



The Bar Tribunals & Adjudication Service

The Council of the Inns of Court

Report of Finding and Sanction

Case reference: PC 2020/0995/D5 and PC 2021/4858/D5

Nicola Cain

The Director-General of the Bar Standards Board

The Chair of the Bar Standards Board

The Treasurer of the Honourable Society of Middle Temple

Disciplinary Tribunal

Nicola Cain

1. In accordance with an appointment made by the President of the Council of the Inns of Court contained in a Convening Order dated 9 December 2021 I sat as Chairman of a Disciplinary Tribunal on 10 January 2022 and 3 February 2022 to hear and determine 4 charges of professional misconduct contrary to the Code of Conduct of the Bar of England and Wales against Nicola Cain, barrister of the Honourable Society of the Middle Temple.

Panel Members

2. The other members of the Tribunal Panel were:

John Vaughan (Lay Member)

Tracy Stephenson (Lay Member)

Sadia Zouq (Barrister Member)

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Charges

The following charges were admitted:

Charge 1

Statement of Offence

Professional Misconduct contrary to Core Duty 2 and/or 3 and/or 7 of the Bar Standards Board Handbook.

Particulars of Offence

1. Ms Cain created a document [the “Fabricated Order”] which falsely purported to be an order made by Senior Master Fontaine in proceedings in the High Court of Justice in Matter 1, in which Ms Cain was instructed by the Defendants. The Fabricated Order included an electronic image of a signature which Ms Cain dishonestly intended should indicate that Senior Master Fontaine has signed the Fabricated Order.
2. Ms Cain created the Fabricated Order with the dishonest intention of deceiving her client as to the content of the two orders made by Senior Master Fontaine on 18 December 2019 [the “First Order” and the “Second Order”, together the 18 December 2019 Orders”]. The Fabricated Order included parts of the First Order and the Second Order in a single document.
3. When creating the Fabricated Order, Ms Cain deliberately omitted and/or altered material parts of the First Order and the Second Order with the dishonest intention of deceiving her client as to the content of the First Order and the Second Order. In particular in relation to the Fabricated Order:
 - 3.1 Ms Cain omitted the fact that her client had been ordered to serve an updated and compliant disclosure statement by 20 December 2019, failing which her clients’ defence would be struck out and judgment entered for the other party with damages to be assessed.
 - 3.2 In relation to an order that her client pay costs in the sum of £9,000, Ms Cain:

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- 3.2.1 Altered the costs to be paid from the other party's "*costs of the hearing on 18 December 2019*" to the other party's "*costs in connection with the further witness statement of the Second Defendant*";
 - 3.2.2 Omitted the fact that these costs were assessed on the indemnity basis; and,
 - 3.2.3 Altered the date by which her client had been ordered to pay those costs from 2 January 2020 to 6 January 2020.
- 3.3 Ms Cain omitted an order that her client pay the other party's reasonable costs of an application dated 20 November 2019;
- 3.4 Ms Cain omitted an order that her client serve a witness statement "*detailing the explanation for not complying with the Order that they serve standard disclosure on the Claimants on 29 July 2019, and not doing so until 12 December 2019*", by 4pm on 23 December 2019;
- 3.5 Ms Cain altered the preamble to state that the Fabricated Order was made "*upon the Claimant's Application dated 16 December 2019*", when in fact the First Order and the Second Order were made upon *inter alia* the other party's applications of 18 November 2019 and 20 November 2019 respectively;
- 3.6 Ms Cian altered the date by which the other party's Re-Amended Particulars of Claim were to be filed and served from 19 December 2019 to 23 December 2019; and,
- 3.7 Ms Cain omitted to date the Fabricated Order.
- 4. On 3 January 2020, Ms Cain attached a copy of the Fabricated Order to an email which she sent to her client. Ms Cain thereby falsely and dishonestly represented to her client that:
 - 4.1 The Fabricated Order was an order made by Senior Master Fontaine in proceedings in the High Court of Justice;
 - 4.2 The Fabricated Order was "*initialled*" by Senior Master Fontaine; and,

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4.3 The Fabricated Order had been “*obtained from the Claimants*”.

5. By her email on 3 January 2020, Ms Cain deliberately misled her client as to the content of the First Order and the Second Order. Ms Cain accordingly failed to provide her client with all relevant information as regards the First Order and the Second Order.

Charge 2

Statement of Offence

Professional Misconduct contrary to Core Duty 2 and/or 5 and/or 7 of the Bar Standards Board Handbook.

Particulars of Offence

1. On 18 November 2019, the Claimants made an application to re-amend their Particulars of Claim, which was served on 19 November 2019 [the “Amendment Application”]; and,
2. On 20 November 2019, the Claimants applied for an order that: [1] the Defendants should provide standard disclosure within 14 days, failing which the Defendants defence be struck out and judgment entered for the Claimants; and [2] that the Defendants within seven days provide a witness statement explaining why the Defendants had failed to comply with the order to serve standard disclosure by 29 July 2019 [the “Disclosure Application”]. Together the “Applications”.
3. Ms Cain failed to notify her client about the Applications, or seek instructions as to the Applications, prior to their determination in a hearing on 18 December 2019.

Charge 3

Statement of Offence

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Particulars of Offence

1. Ms Cain notified her client of the Amendment Application on 19 December 2019 at 17:53 by an email which contained the following words in the subject line “*urgent instructions required*”. Ms Cain did not refer to the fact that the Amendment Application had in fact already been determined at a hearing on 18 December 2019. Ms Cain thereby dishonestly misled her client as to the status of the Amendment Application.
2. The client subsequently sought a copy of the application to which Ms Cain had referred in her 19 December 2019 at 17:53 email. Ms Cain did not provide a copy of either the Amendment Application or the Disclosure Application to her client. Instead, on 20 December 2019 at 13:08, she provided her client with a document [the Fabricated Application] which falsely purported to be the application which Ms Cain had informed her client of on 19 December 2019.
3. Ms Cain created the Fabricated Application with the dishonest intention of deceiving her client as to facts relating to the Applications. When creating the Fabricated Application, Ms Cain deliberately omitted and/or altered material parts of the Applications, including by:
 - 3.1 Omitting reference to the Disclosure Application; and,
 - 3.2 Giving a false issue date of 16 December 2019.

Charge 4

Statement of Offence

Professional Misconduct contrary to Core Duty 1 and/or 2 and/or 3 and/or 5 and/or 7 of the Bar Standards Board Handbook.

Particulars of Offence

1. On 23 December 2019, Ms Cain signed and served on the Claimants a witness statement [the “Witness Statement”] pursuant to the 18 December 2019 Orders. The Witness Statement concerned the reason for the delay in the provision of standard disclosure by the Defendants.

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2. Ms Cain falsely and dishonestly stated in the Witness Statement at paragraph 1 that *"I ...am authorised to make this statement on their [the Defendants'] behalf"*. Ms Cain was not so authorised.

Parties Present and Representation

3. The Respondent was present and was represented by James Counsell QC. The Bar Standards Board ("BSB") was represented by Thomas Ogg of counsel.

Sanction and Reasons

On 10 January 2022 upon receiving the Respondent's admissions and hearing submissions from counsel for the BSB and the Respondent, the Panel adjourned to consider its decision on sanction.

The Panel reconvened on 3 February 2022 to hand down its decision.

For the reasons set out below the Panel decided to disbar the Respondent in respect of charges 1, 3 and 4. The sanction in respect of charge 2 was a 6 months' suspension.

After rising to deliberate but before returning on 3 February 2022, the Panel had received a letter from RPC. There was some debate as to whether the Panel Members should have read it. The Chair confirmed that the fact that the Panel had received the letter was widely known and that he had read it. The Chair stated that one panel member had not read it, but others had. The Chair felt that he had to read it as he might have been required to rule on its admissibility.

The Chair stated that he was experienced in dealing with unsolicited correspondence from third parties and he did not have any difficulty in placing it out of his mind. The Chair confirmed that he did not consider the letter to be evidence, but the Panel was a public forum and it was not unknown for a third party to comment on statements made about it by counsel in mitigation that the third party does not agree with. The Chair confirmed that such a communication is not evidence. Equally, what was said in mitigation on behalf of the Respondent was not evidence.

The Chair confirmed that the Panel had a duty to put the letter into context and then put it to one side.

Counsel for the Respondent expressed concern that the Panel had read the letter. It had been assumed by the Respondent and her representatives that the Panel had not read it. But, noting that it had been read, its contents should be disregarded as the submissions had been concluded

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before the letter was received, mitigation had been made on material provided by the BSB. The BSB had the opportunity of obtaining evidence from RPC but had chosen not to do so.

The Chair confirmed that the Panel was able to put the letter to one side and that, as already stated, it did not impact on the Panel's decision.

Having addressed that issue, the Panel expressed its gratitude to the advocates for the manner in which they had presented their respective cases and the assistance that they had provided to the Panel.

When considering sanction, the Panel approached the matter chronologically. In that regard the starting point was Charge 2. The Panel noted that the charge is not concerned with dishonesty. Rather, the charge is that the Respondent failed to notify her clients about an important application to re-amend particulars of claim. The Panel was of the view that charge 2 was not as serious as the other allegations but it started the narrative and led to the course of conduct that subsequently took place.

The Panel next considered charge 3 which related to a fabricated application. The Panel was of the view that the charge would strike anyone as being a more serious allegation as it involved a dishonest intention to deceive the Respondent's client as to the facts relating to the application.

The Panel was of the view that the course of conduct did not merely amount to an allegation of dishonesty, it was one of serious dishonesty as it concerned the preparation of a fabricated document created to deceive the client.

The Panel was of the view that fabricating a court document involves a high level of dishonesty and indeed serious dishonesty because the document was created to mislead. The Panel emphasised that those who were involved in legal proceedings are entitled to expect that court documents are genuine and mean what they say.

The Panel turned to charge 4 which it noted also alleged dishonesty. The charge concerned the Respondent representing that she was authorised to make a witness statement on behalf of the defendant when in fact she was not so authorised. The Panel stated that whilst this may appear to be a mere formality, it was their view that this amounted to significant dishonesty because an advocate who states that he/she is authorised to make a document on behalf of the client is relied upon and trusted in that regard.

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The Panel was of the view that the Respondent could not obtain her client's authority because she had not informed her client of the true situation and therefore, she had misstated that she had authority. In the Panel's view that was an act of significant dishonesty, and this was just one aspect of the course of conduct.

Finally, turning to charge 1, the Panel was of the view that it was the most serious in terms of dishonesty as it relates to the preparation of a fabricated court order. The Panel confirmed its view that members of the public are entitled to expect that an order of the court is a genuine document and not a fabricated one.

The Panel noted that the Respondent represented that the fabricated order had been initialled by a Senior Master when it had not been so initialled. The Panel was of the view that it represented dishonesty at a high level as the document was misleading on its provenance and on whose authority, it was made.

In addition to the signature, there were other aspects of the fabricated order which were dishonest. For instance, it omitted the fact that the disclosure statement had been ordered and failure to comply would lead to the defence being struck out and also that the Respondent's client had to pay costs of £9,000 on an indemnity basis. Further, the date for costs was altered and it failed to provide the direction that the Respondent's client had to serve a witness statement detailing reasons for not complying with the order for standard disclosure. These aspects demonstrate that this was dishonesty at the highest level and the court order was being fabricated to mislead the client.

The Panel noted that this was a fabricated order of the High Court, using the initials of a judge of the High Court, and was of the view that fabricating a court order is dishonesty of a high order indeed as it goes to the root of the administration of justice.

The Panel proceeded to consider the sanctions guidance of 01.01.2022 and quoted its view that the purpose of the sanctions was protecting the public, maintaining public confidence, promoting high standards and acting as a deterrent to practitioners from engaging in misconduct. This emphasises that the purpose of a sanction is not just punitive, but the Panel had to consider protecting standards and public confidence. The public are a very important aspect of the process.

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The Panel considered the sanctions guidance and noted that it provided that in a case of dishonesty the sanction was disbarment in all but exceptional circumstances. The Panel considered the meaning of exceptional circumstances. The guidance stated that they should relate to the nature and extent of the dishonesty and the degree of culpability. The exceptional circumstances must therefore relate to the dishonesty.

The issue of dishonesty is set out on page 38 of the sanctions guidance, where dishonesty is dealt with as a category of misconduct. The Panel noted that the guidance considered the completion and falsification of documents.

The Panel was of the view that the misconduct of dishonestly concealing information is the essence of the complaint in this case.

The Panel noted that the culpability and harm had to be considered. It considered that one feature of this case, which was addressed by both parties, is whether this was a 'one off' incident or sustained as part of a course of conduct. The Panel concluded that the conduct in this case was repeated in the different instances referred to in the charges.

The Panel considered the nature, scope and extent of the Respondent's conduct and whether it could be described as a fleeting lapse of judgement. The Panel accepted that counsel for the Respondent was right to emphasise that it took place over a matter of days, a relatively short period of time.

However, the Panel was of the view that the Respondent's conduct was not fleeting or momentary - it was a course of conduct that involved dishonesty of a significant nature in the context of culpability.

The Panel considered the issue of harm, and it was of the view that keeping clients in the dark undoubtedly caused a risk of harm. In relation to public confidence, the Panel was of the view that in this case public confidence would be undermined as fabricating documents must rank high as dishonesty that impacts on public confidence.

The Panel concluded that, for the reasons stated, this was misconduct that amounted to significant culpability and significant harm.

The Panel noted that the indicative sanction is the same whether it is upper, middle or lower range - it is disbarment unless there are exceptional circumstances.

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The Panel considered aggravating and mitigating factors and noted that it was submitted that none of the aggravating factors set out on page 75 of the sanctions guidance apply.

The Panel considered mitigation factors that it concluded applied in this case which are:

- (i) The Respondent admitted the misconduct early in the proceedings;
- (ii) There was self-reporting;
- (iii) The Respondent expressed genuine remorse; and
- (iv) The Respondent had co-operated with the investigation.

The Panel acknowledged the Respondent's personal circumstances which were to do with her work, health, mental health and what was described as a very difficult working environment. However, the Panel was of the view that the mitigating factors did not amount to exceptional circumstances given the nature and extent of the dishonest course of conduct.

The Panel noted that the Respondent had an unblemished record, she was a high achiever and at the age of 35 she had become an equity partner in a well-known firm of solicitors. The Respondent worked very well and the references that were provided on her behalf were from important people and did the Respondent great credit.

However, the Panel felt that whilst, with hindsight, it must be recognised that the Respondent was unable to cope with the workload she had, she was a highflyer. She expected much of herself and maybe much was expected of her based on her perceived ability. Clearly, she was not coping, and this impacted on her mental health. The Panel noted that the medical report described the Respondent as 'catastrophising' meaning that a person perceives a catastrophe coming and feels that they need to deal with that negative outcome somehow and accordingly feels under enormous pressure. The Panel noted that it was also relied on that the Respondent did not realise that she was mentally unwell at the time.

However, the Panel was of the view that this did not amount to exceptional circumstances against the background of the course of misconduct and dishonesty. The Panel was of the view that this mitigation did not justify the Respondent's dishonesty and indeed noted it was never argued that it did. The Panel was of the view that the mitigation may explain why the Respondent committed the misconduct - it does not amount to exceptional circumstances because even in those circumstances, barristers must not resort to that level of dishonesty.

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The Panel concluded that it was impossible to find that there are exceptional circumstances and therefore on the charges involving dishonesty, which are charges 1, 3 and 4, the sanction would be one of disbarment.

In relation to charge 2, the Panel were obliged to make clear what the sanction would have been on this particular charge had it not decided to disbar the Respondent on the other charges. The Panel was of the view that the applicable guidance was that relating to a barristers' formal obligations to clients. The essence of charge 2 was failing to notify the client of, inter alia, the applications to re-amend.

The Panel concluded that, in terms of culpability, this misconduct presented a substantial risk to the Respondent's client. The harm was the risk of an impact on the client's case at the time. The Panel was of the view that the level of seriousness was in the middle range and the indicative sanctions range from a medium level fine to suspension of less than 12 months. The Panel was of the view that 6 months suspension is appropriate.

The Panel confirmed that the disbarment is the outcome in this case because of the other charges.

The Panel noted that, as the Respondent was not practising, the form of the order in relation to the sanction of suspension on charge 2 is a direction that no practising certificate would be provided to the Respondent for 6 months.

After hearing arguments on the principle and quantum of costs, the Panel decided that the Respondent should pay the BSB's costs and summarily assessed costs at £5,900. The Panel gave the Respondent 28 days to pay.

After hearing submissions relating to the issuing of a practising certificate during the period when an appeal may be made, the Panel directed that for the purposes of rule E227.3 no practising certificate should be issued to the Respondent during the period when the Respondent may appeal the Panel's decision.

The Treasurer of the Honourable Society of Middle Temple is requested to take action on this report in accordance with rE239 of the Disciplinary Tribunal Regulations 2017.

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Approved: 08 February 2022

His Honour Alan Greenwood
Chairman of the Tribunal

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