The Bar Tribunals & Adjudication Service

The Council of the Inns of Court

Report of Finding and Sanction

Case reference: PC 2021/4962/D5 and PC 2020/0928/D5

Robert Kearney
The Director-General of the Bar Standards Board
The Chair of the Bar Standards Board
The Treasurer of the Honourable Society of Inner Temple

Note: in relation to Person A and Pupils A and B in this case, given the nature of the matters arising, it is directed that they are entitled to lifelong anonymity and that no matter shall be reported which may lead directly or indirectly to their identification.

Disciplinary Tribunal

Robert Kearney

1. In accordance with an appointment made by the President of the Council of the Inns of Court contained in a Convening Order dated 1 September 2022 in relation to case 4692, and by the President in a Convening Order dated 7 November 2022 in relation to case 0928, and following the Interim Reports of the Disciplinary Tribunal I chaired on 11 October 2022 and 9 December 2022, I sat as Chairman of a Disciplinary Tribunal on 17 to 19 July 2023 to hear and determine six charges of professional misconduct (in case PC 2020/0928/D5) and two charges of professional misconduct (in case PC 2021/4692/D5) contrary to the Code of Conduct of the Bar of England and Wales against Robert Kearney, barrister of the Honourable Society of Inner Temple.

2. The Panel reached a decision as to sanction on 19 July 2023 and this was communicated orally to the parties that same day, with written reasons to follow.

Panel Members

3. The other members of the Tribunal were:

   Janine Green (Lay Member)
   Paul Robb (Lay Member)
   Siobhan Heron (Barrister Member)
   John Foy KC (Barrister Member)

Charges in Case 2021/4962/D5

4. The following charges were admitted in case PC 2021/4962/D5:

Charge 2

Statement of Offence

Professional misconduct contrary to Core Duty 5 of the Code of Conduct of the Bar of England and Wales (9th Edition), contained in Part 2 of the Bar Standards Board Handbook (Version 3.3).

Particulars of Offence

Robert Kearney, a barrister and BSB regulated person, behaved in a way which was likely to diminish the trust and confidence which the public places in a barrister or in the profession, in that during the course of a mini pupillage between 23 and 26 July 2018 with Person A, in which he was in a position of trust, engaged in conduct set out in Schedule A towards Person A, such conduct, taken either individually or in combination of one or more instance, being sexually discriminatory conduct and conduct of a sexually harassing nature.

Charge 3

Statement of Offence

Professional misconduct contrary to Rule rC8 of the Code of Conduct of the Bar of England and Wales (9th Edition), contained in Part 2 of the Bar Standards Board Handbook (Version 3.3).

Particulars of Offence

Robert Kearney, a barrister and BSB regulated person, behaved in a way which could reasonably be seen by the public to undermine his integrity, in that, during the course of a mini pupillage between 23 and 26 July 2018 with Person A, in which he was in a position of trust, engaged in conduct set out in Schedule A towards Person A, such conduct, taken either individually or in combination of one or more instance, being sexually discriminatory conduct and conduct of a sexually harassing nature.

Charges in Case 2020/0928/D5

5. The following charges were admitted in case PC 2020/0928/D5:

Charge 1

Statement of Offence

Professional misconduct contrary to Core Duty 3 of the Code of Conduct of the Bar of England and Wales (9th Edition), contained in Part 2 of the Bar Standards Board Handbook (4th Edition, version 4)

Particulars of Offence

Robert Kearney, a barrister and BSB regulated person, failed to act with integrity, in that, on 13 and 14 February 2020, at a chambers social event and a subsequent event, he engaged in the conduct set out in paragraphs 1 and 2 of Schedule A.

Charge 2

Statement of Offence

Professional misconduct contrary to Core Duty 3 of the Code of Conduct of the Bar of England and Wales (9th Edition), contained in Part 2 of the Bar Standards Board Handbook (4th Edition, version 4)

Particulars of Offence

Robert Kearney, a barrister and BSB regulated person, failed to act with integrity in that, on 13 and 14 February 2020, at a chambers social event and a subsequent event, he engaged in the conduct set out in paragraphs 3 and 4 of Schedule A.

Charge 3

Statement of Offence

Professional misconduct contrary to Core Duty 5 of the Code of Conduct of the Bar of England and Wales (9th Edition), contained in Part 2 of the Bar Standards Board Handbook (4th Edition, version 4)

Particulars of Offence

Robert Kearney, a barrister and BSB regulated person, behaved in a way which was likely to diminish the trust and confidence which the public places in him or in the profession, in that, on 13 and 14 February 2020, at a chambers social event and a subsequent event, he engaged in the conduct set out in paragraphs 1 and 2 of Schedule A.

Charge 4

Statement of Offence

Professional misconduct contrary to Core Duty 5 of the Code of Conduct of the Bar of England and Wales (9th Edition), contained in Part 2 of the Bar Standards Board Handbook (4th Edition, version 4)

Particulars of Offence

Robert Kearney, a barrister and BSB regulated person, behaved in a way which was likely to diminish the trust and confidence which the public places in him or in the profession, in that, on 13 and 14 February 2020, at a chambers social event and a subsequent event, he engaged in the conduct set out in paragraphs 3 and 4 of Schedule A.

Charge 5

Statement of Offence

Professional misconduct contrary to Rule rC8 of the Code of Conduct of the Bar of England and Wales (9th Edition), contained in Part 2 of the Bar Standards Board Handbook (4th Edition, version 4)

Particulars of Offence

Robert Kearney, a barrister and BSB regulated person, behaved in a way which could reasonably be seen by the public to undermine his integrity, in that, on 13 and 14 February 2020, at a chambers social event and a subsequent event, he engaged in the conduct set out in paragraphs 1 and 2 of Schedule A.

Charge 6

Statement of Offence

Professional misconduct contrary to Rule rC8 of the Code of Conduct of the Bar of England and Wales (9th Edition), contained in Part 2 of the Bar Standards Board Handbook (4th Edition, version 4)

Particulars of Offence

Robert Kearney, a barrister and BSB regulated person, behaved in a way which could reasonably be seen by the public to undermine his integrity, in that, on 13 and 14 February 2020, at a chambers social event and a subsequent event, he engaged in the conduct set out in paragraphs 3 and 4 of Schedule A.

Parties Present and Representation

6. The Respondent was present and was represented by Rossano Scamardella KC. The Bar Standards Board ("the BSB") was represented by Harini Iyengar.

Preliminary Matters: 11 October 2022 Hearing in Case PC 2021/4962/D5

7. Prior to the start of the hearing, the Respondent indicated that his representative was in discussions with the BSB regarding the pleas to the charges which could resolve the

matters due for consideration today and other matters which were scheduled to be considered in December.

8. The hearing was adjourned for those matters to be discussed between the parties. When the Panel reconvened, the parties advised that matters could not be resolved today. The parties confirmed that they had no objection to this Panel dealing with the second set of charges due to be dealt with in December, subject to their availability.

9. The following directions were issued:

    a. By 25 October 2022, the Respondent is to submit a written statement as to the basis of his plea to the charges in today's case [PC 2021/4962/D5].

    b. By 25 October 2022, the Respondent is to submit a written statement as to the basis of his plea to charges 1-6 in case [PC 2020/0928/D5].

    c. By 25 October 2022, parties to advise of any resolution in relation to charges 7-9 in case [PC 2020/0928/D5].

    d. The Respondent gave an undertaking not to act as a Pupil Supervisor in the future and confirmed that he had not done so since 2019.

    e. Costs reserved.

Preliminary Matters: 7 and 9 December 2022 Hearing in Case PC 2021/4962/D5 and Case PC 2020/0928/D5

10. On 7 December 2022, the Respondent was not present having provided a positive COVID test to the Panel. Through Mr Scamardella he told the Panel that he was suffering from symptoms including fever and was not fit to attend the hearing. Emails from him to Mr Justice Turner, before whom he is presently appearing in the Crown Court at Nottingham, explaining that he was unwell, were provided. On the basis that the Respondent was not contesting charges 1-6 and the BSB would in those circumstances not be proceeding with charges 7-9, the hearing was adjourned to 9 December 2022 for consideration of sanction in relation to both cases.

11. Having heard evidence and submissions, the Panel concluded that the Respondent was involuntarily absent, and it would therefore not be just to proceeding in his absence under rE183.

12. The Panel asked for submissions on whether it had powers to impose an interim suspension on the Respondent, or whether the BSB would do so under the Interim Suspension and Disqualification Regulations in view of the Respondent's repeated misconduct and the risk is perceived to the public.

13. Both parties submitted that there was no such power because, amongst other reasons, the criteria in rE268 were not met. Even if the Respondent's recent admissions to charges 1-6 in case 0928 constitute "*other information*", it was submitted that none of the criteria in rE268(1) are satisfied – the risk not being to the Respondent's clients (rE268(1)(e)) but to pupils and mini-pupils, other barristers and the reputation of the profession – none of which is provided for.

14. The Panel was clear that it would have made such an order if it had the power to do so but having retired to consider the rules reluctantly concluded that it was not possible to make such an order.

15. In those circumstances the Panel adjourned the case for the shortest period possible, to 1pm on 5 January 2023, and accepted undertakings proposed on the Respondent's behalf in the following terms:

    a. Not to accept any new instructions.
    b. Not to attend any work-related social events over the festive period.

16. The Panel made clear that it would rather the Respondent also did not attend a sentencing hearing in the Crown Court at Chester on 4 January 2023, but recognised that it had no power to require an undertaking from him that he would not do so.

17. The Panel made the following directions:

    a. By 4pm on 9 December 2022, the BSB is to submit a disciplinary chronology.

b. By 4pm on 4 January 2023, the Respondent is to submit any written materials on which he relies in mitigation.

c. The Respondent's undertakings of 11 October 2022 to remain in force, together with the undertakings made on 9 December 2022.

d. Costs reserved.

Preliminary Matters: 5 January 2023 Hearing in Case PC 2021/4962/D5 and Case PC 2020/0928/D5

18. Just before the hearing commenced, BTAS disclosed an email from me to the Chair of the Council of the Inns of Court, the Director-General of the BSB and the Registrar of BTAS relating to the Panel's inability to impose interim measures on the last occasion. This caused Mr Scamardella KC to renew orally his previous written application for the Panel to recuse itself on the grounds of apparent bias (Mr Scamardella made a recusal application at a previous application, which was refused). Having retired to consider the matter, we unanimously again rejected that application, and give our reasons for doing so as follows:

a. The Respondent made an application on 5 January 2023 that the whole panel, who are to determine the sanction to be applied in this case should recuse themselves from any further involvement in the case.

b. The history of the matter is that on 9 December 2022, it was anticipated that the sanction to be applied would be determined, but the Respondent was unable to attend as he had a positive COVID test. He was represented at that hearing by Mr Scamardella, who sought an adjournment because he said the Respondent was unwell having tightness of his chest, headaches and diarrhoea, which had begun a few days earlier. That was supported by a GP, who said that the symptoms reported were typical of COVID and he would not be able to take part in a hearing either in person or by video because his symptoms made him feel unwell. The case was adjourned to 5 January 2023.

c. Mr Scamardella said at the hearing on 9 December 2022, somewhat surprisingly, since at the previous hearing the Respondent had admitted the charges set out in case number 4962 and the Tribunal was told that he would admit charges 1-6 in case number 0928, that he was ''*woefully under instructed*'' in relation to sanction. He also said that the Respondent would be called to give evidence although no statement from him had been served.

d. Subsequently, Mr Scamardella made a written application for recusal dated 22 December 2022. BTAS, with the agreement of the Panel, disclosed on 4 January 2023 an email which the Chair of the Tribunal had written to Lord Justice Green in his capacity as Chair of COIC.

e. At the hearing on 5 January 2023, Mr Scamardella repeated his application that the members of the Panel should recuse themselves and said that the email, referred to in the last paragraph, supported and strengthened that submission.

f. The test for recusal is discussed in Locabail (UK) Ltd v Bayfield Properties [2000] QB 451, In Re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700, R v Gough [1993] AC 646 and Porter v Magill [2002] 2 AC 357. The last-named case was a House of Lords decision and the most recent, in which previous authorities were reviewed. All members of the House agreed with Lord Hope on the issue of bias and his conclusion at page 494H was that the test is ''*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*'' That is the test which we have applied to this submission.

g. The thrust of Mr Scamardella's submission was that I had, as Chair, demonstrated bias towards the Respondent in his comments on 9 December 2020 and that the Panel should have considered the issue of whether the case should be adjourned but went on to consider what sanction should be applied without declaring to the parties its decision with regard to the application to adjourn. It was said also that the Panel considered what power they had to impose an interim sanction without saying whether or not the case should be adjourned.

h. With respect to Mr Scamardella, that is a misunderstanding of the process. In the light of what we were told about the Respondent's state of health it seemed there was no choice but to adjourn and the Tribunal was concerned as to what the terms of that adjournment should be and, in particular, whether there should be any interim restriction on the Respondent. An interim restriction as a condition of an adjournment is not the same as a sanction. The Panel did not purport to impose any sanction on the Respondent but were properly concerned about public protection given that:

    i. We were aware that the Respondent had previous findings against him for similar professional misconduct relating to sexual misconduct;

    ii. The present charges, which were admitted by the Respondent, arose on 2 separate occasions and both included sexual content apparently linked to the consumption of alcohol;

    iii. The February 2020 incidents arose while the decision in case number 0057, for which the Respondent was ultimately suspended for 6 months, was pending;

    iv. The period of adjournment was to be short until 5 January 2023 and we were informed that the trial in which the Respondent is currently engaged was not likely to resume until 9 January 2023; and

    v. The festive season took place during that short period when the Respondent might be tempted to attend work related social events at which young females, some of whom might have been particularly vulnerable as was the case with the admitted charges, might be present.

i. In those circumstances Mr Scamardella gave undertakings on behalf of his client that he would not accept further instructions or attend professional festive functions. Mr Scamardella did not have to give those undertakings, but they were similar in nature to undertakings which the Respondent had himself given previously.

j. An interim panel could have imposed conditions prior to a final sanction's hearing by a Disciplinary Tribunal. We were in a better position than an interim panel because we had read all the tribunal documents in the bundles supplied and knew of the previous findings against the Respondent.

k. In those circumstances it is our view that a fair-minded and informed observer, having considered the facts, would conclude that there was no real possibility that the Panel was biased.

l. We adjourned to consider the law on interim suspensions but took the view that we could not do so. That there was a potential risk to the public is obviously something which the Disciplinary Tribunal should try to avoid if possible, pending the decision on what sanction would ultimately be applied. That there were interim restrictions given by way of undertakings, has no bearing on the ultimate sanction which we did not and could not decide then. Nor does it indicate any pre-judgment.

m. It is not alleged, as we understand it, that there was a bias which pre-existed our appointment, but it is said that having read the bundle of documents and other documents supplied, the Panel on an interim basis, displayed bias in wanting to add interim conditions to the adjournment. In view of the history of this Respondent and his admission to present charges, any Panel would or should consider some interim protection for the public. That we did so, hardly supports the conclusion that we were biased.

n. Following the hearing on 9 December 2022, I wrote the email to Lord Justice Green referred to above. Our view about that is that it adds nothing to support the Respondent's case. We were concerned that it appeared, pursuant to rE268, which refers to protection of the client but not the public or other junior barristers, that we had no power to suspend the Respondent until the conclusion of the sanction hearing and the purpose of the email was to draw this to the attention of Green LJ.

o. The letter states that the cases against the Respondent related to very serious, admitted, sexual misconduct. That was at preliminary view which we were entitled to come to having regard to the documents we had read and, indeed, by conveying it to the Respondent, it might help him to formulate his mitigation.

p. The next paragraph makes it clear that we had not yet reached any resolution of the appropriate sanction and the paragraph after that is purely factual.

q. The paragraph starting ''*the matter was listed today…*'' indicates that the current guidance points to disbarment. If the Respondent wish to argue that his admitted breaches were only in the lower range, he could make that argument at the sanctions hearing which was then planned for 5 January 2023. If he accepted that it was in the middle range, the indicative sanction is over 24 months' suspension or disbarment. His previous findings, when he was suspended for 6 months under the old Sanctions Guidance, would be relevant to the penalty. If it was ultimately decided that the seriousness of his offences were in the upper range, the indicative sanction would be disbarment.

r. None of that challenges that the current guidance points to disbarment and, in any case, does not indicate that we have reached any concluded view about the appropriate sanction in this case nor that we are affected by any bias. When we consider the appropriate sanction in this case, we will take into account all of the mitigation put forward on the Respondent's behalf and then determine the appropriate sanction.

s. We have given anxious consideration to Mr Scamardella's submission but reject it on the basis we have set out in paragraph (k) above.

19. The charges then having been put, Ms Iyengar on behalf of the BSB proceeded straight to an analysis of the Sanctions Guidance. It became apparent once Mr Scamardella began his submissions that there were real disputes of fact arising from the bases of plea submitted by the Respondent. There had been no response to those bases of plea from the BSB, save in the form of statements from the witnesses. The apparent disputes of fact include:

a. The length of contact between the Respondent and Pupils A and B in the bar.

b. The alleged purchasing by the Respondent of drinks in the bar.

c. Alleged contact between the Respondent and another barrister in the bar.

20. It appeared to the Panel and the parties that it would or may be necessary to hear oral evidence and/or to view the CCTV to resolve those issues. As a result, the Panel was regrettably again unable to proceed to sanction. It gave further directions to ensure that on the next occasion an effective sanction hearing could be held in both cases.

21. The Respondent renewed his undertaking from October 2022 not to attend work-related social events. He did not renew his undertaking, given in December 2022, not to accept any new instructions, given the further delay in his case proceeding to sanction.

22. The Panel issued the following directions:

a. The BSB to serve a full written opening of the case setting out each and every fact the BSB says is relevant to sanction in both cases by 4pm on 27 January 2023.

b. The respondent is to set out in writing exactly what facts in that opening are disputed, or any additional facts that the respondent relies upon which fall outside that opening, and the basis for such disputes as are identified by 4pm on 10 February 2023.

c. Parties are to set out in writing by agreement which witnesses, exhibits, or other evidence or material is to be called before the tribunal to resolve those issues by 4pm on 24 February 2023.

d. If agreement cannot be reached, each party is to set out separately in writing those witnesses they wish to call on the issues to be litigated, again by 4pm on 24 February 2023.

e. The parties are to identify by agreement, if possible, those parts of the CCTV that the panel must see, and if agreement cannot be reached, each party is to separately set out those parts each party wishes the panel to see, also by 4pm on 24 February 2023.

f. The resumed hearing will be in person, open to the general public, in the Tribunal Suite at Gray's Inn.

g. The parties are to agree a time estimate for the hearing, to include both hearing time and deliberation time, by 24 February 2023. The date of the hearing is to be agreed between the parties and BTAS and fixed administratively before the end of March 2023 if at all possible.

h. The Respondent's undertaking of 11 October 2022 to remain in force as detailed above, his undertakings of 9 December 2022 being discharged.

i. Costs reserved.

Preliminary Matters: 17-19 July 2023 Hearing in Case PC 2021/4962/D5 and Case PC 2020/0928/D5

23. We were informed that Pupils A and B were available to give evidence on the first day of the hearing. A third witness was also available.

24. Certain protections had been put in place to protect the identities of Pupils A and B, including the use of screens. Parties and observers were also reminded through judicial direction of the importance of the perseveration of the anonymity of Pupils A and B and that they (along with Person A) had been granted lifetime anonymity orders.

25. **It is again repeated the Pupils A and B (and Person A) are entitled to lifelong anonymity. No matter shall be reported which may lead directly or indirectly to their identification.**

26. In the event, after some discussion between the parties over the basis of the Respondent's plea, it was decided that Pupils A and B were not required to give evidence, and neither was the third witness. In the end, the Panel was provided with a redacted victim impact statement from Pupil B on the morning of 18 July 2023; she later gave evidence that same day. She was not cross-examined.

27. For the reasons set out more fully below, Pupil B elected not to use give her evidence behind the screens.

Pleas

28. Through his Counsel on 11 October 2022, the Respondent admitted two of the three charges in case 4962 and indicated an intention to admit six of the nine live charges in case 0928. (The BSB later offered no evidence in respect of the one denied charge in case 4962 and withdrew the three denied charges in case 0928).

29. At the hearing on 5 January 2023, the Respondent admitted six charges in case 0928.

30. The manner and timings of these pleas has been considered by the Panel, as set out more fully below.

Evidence

31. The Panel was presented with a bundle of evidence each from the Respondent and the BSB. No discourtesy is intended to either of the parties, but we do not intend to itemise every document we received in the bundles. Suffice is to note that the bundles included statements from Person A and Pupils A and B; correspondence between the Respondent and the BSB; and testimonial evidence on behalf of the Respondent, among many other documents.

32. The Panel heard live evidence from Pupil B, who was called by the BSB. She was not cross-examined. Though certain protections had been afforded to Pupil B (including the use of screens when giving her evidence), she elected not to use them after the Respondent absented himself during the tenure of her evidence. Neither party objected to this method of proceeding. Redactions had been agreed between the parties and applied to the victim impact statement provided by Pupil B. The Panel were not presented with the unredacted material at any point.

33. The Panel heard live evidence from Brendan Kelly KC, who was called by the Respondent to provide character evidence. He was questioned by Mr Scamardella and then briefly by Ms Iyengar.

34. The Panel was also presented by the Respondent with CCTV footage of approximately 55 minutes from the bar that was the focus of the Charges in case 0928. The Panel watched this footage on several occasions, both with the parties and without. The footage had at times been rotated 180 degrees for the Panel's benefit and, on the

Respondent's urging and once of the Panel's volition, sections of the CCTV were magnified.

Summary of Facts

35. Robert Michael Kearney was called to the bar in September 1995.

36. He appears before the Bar Tribunal & Adjudications Tribunal ("BTAS") for sanction on two separate matters. Case 0928 was listed for a Newton-style hearing commencing 17 July 2023. In answer to the charges, the Respondent said:

> "*I admit that [each individual charge 1-6], but obviously varies, the basis of plea which plays a role with regard to the schedule, but I admit the charge.*"

The Respondent had entered a basis of plea which was not then accepted by the BSB. The matter was then adjourned to December for a Newton-style hearing. Matters did not proceed then due to the Respondent's ill health (covid). Regrettably, despite best efforts, the matter was not able to reconvene for the Newton hearing until 17 July 2023, at least in part to allow the Respondent to fulfil his professional obligations to a lay client in a long running trial in Nottingham. Pupils A and B attended in person to give evidence in July 2023, though in the end Pupil A did not give evidence after discussions between the parties. No evidence on the facts was called, though Pupil B elected to deliver her impact statement.[1]

Findings in Case No.: 2020/0928

37. On the evening of 13 February and into the early hours of 14 February 2020, there was a private Silks appointment celebration party ("the Silks party") held at XXXX Chambers[2], followed by further drinks in a local bar attended by a number of barristers. Pupils A and B attended both parts of those events as did the Respondent.

38. Pupils A and B were very junior and new to the profession. Pupil A was approximately three months into her pupillage and Pupil B was just over one month into her pupillage.

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[1] Schedule A to the Charge sheet, together with the basis of plea and supplementary basis of plea of case 2020/0928 and the basis of plea to case 2021/4962 are attached hereto.
[2] Name of Chambers anonymised to protect identity of complainants

Both pupils were in the same chambers. The Respondent was a member of XXXX Chambers where the Silks party was held. For the avoidance of doubt, this was not the same chambers as Pupils' A and B.

39. Full details of the Respondents previous incidents of misconduct are set out below. It is sufficient to note at this stage that the Respondent has a relevant antecedent history which includes:

    a. One then outstanding case for similar conduct (PC2019/0057/D5: the conduct occurred 26-28 January 2015 but not reported until November 2018. The Respondent denied the charges but they were found established after trial. He was sanctioned on 19 March 2021 with a six months suspension and £3000 costs. The Respondent appealed to High Court but his appeal was dismissed on 24 January 2022). Hereafter the "first mini pupil case".
    b. Previous sanction for similar conduct (PC2017/0431/D3: conduct occurred 10 October 2017. The Respondent admitted the charges. A sanction was imposed on 6 December 2018 of a reprimand and £1,000 fine). Hereafter the "male pupil case".
    c. Unreported incident [at that stage] (PC2021/4962/D5: conduct occurred 23-26 July 2018 and reported in March 2021). Hereafter the :"second mini pupil case".

40. Pupils A and B arrived at XXXX Chambers at about 8pm. They had a general conversation with a junior member of XXXX Chambers during which the Respondent arrived, was introduced and joined the conversation. Neither Pupils A or B had met the Respondent before.

41. Pupil A described the Respondent having "*his arm around our backs straightaway.*"[3] Pupil A further stated:

> *"[t]hroughout the conversation, he would place his hand on my back and was stroking my back. He also had his hand around my waist and was squeezing it …*

[3] Statement of pupil A, Main Bundle, ppB1-B3

> *I would manoeuvre myself so that Robert was forced to let go. At this point I was feeling uncomfortable.*"

Pupil B experienced similar behaviour. The Respondent at one point asked: "*do you two beautiful ladies want to show me to the cloakroom?*" Both Pupils A and B declined. Pupil A said:

> "*[t]he night continued and various comments were made to me and Pupil B by Robert about our appearances. Comments were made about our eyes, our figures and appearances in general. Robert was asking me to look at him directly so he could look closely at my eyes. The physical contact also continued. I was repeatedly moving away from Robert.*"

At some point while still in Chambers, Pupils A and B were able to discuss the Respondent's behaviour and both understood that it was making each of them uncomfortable.

42. Later, attendees of the Silks party left Chambers and moved on to a local bar. The group included a range of barristers (from senior to junior), barristers' clerks, Pupils A and B and the Respondent. Having entered the bar, the group's bags and coats were put down and some of the group went to the bar. Drinks were bought. By the Respondent's basis of plea, he admits buying only one round of drinks that included Pupils A and B. We expressly approach the matter on the footing that the Respondent was not seeking to ply Pupils A and B with drink.

43. Various comments were made to both Pupil A and B which were highly sexualised, grossly offensive and utterly repugnant. These comments are set out in Schedule A. They made Pupil A uncomfortable and she challenged the Respondent about them.

44. There has been dispute at the hearing as to the use of the word "*relentlessly*" in describing the Respondent's conduct in making these comments. We have seen CCTV from the bar. The precise moment of entry into the bar is unknown. The likely timescale for these comments is approximately 5 minutes 47 seconds, or some part thereof. We cannot be certain that the CCTV captures the entirety of the event, and that timescale is based upon that part of it that was captured by the CCTV. It is

acknowledged that the group was in the bar for in excess of an hour, during the vast majority of which the Respondent was socialising with another more senior member of Chambers who is not a witness in this case and who has made no complaint. To that extent the word "*relentlessly*" is not objectively borne out, but we acknowledge that it is an emotion which subjectively Pupils A and B felt as a result of the Respondent's conduct.

45. At some stage, Pupil A noticed that Pupil B had become isolated from the group and was sitting with the Respondent and appeared to be looking uncomfortable. Pupil A therefore went to join Pupil B at about the time that the Respondent left the table where Pupil B was sat.

46. Pupil B confirms that when she was in XXXX Chambers, the Respondent joined her group and joined in the conversation.[4] She states that "*he wrapped his arms around mine and Pupil A's back, whilst his hand was on my lower back he was rubbing my back, grabbing my waist and placing his hand lower down my back. He kept squeezing me. I shrugged him off and moved slightly away. I could see Pupil A experienced similar behaviour. Robert asked: 'do you beautiful ladies want to show me the cloakroom?' We declined. As the night continued various comments were made to me and Pupil A … primarily by Robert. His comments were often accompanied by him putting his hand on our backs and standing uncomfortably close to us. The comments made were about our eyes, our figures and general appearance … This made me feel uncomfortable.*"

47. Dealing with the move from Chambers to a local bar, Pupil B stated that:

> "*when we entered … everyone put their bags down on a bench. I proceeded to sit down at the bench as I did not want to leave my items … unattended. Robert Kearney approached telling me how me and the man who was sat down with me made a lovely couple. I explained that we were not a couple and the man was old enough to be my father to which he agreed. Robert then proceeded to sit down uncomfortably close to me.*"

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[4] Statement of Pupil B, Main Bundle, ppB4-B6

Pupil B then sets out in detail the comments made by the Respondent as set out in Schedule A. As already noted, these were highly sexualised, grossly offensive and repugnant sex-based remarks. Pupil B told him that it was none of his business and she took the opportunity to send a WhatsApp message to her pupil supervisor to ask her how she (Pupil B) ought to handle comments about how many men she had slept with and suggestions that she "*get with older men.*"[5] While doing so, the Respondent continued his sexualised comments to and about Pupil B, ultimately accusing her of being "*frigid*". Pupil B described these comments as making her feel visibly uncomfortable.

48. Pupil A in a further statement[6] stated that she had attended the Silks party at XXXX Chambers aware that it was a celebration but also because she had been advised that it was an ideal networking event. She says that when the Respondent joined her conversation it was obvious that he had been drinking, that he was loud and expressive and unsteady on his feet. As regards his verbal and physical conduct, she stated:

> "*at the time, as a pupil, I simply accepted the behaviour. In hindsight I shouldn't have, but I didn't want to make a scene. I felt uncomfortable and would attempt to move away without being obvious. I was conscious that the event was a celebration and I wasn't confident enough to say anything.*"

49. An issue arose in the proceedings about a comment being made by a fellow barrister to the Respondent and attributed by that barrister to either Pupil A or B that the Respondent was a 'DILF' (an abbreviation for the vulgar phrase 'a Dad I'd Like to Fuck'). By his basis of plea, accepted and unchallenged by the BSB, it is accepted that the fellow barrister made that comment and that in turn may have influenced the Respondent in his intoxicated state to somehow consider that his vulgarities would be acceptable to Pupils A and B. However, it is the unchallenged evidence of both Pupils A and B that they each deny saying those words or anything like it. There is no evidence that either consumed alcohol to any degree to adversely impact upon their reliability on this point. Pupil A also dealt with her own alcohol consumption that evening. She

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[5] See WhatsApp message, Further Documents Bundle, pF10
[6] Main Bundle ppB115-B120

admits to two glasses of prosecco at the Silks party and a shot in the bar, but observed that this was an event where more senior members of the Bar would be paying attention to the conduct of pupils, that she had been warned by her supervisor to monitor her alcohol intake at the event and that she (Pupil A), for medical reasons, is self-conscious about how her pupils react when consuming alcohol. She denied – and we find as a fact – that she had not consumed alcohol to the extent that it interfered with either her credibility or reliability.

50. Pupil A gave written evidence about the impact of these events upon her. She has reacted with a degree of robustness, though understandably states that she has found the complaint and disciplinary process to be stressful; that she was further stressed at the prospect of having to give evidence; that she has been consistently worried that the process would influence her reputation on circuit; and that the incident has left her disappointed that this sort of behaviour still exists at the Bar. She declined the opportunity to give any further evidence at the hearing.

51. Pupil B provided a further statement to the Panel setting out additional details of the events and the impact of them upon her.[7] She echoed the denials of Pupil A regarding the DILF statement. She stated that at around the time of the Silks party she had been told by her supervisor that other members of her Chambers had found her to be quiet and shy and that she was encouraged by her supervisor to be more social and outgoing. She says that she was suffering from a sense of feeling out-of-place and like an imposter and so she felt under a degree of pressure to attend the event. She reports herself as a very timid, nervous and shy person, uncomfortable in social settings and that she was only just beginning to come out of her shell when these events happened. She denied that she consumed any significant amount of alcohol during the evening in part because she was aware that her Chambers senior management were in attendance and that she felt on edge and under assessment. Again, we find as a fact that Pupil B had not consumed alcohol to the extent that it interfered with her reliability and credibility.

[7] Main Bundle ppB148-B155

52. Pupil B reported that she was very distressed the following day in reporting what had happened to her to her own Chambers' management to the extent that she was sent home for several days. She reports feeling that she had disappointed her Chambers and that she no longer wanted to be at the Bar. She reported applying for an external mentor to assist with dealing with events. Her feelings were aggravated by this incident happening just as the pandemic began, so that her period of working from home made her feel more isolated. She stated that these events really knocked her confidence and, as a result of these events (though we acknowledge that she had a number of motivations to do so), Pupil B left her Chambers a year after pupillage and moved to practise elsewhere.

53. Pupil B elected to read her impact statement in person before the Panel. Her continuing sense of distress was manifest, and she in essence repeated her description of the extent of the harm caused to her by these events.

54. We note the Respondent's basis of plea.[8] The basis is largely silent about events at the Silks party. It does not challenge the accounts given by Pupils A and B. The basis refers to the reporting to the Respondent by the fellow barrister of the 'DILF' comment (a comment denied by both Pupils A and B, but not challenged by the BSB, and which was made by the fellow barrister and therefore within the mind of the Respondent when he acted as he did). The remaining initial basis amounts to points of mitigation and an invitation to the BSB to review the CCTV material. On 17 July 2023, when listed for the Newton-style hearing, a further supplementary basis of plea was submitted in which the Respondent denied plying Pupils A and B with drink, he repeats the reference to the DILF comment and disputes the use of the word "*relentlessly*" when describing his use of the offensive words and comments. It further asserted that the CCTV demonstrates that he was generally tactile with all in the after-party bar, both male and female, senior and junior. After very considerable deliberation by the BSB, it accepted the basis and called no evidence.

55. For the avoidance of doubt, the Panel Chair asked Mr Scamardella whether it was to be correctly understood that the Respondent's plea was an admission that he used the

[8] Further Documents bundle pF28, Respondent Bundle yellow tab.

words (or words to the effect of) those set out in Schedule A of the Charge Sheet. Mr Scamardella confirmed that it was.

56. In his basis of plea, the Respondent avers that as a result of being told of the "*DILF*" comment, any words and phrases of a sexual nature that he then used towards Pupils A and B were joking. Whilst accepting that in his drunken state the Respondent may have intended the words that way, we are of the view that such words and phrases are wholly incapable of amounting to a joke or to humour to any degree. In our judgement, no fair-minded and reasonable bystander could conceive of such words and phrases as a joke. Furthermore, it is clear that neither Pupil A nor B understood it as such. We have very grave concerns, given the Respondent's antecedent history, about what this says about the degree and nature of the Respondent's insight into such behaviour and the consequential concern that such behaviour might be repeated.

57. The Panel considers that its findings on the totality of the evidence as summarised above is consistent with the bases of plea.

58. As a result of the complaint being made in this case, the Chambers of pupils A and B began an investigation and notified the Respondent's Chambers of the complaint and intended investigation. That caused the Respondent's Chambers to invoke their investigation process which is described by the Respondent's Head of Chambers.[9] The Chambers' Head notes that he was aware of the complaint and investigation arising in 2017 against the Respondent (the male pupil case) which related to the Respondent making inappropriate sexual comments when drunk. The Head notes that the Respondent was challenged within Chambers about that conduct, accepted that he had drunk too much and that he sent a letter of apology to the male pupil's Chambers regarding his conduct. The Head also noted that, as a consequence of this, the Respondent volunteered to not attend Bar Mess or similar social functions for 12 months, which was then extended to cover the period of the proceedings. He also agreed not to act as a pupil supervisor.

[9] Statement, Main Bundle, ppB14-33, with associated exhibits

59. Following the BTAS findings and sanction which were handed down in November 2018, the Respondent's Chambers issued him with a formal warning for breaches of the Chambers' Code of Conduct. The Respondent's Head of Chambers stated that as a result of the publicity relating to the 2015 matters, Chambers received a complaint in March 2021 from a female that had undertaken a mini pupillage with Chambers in 2018 in which she says the Respondent subjected her to unwanted touching and sexually inappropriate comments. As a result of this complaint, the Respondent's Head further extended the Chambers' prohibition on the Respondent supervising either pupils or mini pupil, referred the matter to the BSB and prohibited the Respondent from attending any Circuit or Chambers social events. This decision was notified to the Respondent on 25 October 2019 orally and then confirmed in writing that day by email.

60. It was against that background and with that Chambers' prohibition still extant that the Respondent attended the Silks party on 13 February 2020. The Respondent's Head of Chambers stated:

> *"I was present at the party for about an hour. At about 19:00 I was in the reception area … when the Respondent emerged from the lift. He arrived in a small group … The Respondent saw me and almost straight away came to speak to me. He asked whether it was alright for him to stay. He said that he had been invited by the two new silks whose party it was. I was disappointed that the Respondent had decided to attend the party. Although it was not strictly a chambers event (the convention is that such parties are held at the invitation of the new silks themselves) I felt that he was stretching a point. However, now that he had arrived … I felt that it would be going too far to ask him to leave. Most of Chambers were unaware that he was facing a further disciplinary complaint. I agreed that he could remain."*

Thereafter the Head recounts the history of the complaint by Pupils A and B being received, the internal Chambers process, including commencing Chambers' internal disciplinary proceedings which were curtailed by the Respondent's resignation from Chambers on 5 March 2020. The Joint Heads of Chambers had given the Respondent the opportunity to set out exactly what he admitted and what he disputed of the

accounts by Pupils and B. By his resignation from Chambers, the Respondent brought this internal investigation to a close without any admissions as to his conduct.

61. In respect of the Respondent's response to the complaint, the Panel has considered carefully the terms and extent of the Respondent's response to the complaint of Pupils A and B. We note the following:

    a. When informed by his Head of Chambers of the complaint, but not the terms of it, the Respondent offered to give his "*candid explanation*" of what had taken place. The Head refused to receive this orally, informing the Respondent that he was to put it in writing. The Respondent declined to do so at that stage.

    b. On 23 February 2020, the Respondent issued a letter of apology.[10] That letter asserted "*whilst my recollection of the evening is different from that which I have read, the most important issue is the fact that there are two people who have been upset by my conduct and that is of great shame to me.*" At no stage in that letter did the Respondent make any admissions, either express or implied about the use of the sexually derogatory remarks alleged to have been made by him, although he had read the statements of Pupils A and B. The Respondent's Head of Chambers noted, and we agree, that "*this letter had failed to address the factual allegations made by [Pupils A and B] in their witness statements.*"

    c. On or about 24 February 2020, the Respondent's own Chambers began its internal investigation and disciplinary process. An initial date was set for a response to the allegations from the Respondent, that date being extended to 6th March 2020 at the request of a senior member of the Bar who then acted on behalf of the Respondent. The Respondent did not respond to any factual allegation by that date or at all in the Chambers disciplinary process. Instead, that process was brought to a conclusion without any admissions by the Respondent of the alleged conduct or identification by him of what parts of Pupil A and B's accounts he disputed. The conclusion of these proceedings was

[10] Statement of Head of Chambers, Main Bundle ppB24-25, and at Main Bundle B7-B8.

brought about by the Respondent's resignation from Chambers on 5th March 2020.[11]

d. Thereafter, the BSB investigation and charging process commenced. That process has generated much correspondence. We are not aware – and our attention has not been drawn to – any correspondence from the Respondent in which he makes a clear admission that the sexually derogatory words and expressions alleged against him, or any of the alleged touching either at Chambers or at the bar were admitted. Overall, the focus of the Respondent's response was on the CCTV and what it did or did not demonstrate.

e. On or about 11 May 2020, the Respondent set out in writing to the BSB his response to the allegations.[12] That letter began: "*I deny the allegations. In my response to [the allegations made by Pupils A and B] I noted that I did not accept the facts and that remains the position. I did not want to put anyone through the difficulty of a contested finding of fact where they would have been shown to be mistaken in their evidence.*" He then set out in brief outline his counter account, describing the DILF comment being reported to him by a fellow member of Chambers; admitting that there were references to having sex with older men but that he was "*jokingly*" saying "*who would want to have sex with old men? … I did not start a conversation of a sexualised nature, but I did joke about what I had been called. The fact that it was omitted by both of these people fails to put in context what was said and why.*" The Panel notes that this falls very far short of an admission to the words and phrases set out in Schedule A to the charge sheet.

f. When the matter was listed before us for hearing on 5 January 2023, the Respondent pleaded guilty to charges 1 to 6. Those charges are to be read as incorporating the words and phrases in Schedule A. The basis of plea was entered which did not challenge those words and phrases. The Panel understands, and Mr Scamardella confirmed in oral submissions, that by that

[11] Statement of Head of Chambers, Main Bundle ppB26-32
[12] Main Bundle ppE14-E15

plea the Respondent admitted those words and phrases. In the event, a dispute arose as to the terms of that basis and the precise extent of what was admitted. That dispute has led to a further delay of approximately seven months and to the submission of a further basis of plea which does not materially alter the position save that the BSB now accept that the fellow barrister made the DILF comment (though Pupils A and B did not) and that the CCTV allows the Respondent to demonstrate that he was neither plying Pupils A and B with drink nor relentlessly pursuing his harassing conduct towards them. These differences can and should, in our view, have been resolved much earlier and the consequential additional delay avoided. On balance, we cannot say that responsibility for this dispute sits solely at the feet of the Respondent, but we are of the view that neither side properly engaged to resolve this until the return day of 17 July 2023.

Findings in Case No.: 2021/4962

62. In July 2018, Person A attended a mini-pupillage at XXXX Chambers. She had then completed her second year but had not commenced her third year at university. She was sent by Chambers to join the Respondent at Court. During the day, the Respondent had a conference and Person A sat in on that. Afterwards, the Respondent made a comment about Person A's dress and, as she turned to leave the room, the Respondent pulled the back of her dress down so as to look at the label. This made Person A feel extremely uncomfortable though she did not make any specific comment about it.

63. Later in the day, while on the public concourse at Court, the Respondent saw a member of the public wearing bright floral clothing. He commented to Person A "*that doesn't look great*" before appearing to then step out and away from Person A as if to "*check her out*", then telling her that he thought she "*would look good in that.*"[13]

64. About three days later, Person A was again with the Respondent as part of her mini-pupillage. He told her that he and other barristers in the case she had observed planned to go out for a drink after work. He invited her to join them. Person A declined,

[13] Bundle, statement of Complainant A, ppB17-18

explaining that she had to work. The Respondent replied: "*that's a shame, I put on clean boxers just for you.*" The mini pupil responded by texting her mother about the Respondent's comment, adding: "*HOW VILE*" (capitalisation in original). Person A's mother noted him to be a "*filthy, horrible man.*"[14]

65. Though Person A told her parents about what had happened and was encouraged by them to report the matter, she felt that she could not because she was worried about the consequences to her; her future aspirations at the Bar in the same city; and her prospects of obtaining pupillage.

66. As a result of publicity relating to other matters involving the Respondent that prompted Person A to report matters, doing so in March 2021.

The Respondent's Antecedent History

67. As has been noted, the antecedent history is somewhat complex in that the matters did not come to light in chronological order and so there is overlapping of events. Both sides have attempted to encapsulate this. The position is as follows.

    a. First female mini pupil case: PC/2019/0057/D5
        i. The nature of the complaint was use by the Respondent of highly offensive sexualised language and comment directed towards a person who was at the time a mini pupil.[15]
        ii. Chronologically, the first incident in time, occurring 26-28 January 2015.
        iii. First reported to the BSB on 30 November 2018, the Respondent being notified of the complaint on 27 March 2019
        iv. On 5 February 2020, Respondent does not agree standard directions and asks for the case to be delayed for 6 months to allow him to undertake further investigations. Note that this was 8 days before the incident giving rise to the complaints of Pupils A and B.
        v. On 10 December 2020, the Respondent formally denied the matter.

[14] Copy text message, bundle B25
[15] Detail of charge set out in Chronology Supplementary Bundle pS5

vi. On 21 December 2020, the Respondent pursued an abuse of process argument.

vii. On 19 March 2021, before a BTAS hearing, the charges were found established. The sanction imposed was a 6-month suspension with conditions not to supervise pupils or mini pupils and costs of £3000.

viii. This March 2021 Panel was of course unaware of the matters that are now before the present constituted BTAS Panel.

b. Male pupil case: PC2017/0431/D3

i. The complaint was that the Respondent, at a Bar Mess event while drunk, approached a male pupil who he had never met before, put his arm around the pupil and addressed him in a highly sexualised offensive and intimidating manner.[16]

ii. This is chronologically the second incident occurring on 10 October 2017, though it was the first to be reported.

iii. On 27 November 2017, the Respondent was notified of the complaint by the BSB.

iv. On 8 January 2018, the Respondent responded to BSB in which *inter alia* he stated that he did not wholly agree with the facts but that the differences were minor and he did not require anyone to give evidence. He additionally sent a letter of apology.

v. On 20 November 2018, the Panel sanctioned the Respondent to a fine of £1000 noting that: (i) it was an isolated incident; and (ii) there was no risk of repetition. The November 2018 Panel were unaware of the First female mini pupil case, the incident having not been reported at this stage.

c. Second female mini pupil case: PC2021/4962/D5

i. The nature of the complaint was that the Respondent, when supervising a mini pupil, engaged in sexually discriminatory conduct and made sexualised comments towards the mini pupil.

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[16] Detail of charge set out in Chronology Supplementary Bundle pS5-6

ii. Chronologically this incident is the third in time occurring 23-26 July 2018, but the allegation was not reported until 25 March 2021.
iii. On 9 April 2021, the Respondent was notified of the complaint.
iv. On 11 October 2022, the Respondent formally admits the charges before the BTAS Panel. Sanction is to be imposed as part of this hearing.

d. Female Pupils A and B case: PC2020/0928/D5
   i. Chronologically this incident is the last in time, occurring on 13-14 February 2020.
   ii. On 19 February 2020, the Respondent was notified in writing through his own Chambers of the fact of the complaint and core details.
   iii. On 23 February 2023, the Respondent replies in the terms set out above. The Panel again notes that there was no clear admission of facts regarding the words used and conduct.
   iv. The remainder of this history of this matter is as set out above.

Sanction and Reasons

68. The BSB opened the case largely in accordance with the written materials. Criticisms are made of that opening by the Respondent's Counsel, below. Insofar as there was a dispute between the parties on this, we have set out above our key factual findings.

69. Mr Scamardella set out the Respondent's mitigation in writing and then elaborated in oral submissions. As above, Brendan Kelly KC gave live character testimony.

The Sanctions Guidance

70. The applicable Sanctions Guidance is Version 6, dated 1 January 2022 (hereafter "the Guidance"). Notwithstanding the fact that the events complained of occurred prior to Guidance, as made clear in at paragraph 1.2, and replicating the approach of the Sentencing Council to Criminal Sentencing Guidance documents, the Guidance is "*applicable to all sanctioning decisions taken by panels on or after that date regardless of when the proved misconduct occurred or when the finding of misconduct was made.*" Though the Respondent's Counsel invited some amelioration of the terms of the

Guidance by reference to the previous versions to reflect the fact that conduct occurred under the old regime, Mr Scamardella did in fact expressly concede that it is the current version of the Guidance that is to be applied. We therefore conclude that we are not assisted by the previous versions of the Guidance that pre-dated Version 6.

71. The Guidance at paragraphs 2.2 and 2.3 reads (under the "*Purpose and Principles of Sanctions*" section)

> "*2.2 The purposes of applying sanctions for professional misconduct are to:*
>
> i. *Protect the public and consumers of legal services.*
> ii. *Maintain public confidence and trust in the profession and the enforcement system.*
> iii. *Maintain and promote high standards of behaviour and performance at the Bar, and*
> iv. *Act as a deterrent to the individual barrister or regulated entity, as well as the wider profession, from engaging in the misconduct subject to sanction.*
>
> *2.3 The purposes above are non-hierarchical and any or all may apply in a particular case.*
> *Sanctions under a regulatory enforcement regime should not be imposed to punish. It may*
> *be that the impact of a sanction will have a punitive effect, but panels must ensure that*
> *any sanctions are only imposed to meet the purposes listed above.*"

72. Whilst we have considered the entirety of the Guidance, we have particular regard to paragraphs 5.7 to 5.14 ("*Sexual misconduct and Discrimination*"). We do not quote extensively from this section but take the entirety of it into account, noting the harm that such offences cause both to individual direct victims, to the profession as a whole and to public trust in the profession, diversity, recruitment and retention. As a consequence, serious sanctions are inevitable, including a deterrent element (para 5.7). The lowest starting point for misconduct of this type is a suspension of 12 months (para

5.9). We note that mitigation based on the Respondent's personal circumstances, health, good character/references need to be treated with caution in the context of sexual misconduct, discrimination and harassment. The nature of such misconduct means that serious sanctions are required to protect others and promote standards regardless, in most instances, of the Respondent's own circumstances (para 5.11).

73. The Sanctions Guidance defines six steps to sanction, which we have used to structure our decision-making.

Step 1: Determine the appropriate Misconduct Group that the conduct falls within

74. There is no dispute between the parties that the appropriate group to be applied is Group B: Misconduct of a sexual nature, this being "*unwanted behaviour of a sexual nature, of any kind, that violates a person's dignity or creates a hostile working environment.*"

Step 2: Determine the seriousness of the conduct

75. This requires a consideration of the culpability and harm factors identified both within the specific conduct group and within the general culpability and harm factors at Part 3, Annex 2. We acknowledge that this category necessarily covers a very wide range of conduct from the very most serious forms of criminal sexual assault and violence to other conduct falling short of criminality but amounting to deeply offensive and distressing sexual harassing and/ or bullying behaviour. In the professional regulatory context, both ends of that range are extremely serious though appropriate adjustment must be made to reflect the factual matrix.

76. We identify the following relevant culpability factors from the Group B factors:

    a. Misconduct took place in a professional context – in relation to the Pupils A and B case, though it was technically a private function it was entirely within a professional context as is both accepted by Mr Scamardella on behalf of the Respondent and as is evidenced by the surprise expressed by the Respondent's Head of Chambers to the Respondent's attendance bearing in mind the chambers prohibition upon the Respondent re attending circuit or chambers

social functions. In the case of the second female mini pupil case, the context was entirely within the professional setting.

b. Misconduct took place in front of others – the Pupil A and B case was entirely within a public setting, aggravated by the fact that that public consisted of those whose decision it would be as to whether either Pupil A or B had made the grade to be kept on as tenants upon completion of pupillage. In relation to the second female mini pupil case, although there is no evidence that other people specifically noticed the alleged conduct, it substantially took place within the public concourse of a Crown Court building.

c. Abuse or exploitation of a vulnerable person – although the evidence falls short of establishing that the Respondent's conduct towards Pupils A and B was targeted at them specifically because of their relative vulnerability as pupils (the Respondent, we find, having been highly tactile to all present irrespective of gender or seniority), the practical reality is that both pupils were highly exposed and vulnerable precisely because of their pupil status. There is no even proximate balance of power in this situation. As both Pupils A and B made clear, they felt under scrutiny throughout the events and their ability to object to or challenge the behaviour was compromised by their concern for their position and the potential impact any complaint may have upon their future prospects. We note that any person, whether pupil, junior or more senior barrister must feel entirely able to report any conduct that challenges their sexual autonomy or amounts to harassment or discrimination without any fear of adverse consequence, and it is the duty of all members of the profession at any level to ensure that is so.

77. We identify the following culpability factors from the general list in Annex 2:

a. *Whether the misconduct was a one-off incident, sustained/repeated or attempted to be repeated or part of course of conduct*: this conduct was sustained over a period of time encompassing conduct both at the Chambers Silks party and at the bar afterwards. It was not fleeting or a one-off moment.

b. *The extent to which the Respondent acted in breach of a position of trust/power/authority*: in both cases to be sanctioned there was a clear and substantial power imbalance. The Respondent was and was seen by Person A and Pupils A and B to be in a very senior position within Chambers and within the local Bar.

c. *The extent to which the respondent had control over and/or responsibility for the circumstances giving rise to the misconduct*: in the mini pupil case there was a clear breach of the position of trust held by the Respondent as a senior member of the Bar supervising Person A in circumstances where he alone had control and responsibility over where and when he was with Person A and what he said to her.

d. *The extent to which there was a disparity in seniority or experience between the Respondent and the victim**: we note this point but remain vigilant not to amount to double counting.

e. *Whether the harm could have reasonably been foreseen*: had the Respondent given but a moment's thought to his conduct, the harm was obviously foreseeable.

f. Those factors above asterixed have the following additional note within the Guidance: "*These culpability factors may be particularly relevant to sexual misconduct, discrimination and harassment and behaviour towards others.*"

78. We identify the following harm factors from the Group B list:

a. *Causing fear, humiliation and/or anxiety*: the accounts of Pupils A and B clearly demonstrate their anxiety and sense of humiliation as a result of the Respondent's conduct towards them.

b. *Impact on working life/career of those affected by the misconduct*: noted but not double counted with "*extent of harm caused*" as set out below.

c. *Impact on mental health/wellbeing, whether physical or psychological, of those affected by the misconduct*: noted but not double counted with "*extent of harm*" set out below.

d. *Injury to feelings*: noted but not double counted.

79. We identify the following harm factors from the general list in Annex 2:

a. *The extent of the actual harm caused*: Though Pupil A seems to have dealt with the situation with a remarkable degree of robustness, as she makes clear it was deeply distressing and very stressful to her. Pupil B has had very significant and long-lasting consequences. The issues were profoundly upsetting to her at the time, causing her distress and anxiety. She felt she had let Chambers down. She was so distressed she needed time away from Chambers. She feared for the consequences to her in terms of reputational damage. The issue was ultimately at least in part a factor that led her to relocate from her pupillage chambers to new chambers in London. She continues to be profoundly distressed by the events. As to the incident with Pupil A, though we lack detail of the harm caused, she does refer to the obvious distress caused at the time as evidenced by her contemporaneous text communications with her mother and she states that she was concerned at the time as to the effect of any complaint to her future career prospects.

b. *The number of people/organisations adversely affected or potentially affected*: the harm is not limited to the direct victims. There are clear wider indirect victims to this conduct including the chambers of Pupils A and B, the Respondent's Chambers and to the standing of the profession as a whole in terms of public perception and the safety of women and vulnerable people at the hands of the Bar.

c. *The impact on the public confidence in the legal profession*: noted but not double counted.

80. In his submissions, Mr Scamardella referred us to Farquharson v Bar Standards Board [2022] EWHC 1128 (Admin) per Williams J at para 121 and the definition of "*serious sexual offence*" at Part II B7 of the *previous* Sanctions Guidance. In doing so, Mr Scamardella submits that the apparent gradation of types of sexual misconduct in descending order from least to most serious under the culpability heading of Version 6 of the Guidance imports with it the definition and meaning of "*serious sexual offence*" from the old guidance.

81. We unhesitatingly reject that submission. Version 6 of the Guidance is the applicable guidance as Ms Scamardella accepts. Version 6 is and was intended to be a complete step change from the old guidance. There is no "*read across*" from old to new versions of the Guidance. Version 6 of the Guidance is a standalone document. Though clearly the type of conduct falling under this heading is very wide, and the culpability factors seeks to cover that breadth, culpability is to be assessed exclusively by those factors set out in Version 6 of the Guidance, applying appropriate judgement to the overall factual matrix.

Step 3: Indicative Sanctions Range

82. In carrying out that judgement task, and referring to those factors as set out above, in our judgement we conclude that this conduct falls within, but towards the upper end of the Middle Range, attracting a sanction range of over 24 months suspension to disbarment, before consideration of aggravating and mitigating circumstances.

Step 4: Application of Aggravating and Mitigating Factors

Aggravating Factors

83. The Respondents antecedent history is a significant and seriously aggravating element. Overall, there is a clear pattern of behaviour. The victims of the Respondent's unwanted conduct are always at the very junior end of the profession. When complaint is made, the Respondent's immediate response is to issue an apology without ever clearly and unequivocally accepting the alleged conduct. On the contrary, he either denies it wholly or at least in part without stating what parts he accepts and what he rejects. His apology is therefore without meaning or context; it is impossible for the direct victims to know what it is he admits and apologises for, and equally impossible

for those charged with the duty of care for the direct victims to know what harms are admitted and what protections might be called for.

84. Despite the complex and challenging sequence of disclosures arising as they do out of chronological sequence, there is sufficient complaint prior to the instant matters for the Respondent to have been completely on notice that his conduct was unacceptable. He had already been substantially warned about his conduct by his own Chambers and protective measures (such as excluding the Respondent from supervising pupils and mini pupils) were already in place.

85. We also note the clear prohibition imposed by the Respondent's Chambers on his attendance at Circuit and Chambers socials. We have no doubt that the Respondent's attendance at the silks party was at least in breach of the spirit of that prohibition if not a direct breach of the letter of it. The distinction between the Silks party as a private event as opposed to a Chambers/professional marketing event is so fine as to be immaterial. As evidenced by the Head of Chambers' reaction and his disappointment with the Respondent's attendance, and by the Respondent's own reaction upon seeing the Head of Chambers in coming over to him and asking if it was alright for him to stay, amply indicates that the Respondent knew full well that he ought not to have been there, and, if he was so foolish as to attend, to at least stay sober.

86. That last point moves onto the other key aggravating feature in this case relating to Pupils A and B, which is the Respondent's state of intoxication. It would be not mitigation at all to say (and Mr Scamardella does not say) that the Respondent only behaved this way because he was drunk – or, to put the matter differently, that sober he would not have done so. It is an extremely aggravating feature that the Respondent was profoundly drunk. By the end of the night, the CCTV demonstrates that he was struggling to stand steady and upright. The evidence of Pupils A and B suggest he was obviously under the influence of drink even in Chambers at the Silks party. The Respondent had a previous adverse finding and sanction based upon his sexualised conduct when drinking. Both with that experience and as a senior member of the Bar he was fully aware that it was his responsibility to ensure that he did not allow drink to cause him to lose his self-control in the way that he did.

Mitigating Factors

87. A very considerable body of character evidence was submitted on behalf of the Respondent[17] together with powerful testimony on his behalf by Brendan Kelly KC. We remind ourselves of the Guidance at para 5.7 onward, that the impact of such personal mitigation is of limited value in cases such as this. Nevertheless, we acknowledge that, when sober, the Respondent has another side to his personality. There is no doubt that he is an able and talented barrister who represents his lay clients well. He is held in high professional regard by his professional clients and professional colleagues, both male and female. He is an able opponent who acts in that professional context with integrity. Mr Kelly – who has recent professional experience of the Respondent in a very serious and substantial case – testified to the his professional conduct and to his private conduct towards other people including junior female members of the Bar. Mr Kelly at all times found the Respondent to be courteous, kind, supportive and collegiate in his conduct towards everyone in the case. Mr Kelly saw no evidence of any matter to be concerned with, including the Respondent's alcohol consumption. That said, we have to acknowledge that, even in a professional context rather than social (and when sober rather than drunk), the Respondent is still capable of acting in a wholly improper way towards young and vulnerable people as evidenced by the second female mini pupil case that we are to sanction for.

88. We acknowledge that there has been considerable delay to these proceedings. Some of that arises out of the pandemic and indeed the Respondent's own ill health with Covid in December 2022. A significant proportion of that delay is the responsibility of the BSB. We are firmly of the view that this case has taken far too long to investigate and prosecute. Some of that delay sits at the feet of the Respondent, including allowing time for the Respondent to complete his professional obligations in a long running trial in Nottingham. He has not been as engaged as he ought to have been in the process. However, we give the Respondent the benefit of the doubt and do not in any way aggravate the sanction as a result of any delay. Insofar as there is any mitigating element to this delay it is to be found in the steps taken by the Respondent to rehabilitate himself during that period, in particular those steps as set out in the

[17] Respondent Bundle, red tab

additional email, dated 18 July 2023 at 15:34, from Mr Scamardella to BTAS.[18] Having regard to our public duty and the protection of the public (which includes the protection of vulnerable members of the Bar) provable steps taken by the Respondent to reduce any future risk that he presents is viable mitigation that ought properly to be taken into account in his favour.

89. We have considered the issues of both remorse and insight. We accept that the Respondent is remorseful in that we accept he is genuinely saddened that others have been harmed by his conduct. But we do not equate that to meaningful insight as to why his conduct caused that harm and what steps he could and should have taken to prevent that harm being caused in the first place. We remain concerned that the absence of clear and unequivocal admissions as to his conduct in terms of words used until the entering of his plea demonstrates a continuing lack of insight.

90. In conclusion, we are of the view that the aggravating features identified warrant a considerable movement upwards within the range and that the mitigating features warrant a moderate adjustment downwards.

91. Annex 2 to the Guidance at page 76 identifies that admission of the impugned conduct is a relevant mitigating factor. However, the Guidance goes on to note that is so particularly where the admission is at an early opportunity. We therefore find that the Respondent is entitled to some credit/mitigating effect of his admission of guilt. However, that is moderated by the fact that the first clear admission to the words and phrases in Schedule A of the charge sheet came only on 5 January 2023, just shy of some three years after the events. We have considered whether there ought to be any further reduction in that credit because of the subsequent dispute between the parties about the basis of plea which then required both Pupils A and B to attend for the Newton-style trial and caused a further seven months delay. After careful thought, we conclude that though the first basis of plea was not as clear as it ought to have been, the essential position it adopted remains the position as the clarifying supplementary

[18] To be added to the Defence Bundle of Documents

basis of plea and accordingly there should be no further reduction in credit against the Respondent.

Step 5: Totality

92. Insofar as we must impose sanction today for two incidents of misconduct, totality is achieved by making the sanction for each concurrent, but aggravating the sanction for the lead offence by having regard to the fact there are two separate and similar sets of conduct to be dealt with.

93. Mr Scamardella invites consideration of totality on another footing, namely that the complex history of the emergence of the allegations in a non-chronological manner means that this panel ought now attempt to put itself in the notional position of a panel considering all of these matters together and imposing a single sanction adjusting for totality overall.

94. We do not accept that this is a viable proposition nor in principle an approach that we should take. Though of course we must not double-count and impose any additional sanction for that which the Respondent has already been punished, the gradual emergence of these cases is a natural consequence of the type of offending and the very great challenges faced by complainants in determining whether, when and how they wish to bring forward their complaints.

95. In any event, it is our view that, when the sanction of 6 months suspension in case PC/2019/0057/D5 was imposed on 19 March 2021, a much greater sanction would have been imposed even on the version of the Guidance. But the passage of time means that the old Guidance is no longer relevant. Version 6 of the Guidance must be applied. There is no basis for taking an artificial and imaginary totality position. We are mindful not to sanction the Respondent twice in the task before us today and we do not do so.

Step 6: Reasons

96. We have set out our detailed reasons for our conclusions herein.

Sanction

97. Having regard to those reasons, we find:

a. On PC2020/0928/D5, charges 1 to 6, the Respondent is to be disbarred.

b. On PC2021/4962/D5, charges 2 and 3, had we been sanctioning for these matters alone we would have suspended the Respondent for 12 months. However, there is no practical benefit to do so when he is to be disbarred on the other matters and so we are compelled to disbar the Respondent on these matters too.

c. Pursuant to rE206, it is recorded that this is a decision by majority.

d. Pursuant to rE226, we invited submissions from the BSB and the Respondent on whether we should act under rE227 to require the Respondent to suspend practice immediately and the BSB to suspend the Respondent's practising certificate with immediate effect. Having heard those submissions, we order pursuant to rE227 that the Respondent immediately cease to practice and that the BSB must suspend his practising certificate with immediate effect.

e. Costs – the BSB having filed today a consolidated costs schedule, the Respondent has 14 days to file written submissions. The matter will be determined on written submissions unless the Respondent asks for an oral hearing.

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

Dated: 2 August 2023

HHJ Carroll

Chairman of the Tribunal

Appendix I: Schedule A to Case PC 2020/0928/D5.

Schedule A

1. Mr Kearney made the following comments, or words to that effect, to Pupil A:

i. Inappropriately commented on the appearance of Pupil A whilst she was a guest at a Chambers event, including comments about her eyes, her figure and asking her to look at you directly so that you could look closely at her eyes;

ii. Asked Pupil A, "how many older men have you slept with?"

iii. Asked Pupil A, "how many senior members of the Bar have you slept with?"

iv. Told Pupil A, "You need to have sex with senior members of the Bar, then you will be successful."

v. Told Pupil A, "You have not slept with a man until you have slept with an older man. You need a man with more experience."

vi. Stared at Pupil A whilst telling her she was "beautiful" and "gorgeous".

2. You had inappropriate contact and hand placement with Pupil A over the course of the evening whilst at XXXX Chambers.

3. You made the following comments, or words to that effect, to Pupil B:

i. Inappropriately commented about the appearance of Pupil B whilst she was a guest at a Chambers event, including comments about her eyes, her figure and calling her beautiful and gorgeous;

ii. Sat uncomfortably close to Pupil B whilst in the bar;

iii. Repeatedly told Pupil B that she needed to "fucking have sex" with Man A;

iv. Told Pupil B that she needed to have sex with an older man

v. Told Pupil B that she needed someone more experienced to show her a good time;

vi. Told Pupil B that you were an older man with sexual experience;

vii. Asked Pupil B how many men she had slept with;

viii. Asked Pupil B the age of the oldest man she had slept with

ix. Asked Pupil B if she was in a relationship;

x. Told Pupil B that she needed to go and have “fucking sex”;

xi. Told Pupil B that she was frigid;

4 You had inappropriate contact and hand placement with Pupil B over the course of the evening whilst at XXXX Chambers.

Appendix II: Schedule A to Case PC 2021/4962/D5

Schedule A

1. Mr Kearney made the following comments, or words to that effect, to Person A:

i. on 23 July 2018, after a sentencing hearing, in a video conference room after a video conference link to a prison, "the dress you are wearing is very nice, where is it from?"

ii. on 23 July 2018, walking down the concourse after the video conference, there passed another woman dressed in a brightly coloured track suit. Mr Kearney looked Person A up and down and said, "I bet you would look good in that"; and

iii. on 26th July 2018, in response to Person A saying that she could not attend a planned social gathering after the court hearing with other barristers who were parties to the trial in which Mr Kearney was a junior, he said, "That's a shame. I put on clean boxers just for you".

2. Mr Kearney engaged in unwanted touching of Person A in that, on 23 July 2018, following the alleged comment in 1 (i) above, he pulled down the back of the dress of Person A in an attempt to read the label on the dress.