthy and his client's husband, TA. TA and his wife were adamant that they had received no Rule 6 letters. In the course of reaching their conclusion that Rule 6 letters had not been sent and that those which Mr McCarthy had produced had been "created subsequently" the Tribunal commented:-

> "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." [43]

The decision was reached by the Disciplinary Tribunal in total ignorance of the fact that the statement of TA, which it took by agreement as the evidence in chief, was not his first statement and that the agreement as to the order of statements was made when both Mr McCarthy and those advising him were quite unaware that the Bar Standards

Board had already obtained a statement from TA and had chosen deliberately not to disclose it because of the possibility that he would "doctor his evidence to suit".

9. By the time of the Visitors' hearing, where the claimant was represented by Mr David Reade QC and Mr Quinn, the claimant and his advisers had learned of the existence of the draft statement. Before the Visitors, the Bar Standards Board argued that Rule 7(1)(a) did not require the Board to serve the statements which it had obtained [65]. The Visitors rejected that submission. They held that the Rule did require service of statements of witnesses to be called and, importantly, that "essentially the Rule is consistent with the criminal process and requires service of evidence to be called as well as documents".

10. The Visitors' set out leading counsel for Mr McCarthy's reliance on the draft unsigned statement and their response:-

> "71. Has there in the result been any unfairness? Mr Reade devoted considerable time to comparing the witness statement in draft – which it seems was in draft before DM put in his statement and which he argues would have been likely to have been served if Rule 7(1)(a) had been followed – with the statement that was served and also with some of the e-mails. He suggests that TA's credibility would have been dented if that draft statement had been his evidence in chief. He submits that by reason of the BSB's approach, DM lost a potential forensic advantage.
>
> 72. The first point to make is that if the BSB had been forced to serve the statement of TA there would not have been any draft to compare that with. The second point is that if compliance with Rule 7 had been agreed, it is not clear what statement would have been put in. It could have been limited to a statement that the letters had not been received and evidence along the lines of 16th July e-mail or it could have been as extensive as the statement ultimately put in. The third point to make is that counsel for DM had the material he needed in the e-mails to expose TA and ST if they were to be exposed; there were points on which TA and ST were inaccurate and it was their demeanour in dealing with those points and the tone and contents of the e-mails on which the Tribunal would be assisted in considering whether TA and ST were being honest in saying they had not received the rule 6 letters. The extent to which TA tailored his statement as argued by Mr Reade following receipt of DM's statement is extremely limited, and would have been open to him when he came to give evidence in any event.

Conclusion

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

11. An important feature of that conclusion is the Visitors' rejection of any possibility of comparison between the draft dated 4 June and the signed statement of 29 October 2010. The Visitors' reference in the first sentence of paragraph 72 to the BSB being "forced to serve the statement of TA" is, it seems clear, a reference to the earlier statement of 4 June 2010. There was no previous draft of that statement and thus no basis for any comparison. In their second point, they again reject the possibility of comparison because "it is not clear what statement would have been put in".

12. It seems to me that the Visitors did not appreciate the proper scope and effect of Rule 7 as it applied to the procedure which was in fact adopted. In the light of the agreement which the parties had reached as to the directions and order of service of statements, TA's signed statement was served first, albeit after that of Mr McCarthy. In that circumstance, the Bar Standards Board was obliged to serve the earlier draft dated 4 June 2010. Of course, as the Visitors observed, if the draft had been signed and served, there would not have been any draft to compare it with. But there was no warrant for the Visitors to hypothesise. The draft was not the first statement served. The first served statement was dated 29 October 2010. Having chosen to adopt that course, it was incumbent upon the Bar Standards Board to serve, in pursuance of their obligation under Rule 7, any draft earlier statement which might reasonably be considered capable of undermining the Bar Standards Board's case against Mr McCarthy in that it was capable of undermining the credibility of the witness.

13. That that was the obligation under Rule 7 was a matter of controversy between the parties. The Visitors' decision makes no reference to any obligation to disclose the draft *once* the statement dated 29 October 2010 had been served. The Visitors proceeded on the basis that service in compliance with Rule 7 would have been limited to the provision of one statement. The content of that statement could then have been compared with the e-mails or any oral evidence (the Visitors' third point at [72]). But the Visitors never considered the obligation imposed by Rule 7 to disclose the draft dated 4 June 2010 once the statement dated 29 October 2010 had been served.

14. The reason why the Visitors never mentioned any such obligation is not difficult to find. The Bar Standards Board resolutely denied any such obligation. Far from accepting it, counsel then appearing on behalf of the Bar Standards Board, as recorded in paragraph 65 of the Visitors' decision, denied even that the Rule required service of the statement, let alone any service of a draft.

15. Following the decision of the Visitors, the Bar Standards Board, in its detailed Grounds of Resistance, accepted that it was "inappropriate" for it to enter into an agreement with the claimant that he should serve his own evidence first without informing him that it *was* in a position to serve a copy of the evidence it intended to call from TA (paragraph 23). But the Bar Standards Board persisted in denying that there was any obligation under Rule 7 to disclose the draft of the statement dated 4 June 2010. Indeed, Mr Nicholls QC, who conducted the hearing on behalf of the Bar Standards Board in a frank and fair manner, still denied any obligation to serve such a draft. He argued that the Bar Standards Board was under no greater duty than any other civil litigant to serve a draft statement of a witness.

16. After the hearing concluded the Bar Standards Board was good enough to send me, on 4 September 2013, a letter which contained a policy ultimately published in June 2012. That policy did not exist at the time of Mr McCarthy's Tribunal in March 2011. Mr Nicholls, apparently, had not been informed of the policy published in June 2012, over a year before he made his submission and the detailed grounds were drafted. That is in no way intended to criticise Mr Nicholls or his junior. The policy imposes a clear duty to serve a draft statement such as TA's dated 4 June 2010.

17. In any event, it seems to me beyond question that in disciplinary proceedings with the potential for such grave consequences, draft statements capable of being used to discredit a witness should be disclosed. After all, the Visitors themselves had recognised that Rule 7(1)(a) is "consistent with the criminal process" [66]. The criminal process, as the Visitors described it, had for nearly 80 years recognised the obligation to disclose statements which were potentially of use for the purpose of cross-examining witnesses. In *R v Clarke* Crim App Rep 22 1931, page 58, the Court of Appeal acknowledged an obligation to serve earlier written descriptions of identification for the purpose of cross-examination even though in that case Mr Curtis Bennett, for the appellant, acknowledged that there was no discrepancy in the actual documents. It is now, and has been for many years, well understood that, in criminal courts, draft statements of witnesses which might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused, are disclosable (see s.3(1)(a) of the Criminal Procedures Investigations Act 1996 and Attorney General's Guidelines).

18. The prosecution in criminal cases acknowledges that it is difficult for them to judge the extent to which any inconsistency might be deployed by the defence. No one responsible for the prosecution would hesitate in disclosing a previous draft of a statement such as that which was finally signed and served on 29 October 2010. After all, if there is no inconsistency, the prosecution has nothing to lose and if there is, there is no warrant for concealing it. I can see no basis why the position should be any different in relation to disciplinary proceedings brought on behalf of the Bar Standards Board and I find it hard to understand why there was any difficulty in recognising this obligation in March 2011 or why it took over a year to publish a

policy which did acknowledge that duty. The demands of elementary fairness impose such an obligation.

19. Accordingly, as now acknowledged in the Bar Standards Board's own policy, once they had chosen to serve a statement on 29 October 2010 they were obliged to disclose the earlier draft dated 4 June 2010. They did not do so. Nor did they acknowledge any such duty before the Visitors. In those circumstances, they bear the responsibility for the approach adopted by the Visitors. The Visitors should have recognised that the draft statement dated 4 June 2010 could have been deployed by Mr McCarthy to undermine and challenge the evidence of TA. The Visitors never even considered a comparison between the draft statement of 4 June 2010 and the signed statement of 29 October.

20. As I have already commented, views as to the extent to which the statements differed would undoubtedly vary. Both statements were consistent in denying that any Rule 6 letters had been sent. But 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. It is unnecessary for the purposes of this judgment to identify the full details. Counsel for Mr McCarthy asserts that the draft document was crucial as to TA's credibility. Whether that is correct or not, it seems to me plain that the difference might reasonably be considered *capable* of undermining the Bar Standard's Board case in that it might have an impact upon the witnesses' accuracy and credibility. That that was of importance can be demonstrated by the decision of the original Tribunal. The Tribunal considered the criticisms of TA. It commented, in the terms I have recalled [8 *supra*].

21. The first Tribunal based its acceptance of TA at least in part on his accuracy. Counsel for Mr McCarthy might have been able to undermine that impression by the use of the original draft statement. It is important to underline that the obligation to disclose that draft does not depend upon a final view as to the extent to which the discrepancies might be explained, or might undermine the essential issue as to whether Rule 6 letters had ever been sent. The Tribunal plainly thought that TA's accuracy and fastidiousness were relevant features of his evidence.

22. I conclude that the failure of Bar Standards Board to disclose the draft dated 4 June 2010 was a breach of Rule 7. Moreover, it was unfair. Of course, had there been no agreement as to the order of service of statements, there may have been no draft and no second statement. But that is beside the point. As a result of the Bar Standards Board's misleading conduct the agreement *was* reached. In the result, there were two statements, the latest signed version and an earlier draft. Both should have been available to Mr McCarthy to undermine, if he could, the precision and the weight of TA to which the Tribunal attached importance.

23. The question then arises as to whether this unfairness can be remedied by judicial review proceedings against the decision of the Visitors. Decisions of the Visitors are only amenable to judicial review if the Visitors have exceeded their jurisdiction, failed to exercise it, abused their powers or acted in breach of the rules of natural justice. In *R v Visitors to the Inns of Court ex parte Calder* [1994] QB 1 the Court of Appeal applied the principles applicable to charitable corporations identified in *Ex parte Page* [1993] AC 682 to the Inns of Court (see *Ex parte Page* 704 and *Sir Donald Nicholls V.-C.* 40F-41H).

24. It is significant that in *Ex parte Calder*, of the four grounds advanced by Miss Calder two were allegations of a breach of natural justice. The Court of Appeal concluded that the issue as to whether Miss Calder had had a fair hearing before the Disciplinary Tribunal was an issue *within* the Visitors' jurisdiction. Thus, the correctness of that decision was not amenable to judicial review. Stuart Smith LJ disagreed with the Visitors' views that there had been no unfairness. He said:-

> "I respectfully disagree with the views of the Visitors on this point (a point as to unfairness). But is this ground one upon which the Visitors' decision can be reviewed? If the breach of natural justice is on the part of the Visitors, then there is no doubt that their decision is reviewable. See…*ex-parte Page* 704F. But here the breach of natural justice was on the part of the Tribunal. The Visitors, in my judgment, erred in law in declining to hold that there was such a breach, but such an error of law appears to me to fall within their jurisdiction. However, in some cases a breach of natural justice at the trial stage will vitiate the appellant stage. But in *Lloyd v McMahon* [1987] QC 625, their Lordships, albeit *obiter*, said that where there is a full appeal by way of hearing on the merits, that will normally cure procedural error in the Tribunal appealed from." [58D]

25. The Court did, however, conclude the view that the Visitors had misunderstood their role since they thought they were a reviewing and not an appellate tribunal (see 42D-F).

26. The importance of this part of the judgment in *ex-parte Calder* is the recognition that even though the Visitors erred in law in declining to hold that there was a breach of natural justice, that error of law fell within their jurisdiction and therefore was not amenable to judicial review. The scope for judicial review is limited even where the Visitors err in law in a matter going to the natural justice of the case.

27. But there was a suggestion, in *Calder*, that an error of natural justice on the part of a Disciplinary Tribunal may affect the fairness of the hearing of the Visitors, as Stuart Smith LJ mentioned at the close of the passage from which I have cited. Staughton LJ said:-

> "There has been no suggestion of any breach of the rules of natural justice by the Visitors in this case. Was their decision infected by the breach before the Disciplinary Tribunal? And if so, is that a ground of judicial review within *ex-parte Page*?...I need not express a concluded view on those questions." (page 68G)

28. In this instant appeal the disciplinary Tribunal did not itself cause any breach of natural justice because they had proceeded, as a result of the Bar Standards Board's conduct, in ignorance of the existence of an earlier draft statement and of the fact that the agreement as to whose evidence should be adduced first was reached in part because the Bar Standards Board had concealed the existence of the draft statement.

29. The unfairness which flowed from the conduct of the Bar Standards Board continued throughout the hearing of the Visitors. The Bar Standards Board failed to make it clear to the Visitors that they ought to have disclosed the draft statement once they had served the signed statement and that in considering the merits of the appeal the Visitors ought, as counsel for Mr McCarthy submitted, compare the draft statement with the signed statement. Had the Bar Standards Board acknowledged what seems to me an elementary duty of disclosure, the Visitors would not have been led into error. But did that error vitiate the appellate stage or, as Staughton LJ put it, infect their decision?

30. Neither Stuart Smith nor Staughton LJJ needed to expand on what they had in mind when they spoke of the appellate stage being vitiated or infected. Indeed, there is little advantage to be gained in expanding what those words mean without reference to the particular facts of any given case.

31. In my judgement, the inappropriate and unacceptable behaviour of the Bar Standards Board did cause a breach of the rules of natural justice by the Visitors themselves. This, I acknowledge, is surprising, and all the more so in the light of membership of this Visitors Panel. I must therefore explain with caution and respect what I mean by a breach of natural justice on the part of the Visitors. The breach occurred because they were misled as to the obligations of the Bar Standards Board. It was the Bar Standards Board's failure to recognise and acknowledge the full extent of their duty which led the Visitors into error. It was never explained to them that those obligations included, in the instant case, an obligation to serve the draft statement dated 4 June 2010. Had that obligation been appreciated then, to cure the procedural errors it would have been necessary to test the evidence of the witness and his signed statement against the draft statement he had made earlier. This was not the process which the Visitors ever undertook. As their decision makes plain, they did not regard it as necessary to do so. The error of the Bar Standards Board led to unfairness in the approach of the Visitors. They never, as they should have done, compared what Mr TA had said in his draft statement against that which he had said in his signed statement.

32. Now that that error has been identified, must this court, in fairness, afford the claimant the opportunity he would wish of testing TA's evidence in the light of that draft statement? It is trite to observe that in many cases where unfairness is alleged it is necessary to consider both the nature and degree of the unfairness and the extent to which it might have made a difference, always recalling, however often cited, Megarry J in *John v Rees* [1971] CH 345 402C-E. For that reason, so many judges have underlined the rarity of those cases, where, despite the absence of a fair hearing, a person may be denied a further opportunity to put his case (see, for example, *R v Chief Constable of the Thames Valley Police ex-parte Cotton* [1990] IRLR 344 per Bingham LJ at 352). This is all the more so where a person has been denied a right; in the instant case a right to cross-examine TA on his draft statement.

33. The Bar Standards Board submits that this court should deny him that opportunity because counsel before the Visitors never invited them to deploy Rule 14 and call the witness before them to be tested in the light of the draft statement. I reject that submission. Even if counsel had thought that that rare opportunity should be afforded it can safely be predicted that it would have been rejected by the Visitors since they had taken the view, at the invitation of the Bar Standards Board, that the draft

statement could not be deployed to test the evidence of the witness or his signed statement.

34. In those circumstances, I take the view that it would be open to this court to quash the decision of the Visitors on the grounds of the error of law which led to unfairness on their part. It cannot be said that the Visitors overcame the unfairness caused by the conduct of the Bar Standards Board when it itself was led into error in appreciating the full extent of the Bar Standards Board's breaches of obligation.

35. But there still remains the question whether the loss of the opportunity to test TA's evidence by comparing the draft statement of 4 June 2010 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.

36. I shall not set out in detail the e-mails to which the Visitors referred because they have been fully described between paragraphs 7 and 47 of the Visitors' decision. The Visitors identify a number of features of those e-mails which were, so they thought, inconsistent with the claimant having sent the four Rule 6 letters he contends he did send. On the contrary, only one e-mail, the e-mail dated 30 January 2009, referred to a letter "which set out fees and the basis on which they would be incurred". The most striking feature of the e-mails and the exchanges between Mr McCarthy and TA is the failure of Mr McCarthy ever to refer, save on that one occasion, to the existence of the Rule 6 letters and the fact that their content would have resolved many, if not all, the disputes as to how much money was owed and in respect of which work.

37. I am unable to identify any possible rational explanation for that failure. Mr McCarthy's explanation recorded by the Visitors is that he had not searched for the letters "until quite late in the history and then only found them in his Bar Council box when pressed by the BSB" [34]. But even if he had not searched for them it is not possible to think that, as the arguments continued over so many months, this barrister, whose first direct access case this was, had forgotten about the existence of the Rule 6 letters and had failed to appreciate that many of the arguments would be solved by reference to what they contained. That is not only my conclusion but it is the only reasonable conclusion. If it had been anything less, I would have ordered judicial review to go.

38. I reach this conclusion with reluctance. Mr McCarthy had a right to cross-examine the main witness in this case with all the material properly available to him. He was wrongly and unlawfully deprived of that opportunity by the failure to disclose the earlier draft. But in my view, however much he had been able to destroy the oral witnesses on whom the Bar Standards Board relies, there remains that which Mr McCarthy's own e-mails revealed. It is the history of those e-mails which provides conclusive evidence that four Rule 6 letters were not sent at the time, as they should have been. Once it is concluded that the Rule 6 letters were not sent, then the charges alleged against him were made out. For the reasons I have given, I grant permission to move but refuse to quash the Visitors' decision.