Neutral Citation Number: [2015] EWHC 3583 (Admin)

Case No: CO/3250/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2015

Before :

MR JUSTICE GARNHAM

- -

Between :

Oliver White	**Appellant**
- and -	
Bar Standards Board	**Respondent**

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- -

Oliver White in person
James Stuart (instructed by **Bar Standards Board**) for the **Respondent**

Hearing dates: 1st December 2015

- -

Approved Judgment

Mr Justice Garnham :

Introduction

1. Mr Oliver White is a barrister practising at 4-5 Gray's Inn Square. On 17th June 2015 he appeared before the Disciplinary Tribunal of the Council of the Inns of Court in respect of three disciplinary charges. He pleaded guilty to each. In respect of charge 2, the Tribunal suspended him from practice for three months. He now appeals against that sentence.

2. On 1st December 2015 I heard submissions from Mr White acting in person and from Mr James Stuart acting for the Bar Standards Board ("BSB"). I am grateful to both for their submissions.

The Nature of the Appeal

3. A right of appeal to this Court has been conferred by the Council of the Inns of Court pursuant to Section 24 of the Crime and Courts Act 2013. The appeal is governed by CPR 52.11 which provides that such an appeal is limited to a review of the decision of the Tribunal.

4. The Court will allow an appeal where the decision of the Tribunal was wrong, or unjust because of a serious procedural or other irregularity in the proceedings in the tribunal (CPR r52.11(3)). That means that I should allow this appeal if I conclude that the Tribunal erred in law, erred in fact or erred in the exercise of a discretion. As to the latter I should only conclude that the Tribunal erred in the way it exercised discretion if it exceeded the generous ambit within which reasonable disagreement is possible.

The Charges

5. The Appellant faced three charges of professional misconduct. The first charge alleged that on or shortly after 11 June 2014, whilst acting by direct public access for his client Roveiva Trading Limited in a High Court claim, he handled some £400,000 of his client's money, contrary to Rule C73 of the Conduct Rules of the Bar Standards Board Handbook. Rule C73 is also of relevance to charge 2, so I set it out here:

> "*C73 Except where you are acting in your capacity as a manager of an authorised (non-BSB) body, you must not receive, control or handle client money apart from what the client pays you for your services.*"

6. The third charge was to the effect that Mr White failed to reply to a letter and email sent to him on 26th September 2014 requiring him to provide his written comments on the complaints made about his professional conduct by 20th October 2014, notwithstanding a reminder letter and email sent to him on 13th October 2014.

7. In respect of the first charge he was fined £1,500; in respect of the third he was fined £500. He makes no complaint about either of those in this appeal.

8. It is the second charge which is the subject of this appeal. In its amended form, it alleged that Mr White was guilty of professional misconduct contrary to Core Duty 3

and Rule C9.1 of the Bar Standards Board Handbook. The particulars of the offence were that he:

> "... *failed to act with integrity in that on 13th August 2014 he wrote by email to solicitors for High Court Enforcement Group Limited stating that (in respect of his handling of client money on or shortly after 11th June 2014) he was entitled to 'conduct litigation with all the same freedoms that a solicitor is able to operate within', whereas in fact:*
>
> *(1) he was not entitled to conduct litigation and*
>
> *(2) he was not entitled to receive, control or handle client's money."*

9. It was said that:

> *"his purpose in writing such statement was to dissuade High Court Enforcement Group Limited (or their solicitors) from complaining to the Bar Standards Board that he had breached Rule C73 of the Conduct Rules in the BSB Handbook (in relation to the handling of client money) and he thereby recklessly misled or attempted to mislead High Court Enforcement Group Limited (or their solicitors)."*

10. The amendments to charge 2 had deleted the word "*honesty and*" before the word "*integrity*" in the first clause of the passage set out at paragraph 8 above, and the word "*dishonestly*" before the word "*wrote*" in the second clause. It also deleted the phrase "*knowingly or*" before the expression "*misled or attempted to mislead*" in the passage set out in paragraph 9. Those changes were introduced because the BSB accepted that it could not show Mr White had been "dishonest" in his conduct; although they maintained, and by his admission he admitted, that he had not acted with integrity.

11. The Tribunal was chaired by HH John Price and sat with two lay members and two barrister members. Mr White attended the hearing but was not represented. The BSB was represented by Mr Stuart.

The Background and the Tribunal's Decision

12. The hearing before the Tribunal and their decision is recorded in two documents, a contemporaneous transcript of the proceedings and a report. It is convenient to deal with the latter first, because it describes the background well.

13. Following the hearing the Tribunal Chairman wrote to Mr White, the Director of the BSB and the Treasurer of the Honourable Society of Lincoln's Inn providing details of the hearing and inviting the Treasurer of Lincoln's Inn to take action on their report in accordance with Rule E189 of the Disciplinary Tribunal Regulations 2014.

14. The background to the events that formed the subject matter of these charges is set out in that report. The Tribunal said as follows:

> *"11. The disciplinary matters arose out of the Defendant acting for a claimant in enforcement proceedings under the direct access scheme. Settlement of the proceedings was agreed in the amount of £400,000. This included the amount of the judgment*

debt, interest and costs, including £53,842.23 in fees owed to High Court Enforcement Group Limited ('HCEG'). The Defendant arranged for the settlement sum to be paid to the account of his Chambers. He was not permitted to handle client money in this manner. This gave rise to charge 1.

12. The money was subsequently paid out of the Chambers account to the Defendant's lay client, which then failed to pay out fees from those monies to HCEG. When the solicitor for HCEG, a Mr John McConkey of L G Williams and Pritchard approached the Defendant about the unpaid fees and noted that he should not have been handling client money, the Defendant inaccurately informed the solicitor that:

> *'... I have subscribed to the recent changes the Bar Council have implemented under the new "conduct of litigation" rules which entitles me to conduct litigation with all the same freedoms that a solicitor is able to operate within.'*

This inaccurate statement, contained in an email dated 13th August 2014, gave rise to charge 2.

13. Following a complaint being laid against the Defendant by Mr McConkey, the BSB wrote to the Defendant requiring his comments by 20th October 2014. Despite a further reminder letter being sent on 13th October 2014, no response was ever provided to the BSB, until the witness statement provided by the Defendant shortly before the disciplinary hearing. This conduct gave rise to charge 3.

14. In regards to matters relevant to sentencing, Mr Stuart informed the Tribunal that the Defendant had a very recent disciplinary history. On 3rd June 2015 he admitted four charges of misconduct. These included handling client money, failing to liaise with the Legal Ombudsman, and failing to respond to inquiries from his regulator. He was prohibited from doing public access work for six months, and fined a total sum of £1,000.

15. The Defendant was given the opportunity to expand upon his witness statement dated 16th June 2015, which contained information by way of mitigation. He admitted that it was wrong of him to handle client money, and expressed regret at his inaccurate communication dated 13th August 2014 with the solicitor at HCEG, which he sent before checking the relevant rules. It was a quick-fire response when he was feeling under pressure and somewhat aggrieved that he was being chased for fees that should have been paid by his lay client. He also emphasised that his personal life was in turmoil at the time, as he attempted to deal with the breakdown of his marriage and

> *psychological issues associated with that. He said that he had been making concerted efforts to improve his professionalism, and was about to do a Direct Access 'top-up' course."*

15. The transcript of the hearing includes the Tribunal's decision on charge 2:

> *"As far as charge 2 is concerned he. We find recklessly – he admits recklessly – and knowingly, and we say, quite wrongly, told the solicitors he was entitled to conduct litigation with the same freedom as a solicitor when that was not the case. We find his motive was to mislead about these proceedings and that is a serious breach of Core Duty 3 to act with integrity and Core Duty Rule C91."*

Submissions

16. I had the benefit of skeleton arguments from both Mr White and Mr Stuart. Mr Stuart's had been served some months ago; Mr White's was served the night before the hearing before me. In their oral submissions both Mr White and Mr Stuart referred to and adopted the contents of their skeleton arguments.

17. Mr White's primary submission was that the three month suspension in respect of charge 2 was manifestly excessive. He made three main points.

18. First, and this was at the heart of Mr White's case, he argued that the Tribunal failed to take account of the effect of the amendment which removed any suggestion of dishonesty on his part. He invited my attention to the passage set out at paragraph 14 above.

19. Mr White says that by finding that he acted "knowingly" in that regard the Tribunal was disregarding the amendment to the charge which excluded every element of dishonesty.

20. Second, he pointed to the way the Tribunal treated the aggravating features of the case. On page 5 of the transcript of their determinations the Tribunal said the following:

> *"The aggravating features: we find that he has undermined the profession in the eyes of the public; he attempted to hide the misconduct or put the blame elsewhere; and there are previous disciplinary findings of similar breaches."*

21. Mr White says that he has no previous disciplinary findings for a similar breach, the previous findings were, he says, of a different nature. He says that the Tribunal erred in suggesting that he had "put the blame elsewhere"; he says that there is no evidence that he ever attempted to blame anyone else. Finally on this element of his case, he argues that the conclusion that his conduct "undermined the profession in the eyes of the public" is not made out.

22. Mr White's third submission was that the Tribunal failed to take proper account of the mitigating factors in his favour. He refers me to the printed proforma that was made

available to the Tribunal panel which lists categories of mitigating factors. He said account should have been taken of the fact that he acted in the heat of the moment and he should have been credited with displaying genuine remorse. These boxes on the proforma were not ticked by the Tribunal.

23. As to the first of those factors, Mr White refers to the passage in the email he sent to Mr McConkey, the solicitor for High Court Enforcement Group Limited, on 13th August 2014. He says that that email was sent only 10 minutes after the email to which it was a reply. He says he failed to look up what Rule C73 said; he had no idea that C73 related to the handling of money. He says it was never his intention to try to persuade Mr McConkey not to make a complaint against him. He believed he was wrongly being pursued for a debt and this email was simply a reckless, knee jerk reaction to Mr McConkey's email. He accepted that it was a mistake to send that email without first ascertaining what Rule C73 provided, but this, he said, was not dishonesty. Fairly analysed, Mr White argues, this was an email sent in the "heat of the moment".

24. Mr White emphasised how remorseful he is for the conduct to which he has pleaded guilty and he says he made that clear to the Tribunal.

25. Mr White advanced an alternative case; one he had not suggested anywhere before the day of the hearing before me. He suggested that despite the fact that he agreed to the amendment to the charge sheet and pleaded guilty to it in its amended form, his plea was equivocal. He argues that the admitted allegation that he recklessly misled or attempted to mislead High Court Enforcement Group Limited (or their solicitors) in writing his email of the 13th August 2014 implies dishonesty on his part.

26. Mr White ended his submissions by pointing to the implications of a three month suspension. He said that for him it would be catastrophic. He says that it would cause enormous harm to his professional reputation; it would have an effect on continuing instructions that he might otherwise have expected to receive; it would have a severe effect on the work he might obtain by direct access; he says his chambers are unlikely to permit him to return to practice there if the suspension is upheld; and he says the financial cost would be far greater than being unable to work for three months. He ended his submissions by emphasising that there was no premeditation in what he did.

27. In response to the allegations that the Tribunal were wrong to use the word "knowingly" in relation to what Mr White told the solicitors in the email of 13th August 2014, Mr Stuart emphasises that the adjective "knowingly" qualifies the verb "told" and was not a finding that Mr White knowingly misled the solicitors.

28. Mr Stuart contends that the complaint that there was no evidence on which the Tribunal could conclude that Mr White was attempting to lay the blame for his misfortune on others cannot survive a close examination of the transcript of the entire proceedings.

29. As to the allegation that the Tribunal failed to take account of genuine remorse on the part of Mr White, Mr Stuart says the word "remorse" is used in the proforma in a particular way as is explained on the proforma itself. It is intended to cover only some expression of remorse to those affected by the conduct in question.

Discussions and Conclusions

30. I deal first with the suggestion, rather faintly pursued at hearing, that Mr White's admission of the charge 2 was equivocal. I reject that submission. Mr White is a barrister of some years standing and was acutely familiar with the facts of the case with which he was dealing because it concerned his own behaviour. It is evident he had a long discussion with counsel for the BSB about the proposed amendments to the charge sheet and what was eventually put before the Tribunal was what had been agreed between them. Mr White must have considered, and then positively acknowledged, the allegation made in the second half of the charge 2 to the effect that his purpose in writing the email of 13th August 2014 was to dissuade the solicitors from complaining to the BSB that he had breached Rule C73.

31. In any event, it is perfectly plain that that is in fact what Mr White was attempting to do. The email Mr White sent at 14:14 was in reply to Mr McConkey's email of 14:04 on 13th August 2014. That email referred to Mr McConkey's letter to Mr White of 6th August 2014, which made clear the solicitor's concern about the fact that client money was being held by Mr White in his chamber's account. The email of 14:04 refers to the possibility of a complaint against Mr White being made for breach of Rule C73.

32. Even though I accept that Mr White did not look up the terms of Rule C73, his response to the threatened complaint under that provision was plainly, on the face of the email, designed to allay the concerns of Mr McConkey that had led him to threaten to make a complaint. In any event, it does not seem to me that that made the plea equivocal; there was no dishonesty but there was an intent to persuade the complainant to discontinue his complaint.

33. In those circumstances, I have no hesitation in rejecting the alternative submission about an equivocal plea. I turn then to Mr White's primary case.

34. Until I heard Mr Stuart's reply, it seemed to me that Mr White's strongest point turned on the Tribunal's use of the word "knowingly", on page 4 of the transcript of the decision, to describe the circumstances in which he told the solicitors that he was entitled to conduct litigation "with the same freedoms as a solicitor". However in that regard it seems to me that Mr Stuart is plainly right.

35. The word "knowingly" qualifies "told" in describing the manner in which Mr White emailed the solicitors. In other words the Tribunal was holding that Mr White made a deliberate decision to inform Mr McConkey that he was entitled to conduct litigation as a solicitor would; this was no slip of the tongue or slip of the keyboard. "Knowingly" here does not imply that Mr White knew the terms of Rule C73. That being so, there was no failure on the part of the Tribunal to respect the fact that the word "knowingly" had been deleted from the description in the second half of the particulars of the offence. "Knowingly" in this context does not betoken dishonesty.

36. Mr White's argument, however, went wider than simply reference to the manner in which the Tribunal described his conduct. He says that the punishment imposed in respect of count 2 "*neither gives effect nor takes into proper account the effect of the amendment and the removal of dishonesty in the particulars of the offence*". In my judgement that complaint is misconceived. It is clear from the transcript and their

decision that the Tribunal took considerable trouble to clarify precisely what Mr White was admitting. It is equally clear that they took account of the fact that the dishonesty element of the charge had been deleted. The transcript of the decision records the following:

> *"Charge 2 is professional misconduct contrary to Court Duty 3 and Rule C9.1 of the Bar Standards Board Handbook in that he, barrister failed to act – 'dishonestly' is crossed out – with integrity..."*

37. Later in the transcript it is recorded that:

> *"It was said his purpose in writing such a statement was to dissuade the High Court Enforcement Officer from complaining that he had breached Rule C73 of the Conduct Rules and he recklessly – 'grievously' is crossed out – misled the High Court Enforcement Officer."*

38. Towards the end of the decision the Tribunal said the following:

> *"The mitigating factors are however late in the day, he admitted the charges. We give full credit for the admission on count 2. That was changed from 'dishonestly' to 'recklessly'."*

39. It is apparent from that transcript that the Tribunal had at the forefront of their mind the fact that the version of the charge sheet to which the appellant pleaded guilty had been amended expressly to reflect the fact that dishonesty was no longer contended for.

40. As Mr Stuart rightly points out, had the Tribunal been sentencing Mr White for an offence of dishonesty, the sentence would almost inevitably have been more severe. The Sentencing Guidelines provide as follows:

> *"In cases where it has been proved the barrister has been dishonest... disbarment will almost always have to be considered..."*

41. There is nothing to suggest that disbarment was even contemplated in this case, and that was perfectly proper. But, in my judgment, it cannot sensibly be suggested that the Tribunal failed to appreciate or take account of the fact that Mr White was not facing allegations of dishonesty.

42. I also reject the suggestion that there was no evidence on which the Tribunal could conclude that Mr White attempted to hide the misconduct or put the blame elsewhere. In his oral submissions to the Tribunal, recorded at pages 26-27 of the transcript of the hearing, Mr White is recorded as saying:

> *"... I do not think [my client] realises the extent of the jam I have got in, one might say, on his behalf. But I am sufficiently ashamed of my own wrongdoing that even he does not realise the fix that I am in because of what, effectively, has been a turn*

> *of events that has benefited him and him alone and certainly not me…*
>
> *I, no doubt, was feeling a great deal of heat at the time of these letters… and, perhaps wrongly, a perception of being hard done by because it was my client's conduct not my own that had led to this cause of discontent.*"

43. It seems to me clear from those remarks that Mr White was at least suggesting that others were to blame for his difficulties.

44. I also reject the submission that the Tribunal should have ticked the relevant box on the BSB proforma to indicate that Mr White had shown "genuine remorse". The proforma requires that such genuine remorse should be "*expressed in e.g. a willingness to apologise to the complainant and or compromise over matters such as fees*". There is no evidence that Mr White has ever apologised for the misleading remarks he undoubtedly made in his email of the 13th August 2014, whether to the solicitors concerned or anyone else affected. The BSB were aware that Mr White was expressing remorse to them and I have no doubt that that remorse was genuinely felt. But I see no grounds for criticising the Tribunal for failing to acknowledge the particular type of remorse to which the proforma referred.

45. In my judgment, the argument that the Tribunal should have held that the email of the 13th August 2014 was sent in "the heat of the moment" is hopeless. First, it seems to me to strain the meaning of the expression to suggest that "heat of the moment" encompasses an email sent 10 minutes after the message to which it was a reply. But second, and rather more importantly, it is perfectly clear that that email was not sent without thought. Mr White begins that email by saying "*I was in fact drafting a reply to your last email and attachment at the very moment you sent your most recent email*". That must have been a reference to the letter sent by email on the 6 August 2014. It is perfectly clear that Mr White had had some days to reflect on an appropriate response to that letter and to the suggestion that there might be something amiss about the fact that client money had been held by Mr White in his chamber's account. He had evidently already begun formulating his reply to the letter when the email arrived.

46. Furthermore, the email of 13th August was plainly addressed to the "threatened complaint". That must have been a complaint about holding client money. Apart from anything else, there was no other complaint that had been mooted. The Tribunal was justified in concluding that the purpose of this email was to seek to dissuade Mr McConkey from continuing with his complaint against Mr White. That had been the assertion advanced in the second half of the particulars of this offence, which offence and which particulars Mr White had admitted.

47. I reject too the argument that the Tribunal were not entitled to conclude that Mr White's conduct had undermined the profession of barrister in the eyes of the public. The offence which Mr White had admitted, namely failing to act with integrity, is a serious one. It is right to say that it is yet more serious if it is established that a barrister not only failed to act with integrity but also acted dishonestly but that is not to ignore the seriousness of the former offence.

48. Finally I reject the argument that the Tribunal ought not to have described the previous offence as "similar". Mr White pleaded guilty to holding client money on that occasion; the similarity is obvious given that charge 2 in the present case related to another offence of handling client money.

49. In Bolton v Law Society [1994] 1 WLR 512 at page 518, Sir Thomas Bingham MR said this:

> *"Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitor's Disciplinary Tribunal. Lapses from the required high standard may of course take different forms and be of varying degrees. The most serious involves proven dishonesty... if a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends on trust. A striking off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or suspend will often involve a fine and difficult exercise of judgment... on all the facts of the case. Only in a very unusual and venial case of this kind will the tribunal be likely to regard as appropriate any order less severe than one of suspension."*

50. Self-evidently, the same principles apply to a barrister.

51. That that is so, in my judgment, emerges from any fair reading of the BSB's Sentencing Guidance (2014). The guidelines do not deal expressly with an offence of failing to act with integrity. However they cover offences such as acting without a professional client, breach of the cab rank rule and failing to comply with a court order or court judgment. The guidelines to all of those offences refer to the possibility of a period of suspension. In my judgment the charge admitted here, of acting with a lack of integrity, was at least comparable with those other offences.

52. In my judgment, a three month suspension was an entirely appropriate and proportionate response to the admitted breach of professional standards contained in charge 2. It is the sentence I would have imposed if I had been sitting as the Tribunal. I recognise and accept the serious implications of such a suspension for Mr White's career. I have no doubt that it will impact upon his reputation, upon the nature and quality of instructions he receives hereafter, on his chamber's attitude towards him and on his financial circumstances. I recognise that this was not premeditated wrongdoing and that there was no suggestion of dishonesty in his conduct. But nonetheless the conduct described in charge 2 was seriously below the standard to be expected of a barrister. I see no grounds whatsoever for interfering with the Tribunal's decision.

53. It follows this appeal is dismissed.