Case No: CO/3114/2017

Neutral Citation Number: [2017] EWHC 3101 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/12/17

Before :

LORD JUSTICE HICKINBOTTOM
and
MR JUSTICE GREEN

- -

Between :

THE BAR STANDARDS BOARD

Appellant

- and -

LINCOLN CRAWFORD

Respondent

- -
- -

Simon Clarke (instructed by **The Bar Standards Board Legal Team**) for the **Appellant**
Anthony Speaight QC (instructed by **Weightmans LLP**) for the **Respondent**

Hearing date: 29 November 2017

- -

Judgment

Lord Justice Hickinbottom :

Introduction

1. Lincoln Crawford OBE ("the Respondent") was called to the Bar by Gray's Inn on 22 November 1977.

2. On 13 June 2017, he appeared before a five-person panel of the Disciplinary Tribunal of the Council of the Inns of Court ("the Disciplinary Tribunal") to answer a single charge, namely that, contrary to Core Duty 5 of the Bar Standards Board ("the BSB") Handbook ("the BSB Handbook"):

> "[He] engaged in conduct which was likely to diminish the trust which the public places in him as a barrister or in the barristers' profession in that he on 20 April 2015 was convicted on five counts of having breached a restraining order imposed by the Highbury Magistrates' Court on 15 May 2016 pursuant to the provisions of the Protection from Harassment Act 1997".

He admitted the charge and, having heard the matter opened on behalf of the BSB and from Anthony Speaight QC for the Respondent, the Disciplinary Tribunal imposed a reprimand.

3. The BSB now appeals against that sanction, under section 24 of the Crime and Courts Act 2013 ("the 2013 Act") and regulations rE183 and rE185 of the Disciplinary Tribunals Regulations 2014 ("the 2014 Regulations")

4. Before us, as before the Disciplinary Tribunal, Simon Clarke of Counsel appeared for the BSB, and Mr Speaight for the Respondent. At the end of the hearing, we announced that we would dismiss the appeal but would give our reasons later. We do so now.

The Factual Backgound

5. The Respondent was born on 1 November 1946 in Trinidad, where he was brought up in a rural village by his grandparents. In 1967, following a chance encounter with someone from London, he bought a one-way ticket on a cargo passenger ship to England, determined to make good. On arrival, he worked as a night security guard to support himself, whilst he worked his way through A level examinations and then a law degree at Brunel University. He was called to the Bar in 1977, and secured a tenancy at the chambers of Lord Rawlinson QC, where he built up a mixed common law practice. He was appointed Junior Counsel to the Scarman Inquiry, following the Brixton riots. He was appointed an Assistant Recorder in 1993, and a Recorder in 1997. He sat as an employment tribunal judge from 1996. In addition, he obtained a number of public appointments, for example as a Commissioner with the Commission for Racial Equality and a member of the Parole Board. He took an active part in the campaign to abolish slavery, including speaking at the United Nations on behalf of the United Kingdom. He was also active in politics being, amongst other things, an elected member of the Inner London Education Authority. He was awarded the Order of the British Empire in 1998.

6. He married in 1976, he and his first wife having three children. That marriage unfortunately broke down. They divorced, but, as I understand it, remained on good terms.

7. In the late 1980s, the Respondent began a relationship with Bronwen Jenkins, whose father had been a prominent trade unionist, whom he had met in the course of his political activity. They began living together in 1990. From the mid-1990s, they lived at Miss Jenkins' family home in North London, which had been transferred to her after her father had died and her mother had moved out of London. The Respondent and Miss Jenkins married in 1999. They had two children.

8. Unfortunately, their years of married happiness were few. Miss Jenkins was a solicitor, in a firm in Sheffield. She began an affair with one of her partners. By early 2003, Miss Jenkins clearly considered that her marriage with the Respondent was over. She began divorce proceedings. The divorce, and its ancillary applications, were highly acrimonious. It seems to me that no party came out of them with any credit; and everyone, but particularly the entirely innocent children, suffered a great deal as a result of the manner in which the Respondent and Miss Jenkins conducted themselves over several years.

9. Immediately before serving the divorce proceedings and without notice, Miss Jenkins applied for, and obtained from the Principal Registry of the Family Division, a non-molestation injunction against the Respondent. The Respondent is of the firm view that she acted inappropriately in obtaining that order; but it is unnecessary for me to do more than note that that injunction was maintained, and quickly followed by an on notice application seeking to oust the Respondent from the matrimonial home. After a contested hearing, that order too was granted. The Respondent had to leave the home he had occupied for several years. He was considerably upset. He felt humiliated.

10. However, it was Miss Jenkins who was made unhappy by the next stage of the proceedings, in which, as part of the financial settlement, to reflect his considerable contribution to it, the Respondent was awarded 29.5% of the value of the matrimonial home. In practice, that meant that Miss Jenkins could not remain there. The house had to be sold, and the proceeds split.

11. Miss Jenkins was granted a residence order in respect of the two children, with the Respondent having access both at weekends and during the week. Until 2006, when he obtained a permanent place to live, he picked up the children from Miss Jenkins' house; thereafter, she was ordered to deliver the children to him for the purposes of allowing him access. The access arrangements were a constant source of disagreement and discord between the Respondent and his former wife.

12. Miss Jenkins began involving the police, to whom she complained of harassment at the hands of the Respondent. She had in mid-2005 begun a relationship with another man, Dominic Buttimore; and much of the Respondent's concern (and the alleged harassment) was focused upon that man's relationship and contact with the Respondent's children.

13. In September 2005, the Respondent was charged with two offences contrary to section 2 of the Protection from Harassment Act 1997, the first alleging that, during

2005, he had pursued a course of conduct which amounted to the harassment of Miss Jenkins and Mr Buttimore respectively. On 15 May 2006 at the Highbury Corner Magistrates' Court, after a nine-day trial, the Respondent was convicted on both charges, and given a conditional discharge for 18 months. Importantly for this appeal, the court also imposed a restraining order on the Respondent, for the express purpose of protecting Miss Jenkins and Mr Buttimore "until further notice", paragraph 1 of which prohibited the Respondent from:

> "Contacting directly or indirectly Bronwen Jenkins, Dominic Buttimore…. or Christine Murphy EXCEPT to send a text message to Christine Murphy during the week, or Bronwen Jenkins during the weekend concerning contact with the children, or in the event of an emergency concerning the children OR by post in relation to Civil Litigation Proceedings."

Ms Murphy was the children's nanny. The order also prohibited the Respondent from entering various areas around where Miss Jenkins lived.

14. The Respondent appealed to the Crown Court; but, after an 11-day hearing, on 28 September 2006 the appeal was dismissed. A challenge to that decision by way of appeal by case stated was dismissed by a Divisional Court on 4 February 2008 ([2008] EWHC 1481 (Admin)).

15. In the meantime, however, there had been an incident involving the Respondent and Mr Buttimore. The normal arrangements for the handover of the children for access were changed to accommodate Miss Jenkins. Usually, the handover was at Miss Jenkins' home, in Mr Buttimore's absence. On 6 July 2007, it was agreed to take place at the children's school. The Respondent did not expect to find Mr Buttimore there – but he was there, for a reason that has never been made clear. There was a verbal altercation between the two men, the Respondent asking Mr Buttimore, in robust terms, what he was doing there. In speaking to Mr Buttimore, the Respondent was in breach of the restraining order to which I have referred.

16. Miss Jenkins reported the matter to the police. The Respondent was willing to plead guilty to a breach of the restraining order contrary to section 5(5) of the Protection from Harassment Act 1997, as a result of his confrontation with Mr Buttimore; but he faced a total of six charges of breach. He elected trial at the Crown Court. In the event, he pleaded guilty to the single charge, all the other charges being dropped. On 21 July 2008, he was sentenced to a community order with 50 hours unpaid work.

17. The BSB then brought three charges against the Respondent, two in relation to his convictions for harassment in 2006 and one for the breach of the restraining order as a result of the incident with Mr Buttimore. Before a Disciplinary Tribunal panel chaired by His Honour Dennis Levy QC, the Respondent was found not guilty of the first two charges. He pleaded guilty to the third. Of this charge, the Disciplinary Tribunal, in its determination of 26 June 2009, having taken into account the fact that the Respondent had pleaded guilty to the charge at an early stage and had much by way of positive good character upon which to call by way of mitigation, said this:

> "… [W]e are satisfied that had Mr Buttimore not attended the school, the incident would not have occurred. Furthermore, at this event, the behaviour of Miss Jenkins and Mr Buttimore was such as to stretch the patience of anyone in the position of the [Respondent]. The provocation to the [Respondent] was such that in all the circumstances of the case we concluded that the penalty for the offence should be one of reprimand.
>
> … We are satisfied that the conduct which resulted in the plea of guilty arose from an acrimonious family dispute for which Miss Jenkins was largely responsible. She was a solicitor, who… knew how to provoke the [Respondent] in a way which she hoped she could benefit by calling for assistance from the police and encourage court proceedings."

The tribunal said that they considered the Respondent was "most unlikely to offend again".

18. However, the bad feeling between the Respondent and Miss Jenkins continued. In the period to 2009, the Respondent was arrested half a dozen times at the behest of Miss Jenkins, without charges being brought. In respect of the last occasion he was arrested, on 16 July 2009, he sued the police and Miss Jenkins for malicious prosecution, a claim that was settled by the police for a modest sum prior to trial. His claim against Miss Jenkins was struck out on the basis that she had immunity from suit, a defence that was upheld on appeal ([2014] EWCA Civ 1035; [2016] QB 231).

19. After 2009, there was, relatively speaking, a period of calm between the Respondent and Miss Jenkins. However, in March 2014, the Respondent was again arrested for an alleged confrontation with Mr Buttimore. No charge arose out of that incident; but, shortly afterwards, the Respondent was charged with six counts of breaching the restraining order. From February to July 2013, Miss Jenkins had kept all the text messages passing between herself and the Respondent, a total of 467 texts from her to him and 446 texts from him to her. She handed all of them over to the police. 29 of the latter were considered to be in criminal breach of the restraining order, i.e. they were sent, without reasonable excuse, in breach of the prohibition on contact with Miss Jenkins. These formed the basis of four charges, two relating to specific texts and two to multiple incidents of eight and 19 texts respectively. There were two further charges, involving an email and a letter, both sent within the same period.

20. The two texts that formed separate charges can be regarded as typical of the rest, and indeed it may perhaps be assumed that they formed the basis of distinct charges because they were regarded as the worst of their kind. Each of the texts was sent on a day when a number of other, unobjectionable texts concerning the day-to-day arrangements for the children were also sent and received. Each of these two texts appear to have been sent by the Respondent in response to a text from Miss Jenkins complaining that the Respondent did not have one of the children in accordance with arrangements. They read as follows. I have not sought to correct errors of grammar or spelling. By way of background, I should say that the Respondent was receiving texts from Mr Buttimore's phone, to which he took exception; and he and Miss Jenkins had long since agreed a financial settlement in respect of the children.

> "U are so petty its unbelievable. All this garbage about me not having the kids when I suppose to is just a rouse by you to try and Con monry from the CSA, you are a disgrce. You are frightened and. Insecure about my relationship with the children you would do anything. Why don't you just grow up? They would leave home one day and what would you do then?"
>
> "You are a pathetic woman. What have you achived? The right to call yourself by the surname of an empty human being and snd me messages from his phone. Can you not do better?"

The letter, sent on 3 June 2013, was in similar vein, but much longer.

21. We have had the benefit of seeing many of the texts sent during this period, each way. Without seeking to apportion blame, or say that the texts of one communicant were worse in tone than those of the other, it is fair to say that, on occasions, Miss Jenkins sent texts in similarly unkind and rude language – although she, of course, was not the subject of a restraining order as was the Respondent.

22. On 20 April 2015 in the Crown Court at Isleworth, the Respondent was convicted on all counts, except that relating to the email. He was sentenced to an aggregate of 9 months' imprisonment suspended for 24 months, with 150 hours of unpaid work and costs. A restraining order to protect Miss Jenkins and Mr Buttimore was re-imposed, in the same terms as the 15 May 2006 order. The judge, who had of course heard all of the evidence, clearly took a very serious view of the Respondent's conduct. In sentencing him, he said that, in his view, the Respondent had contrived a destructive relationship with Miss Jenkins, which had impacted adversely on the children. An appeal to the Court of Appeal (Criminal Division) was dismissed.

23. Those convictions led to the BSB bringing a further charge against the Respondent, in that his conduct as reflected in those convictions amounted to professional misconduct contrary to Core Duty 5 of then-current BSB Handbook. Core Duty 5 was in the following terms:

> "You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession."

Guidance on the matter of criminal convictions was provided under paragraph gC27.1.b of the Handbook, which, so far as relevant to this appeal, provided as follows:

> "Conduct which is not likely to be treated as a breach of Rule… CD5, includes (but is not limited to):
>
> .1 minor criminal offences;
>
> .2 your conduct in your private or personal life, unless this involves:
>
> .a …

> .b committing a criminal offence, other than a minor criminal offence."

Therefore, the Respondent did not breach that rule simply by sending the texts that he did, unpleasant as some of them were. He breached the rule because, by sending the texts, he breached the restraining order and thus committed a more than minor criminal offence.

24. As in 2009, the Respondent accepted that, by breaching the restraining order, he had necessarily engaged in conduct which is "likely to diminish the trust and confidence which the public places in [him] or in the profession"; and therefore indicated, from an early stage, that he proposed to plead guilty to the single disciplinary charge.

25. Furthermore, on 23 July 2015, the BSB wrote to him asking for an undertaking to suspend himself from practice at the Bar until such time as the disciplinary process and any appeal had run their course, failing which the BSB indicated they would give consideration to applying for an interim order. On the basis that, in practice, he had no choice – because, if he refused to self-suspend, an interim order suspending him would be made – the Respondent gave that undertaking, and he has consequently not practised since July 2015.

26. The matter came before a five-person Disciplinary Tribunal panel on 13 June 2017. In its determination (given by the panel chair, His Honour John Price), the tribunal noted the background of the Respondent's relationship with Miss Jenkins and that the "tragedy of the breakdown of the second marriage which has really caused all of these matters". It also noted the Respondent's otherwise "exceptional character". It identified mitigating and aggravating factors, in the following terms:

> "We take into account the mitigating factors:
>
> (1) He admitted the charge at the earliest opportunity.
>
> (2) The messages, although they were considerable and over a period of months, the unpleasantness came in the heat of the moment when the messages were being sent when his ex-wife... was being difficult and he was difficult and then offensive back. That is why we say a mitigating factor is the heat of the moment.
>
> (3) He has wholly cooperated with the investigation and provided information.
>
> (4) There is evidence of attempts [to] prevent reoccurrence and that means that there has been four years since the last instance. That in itself is impressive.
>
> (5) There are unusual personal circumstances in that this is based on the breakdown of the marriage and the divorce.
>
> (6) The references are first class. We have had a retired circuit judge giving evidence, we have had another senior

member of the Bar giving evidence and we had his son giving evidence, all speaking extremely highly of him.

The aggravating features are that:

(1) This is persistent conduct, it was over a period of time.

(2) It did undermine the profession in the eyes of the public.

(3) He did have a position of responsibility in the profession.

(4) There had been a previous disciplinary finding against him."

27. The tribunal determination continued:

> "We take into account, as I say, very importantly, the four year break since there has been no repetition. We are confident that there will not be any more because of the ages of the children, who are now 18 and 16.
>
> Also, we take into account that he self-suspended himself. That was recommended by the [BSB] in a letter we have seen. He self-suspended himself for two years.
>
> Had he not done so we would have suspended him for a period of 12 months, we would have reduced it from 18 months because of the mitigating factors that I have already read out. That is what we would have done.
>
> I say we would have done that but we are not going to because he has self-suspended himself for a period of two years. What we do is reprimand him for this behaviour and for this professional misconduct.
>
> It will be on the record that we would – had he not self-suspended himself – have suspended him for a period of time starting at 18 months but reducing it to 12 months because of mitigating factors.
>
> As far as… other financial matters are concerned, we know that he is in a very poor financial state. We don't make a costs order or any fines or anything like that. We of course have taken into account his personal circumstances."

28. It is that sanction against which the BSB now appeals.

The Legal Background

29. The history of the regulation of barristers is helpfully set out by Jackson LJ in R (Mehey) v Visitors to the Inns of Court [2014] EWCA Civ 1360 at [11]-[18], as

brought up to date by me in Rehman v Bar Standards Board [2016] EWHC 1199 (Admin) at [18] and following. It is unnecessary to rehearse that again.

30. Suffice it to say that the BSB has no separate legal entity, being the regulatory arm of the Bar Council. It has regulatory functions delegated to it by the Bar Council, which is an approved regulator under paragraph 1 of Part 1 of Schedule 4 to the Legal Services Act 2007; and it performs that function, in part, through its Professional Conduct Committee ("the PCC"). The BSB thus investigates disciplinary complaints against members of the Bar and, if considered appropriate, prosecutes disciplinary charges before a panel of the Disciplinary Tribunal set up for the purpose by the Council of the Inns of Court ("COIC"). It has the power to regulate its own procedure.

31. Section 24 of the 2013 Act abolished the jurisdiction of judges of the High Court sitting as Visitors to the Inns of Court to review decisions of such a tribunal. However, it provided that the General Council of the Bar, an Inn of Court, or two or more Inns of Court acting collectively in any manner, may confer a right of appeal to the High Court in respect of a matter relating to the regulation of barristers (section 24(2)(a)).

32. Rights of appeal to this court have been provided in the 2014 Regulations, which form part of the BSB Handbook. Mr Speaight accepted that, if the Handbook had been properly adopted, then the 2014 Regulations which form part of it do confer jurisdiction on this court to hear appeals, including appeals by the BSB against sanction. However, the Respondent and those representing him repeatedly requested evidence that the BSB has formally adopted the Handbook, without any satisfactory response; and so, in my view understandably, Mr Speaight submitted that this court had no such jurisdiction. Before us, relying upon the minutes of a meeting of the BSB on 21 March 2013, Mr Clarke submitted that the BSB Handbook was approved in draft form at that meeting; and, although that draft did not purport to confer any appellate jurisdiction on this court, the meeting also agreed to delegate responsibility for the agreement of any further amendments to the Handbook Working Group which, we were told, in due course agreed amendments to include the provisions to appeal to this court now found in regulation rE183 and rE185 of the 2014 Regulations which came into force on 6 January 2014. Unfortunately, Mr Clarke said, a search for a document confirming that the Working Group had approved such amendments had drawn a blank; but, he submitted, as the relevant rules have now appeared in the BSB Handbook for four years, we could safely assume that they had been properly agreed and adopted by the Group.

33. In my view, given the terms of section 24 of the 2013 Act, it is far from satisfactory for the jurisdiction of this court to be based upon less than the clearest evidence of the right of appeal being properly conferred by an appropriate body. It is even less satisfactory that the Respondent's perfectly legitimate enquiry about the source of jurisdiction met with no full response until the day of the appeal hearing itself. However, I am satisfied – just – that the evidence shows that the BSB Handbook (of which the 2014 Regulations form part) confers jurisdiction upon this court to hear appeals from a Disciplinary Tribunal.

34. Paragraph rE183 of the 2014 Regulations provides:

> "In cases where one or more charges of professional misconduct have been proved, and/or a disqualification order has been made, an appeal may be lodged with the High Court in accordance with the Civil Procedure Rules:
>
> .1 by the defendant against conviction and/or sentence;
>
> .2 with the consent of the Chairman of the [BSB] or the Chairman of the PCC, by the [BSB] against sentence on any of the grounds in rE185 below."

I pause there to note that, in this case, the appeal by the BSB is brought with the consent of the Chairman of the PCC.

35. Paragraph rE185 provides that:

> "The [BSB] may only lodge an appeal (against sentence or dismissal) where the [BSB] considers the Disciplinary Tribunal has:
>
> .1 taken into account irrelevant considerations;
>
> .2 failed to take into account relevant considerations;
>
> .3 reached a decision that is wrong in law; and/or
>
> .4 reached a decision which no reasonable Tribunal could properly have reached."

Therefore, the BSB is only able to appeal to this court against a sanction imposed by a Disciplinary Tribunal on one or more of the grounds set out in paragraph rE185.

36. Except where the decision appealed is one to disbar, the decision of the High Court on an appeal to this court is final (section 24(4) and (5) of the 2013 Act).

The Appeal

37. Mr Clarke initially submitted that the question posed in this appeal – one of the first appeals to this court by the BSB under its new powers to appeal against a sanction imposed by a Disciplinary Tribunal – is as follows (see paragraph 10 of his skeleton argument):

> "What is the proper sanction for a barrister who repeatedly breaches an order of the criminal court and in so doing acquires three convictions for seven separate offences over a period of seven years, with sentences of unpaid work and imprisonment being thereby imposed, the latter conviction being committed after a previous Disciplinary Tribunal sanction, imposed in respect of an earlier conviction?"

Leaving aside the limited scope of the available grounds of appeal, in my view that question is patently too broad; because the appropriateness of a sanction is necessarily

fact-specific. In paragraph 23 of that same skeleton argument, drawing on the observations of Jackson LJ in Salsbury v The Law Society [2008] EWCA Civ 1285; [2009] 1 WLR 1286 at [30] and, more recently, Beatson LJ in Ballard v Solicitors Regulation Authority [2017] EWHC 164 (Admin) at [66], Mr Clarke puts the question for this court in this way:

> "On the facts of this case, was the decision of the tribunal 'clearly inappropriate'?"

That, at least, focuses upon the facts of this specific case, which any exercise involving sanction must do.

38. Regrettably, neither the grounds of appeal nor the skeleton argument properly identified the issues which this court was being asked to consider and determine.

39. The grounds of appeal failed to comply with the requirements of CPR Part 52, which applies to appeals such as this. In Rasheed v Secretary of State for the Home Department [2014] EWCA Civ 1493 at [12], the Vice-President of the Court of Appeal (Civil Division), Moore-Bick LJ, said this:

> "Grounds of appeal are intended to be short, succinct documents which identify as briefly as possible the respects in which it is said that the court below… erred. If drafted as the rules intend and require, they provide the court and the parties with a clear and concise statement of the issues that will arise on the appeal and to which argument will be directed."

The grounds of appeal in this case singularly failed to identify the issues that were said to arise, and to which argument would be directed. However, that failure was compounded by their failure properly to engage with the grounds of appeal available under paragraph rE185 of the 2014 Rules, which must be the starting point for any appeal by the BSB.

40. The formal grounds of appeal dated 16 June 2017 are four in number, namely that the sanction imposed was inconsistent with the principles set out in Bolton v The Law Society [1994] 1 WLR 512 and Ujam v General Medical Council [2012] EWHC 683 (Admin) (Grounds 1 and 2), erred in the exercise of discretion (Ground 3), and was in all the circumstances unduly lenient (Ground 4). However, in respect of Grounds 1 and 2, the scope of appeal in the disciplinary regime for solicitors and doctors is different and considerably wider than that in the regime for barristers which I have described, involving what might be described as a true appellate jurisdiction rather than merely a supervisory jurisdiction as appertains under regulations rE183 and rE185 of the 2014 Regulations. In respect of Grounds 3 and 4, insofar as these engage the regulation rE185 grounds of appeal, they may perhaps be construed as incorporating a contention that, on the facts of this case, no reasonable tribunal could properly have imposed a reprimand by way of sanction. However, nowhere do the grounds expressly contend that the sanction imposed was unlawful as being legally perverse in the Wednesbury sense, as required by regulation rE185(d). Otherwise, none of these grounds were pursued before us; and, if I might say so, rightly so.

41. Moving to Mr Clarke's skeleton argument, that does not directly relate to either the grounds of appeal available under regulation rE185, or to the formal grounds of appeal relied on in this case to which I have referred. However, the only regulation rE185 grounds which might be engaged by the complaints the BSB makes about the sanction in the skeleton argument appear to be three-fold.

42. First, the tribunal failed to take into account a relevant consideration, namely the Respondent's previous convictions in 2006 and 2008. However, there is no force in that complaint. Looking at the tribunal's determination as a whole, it is clear that it had the Respondent's previous convictions well in mind. The 2006 and 2008 convictions are recited in the determination, with dates, precise charges and sentences imposed. Although not listed in the aggravating features expressly taken into account (which I have quoted: see paragraph 26 above), these appear to have been taken from the specific aggravating features listed in the Sentencing Guidance, which do not include previous convictions but which do include "Persistent conduct over a lengthy period of time" and "Previous disciplinary findings for similar breaches" which in themselves reflect the earlier criminal behaviour and which were specifically referred to as aggravating features in the tribunal's determination. It is inconceivable that the tribunal had, over the course of two pages of its determination, forgotten about these previous convictions, or that it failed to take them into account as aggravating for the purposes of sanction. During the course of debate, this ground too was not pursued; and, in my view, it was rightly abandoned.

43. Second, it was submitted that the tribunal failed to give the weight it ought to have given to the high culpability of the Respondent. However, I do not see any basis for that contention either. The tribunal clearly took into account the culpability of the Respondent. The weight given to a material factor is quintessentially a matter for the tribunal. The weight given by the tribunal to the culpability of the Respondent was certainly not, in itself, legally perverse. The tribunal considered the substance of the breaches, up to 29 abusive texts (out of a total of nearly 500 texts) being sent by the Respondent to his former wife over a period of about six months. The tribunal was entitled to find and take into account, as it did, that all of the texts were sent in the heat of the moment when Miss Jenkins was being difficult about the Respondent's access to his children, in the general context of an acrimonious marriage breakdown where there was (in the Respondent's words) "high emotional intensity" of the "emotional pressure cooker of [their] on-going relationship", "on-going" because of the need for the Respondent and Miss Jenkins to deal with each other in the context of access arrangements (see paragraphs 75 and 81 of the Respondent's statement dated 17 May 2017). In considering culpability, the tribunal also took into account, as it was entitled to do, that the Respondent had not breached the restraining order for four years, and, given the ages of the children now, the tribunal considered that he was unlikely to breach the order again.

44. But the gravamen of the charge to which the Respondent had pleaded guilty was in the fact that he had, not for the first time, defied a court order by contacting Miss Jenkins in the manner that he did. The tribunal clearly had that in mind, noting that it was the conviction in respect of those breaches that brought him before the tribunal. In that regard, the tribunal was entitled to take into account, as it did, the fact that he had pleaded guilty to the disciplinary charge at the first opportunity, and fully cooperated with the BSB investigation and prosecution.

45. Therefore, serious as the Respondent's criminal convictions were – particularly in view of his previous convictions – the tribunal was entitled to conclude that his culpability was considerably diminished by these factors. Its conclusion does not become perverse simply because the BSB does not agree with it.

46. In my view, there was no force in this complaint, which again, as a specific ground, was not pursued before us; and, in my view, rightly so.

47. That leaves, as the third matter, the overarching submission, that perhaps underlies both the formal grounds of appeal and the submissions found in Mr Clarke's skeleton argument, that, on the facts of this case, no reasonable tribunal could have imposed the sanction of reprimand. During the course of the hearing before us, Mr Clarke frankly accepted that this was the only ground that the BSB could pursue. It is in my view unfortunate and regrettable that the ground was not clearly identified and overtly pleaded in the formal grounds of appeal and developed in the BSB's skeleton argument, but rather crystallised only at the hearing of the appeal.

48. In respect of this ground, I found the well-trodden authorities to which we were referred by Mr Clarke, such as Bolton, Salsbury, Ujam and Ballard, to be of limited value, because they were considering different schemes, where the scope of the appeal was different. However, two points of relevance do arise from these cases.

49. First, the cases emphasise that the primary function of a disciplinary tribunal when it imposes a sanction on a member of a profession is not punitive, but to protect and promote public confidence in both the individual practitioner and in the profession as a whole. Mr Clarke considered that to be the overarching principle in play; and I agree. However, where the tribunal is satisfied that there has been a breach of the relevant professional disciplinary code, it has to assess the extent to which that breach has led to the undermining of that confidence, and then impose a proportionate sanction, taking into account all relevant circumstances, including the circumstances in which the breach occurred. Where the misconduct is in the professional's personal life, then, depending on the circumstances, that may be less undermining of confidence that if it had occurred in his professional life; unless it exhibits a characteristic (e.g. dishonesty) which is particularly relevant to that professional life. It is worthy of note that the comments of Sir Thomas Bingham MR in Bolton at pages 518-9, to the effect that mitigation in disciplinary cases may have less effect than in other cases, upon which Mr Clarke relied, was made in the specific context of misconduct in the discharge of professional duties. The potential difference in potency, for these purposes, between misconduct in an individual's private life and misconduct in his professional life is specifically recognised in the relevant Sentencing Guidance to which I refer below (see paragraph 58).

50. Second, even where this court exercises what might be described as a full appellate jurisdiction, the starting point is that the sanction decision of the tribunal is correct unless and until the contrary is shown. This was most eloquently put by Laws LJ in Subesh v Secretary of State for the Home Department [2004] EWCA Civ 56 at [44]:

> "The burden so assumed [by the appellant] is not the burden of proof normally carried by a claimant in first instance proceedings where there are factual disputes. As appellant, if he is to succeed, he must persuade the appeal court or tribunal

> not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one. The divide between these positions is not caught by the difference between a perceived error and a disagreement. In either case the appeal court *disagrees* with the court below, and, indeed, may express itself in such terms. The true distinction is between the case where an appeal court might *prefer* a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, *require* it to adopt a different view. The burden which an appellant assumes is to show that the case falls within this latter category." (emphasis in the original).

51. To that extent the court has to engage in the merits of the case; but, nevertheless, the court is required to give due deference to the tribunal below, because (i) with the authority of the elected legislature, the tribunal has been assigned the task of determining the relevant issues; (ii) it is a specialist tribunal, selected for its experience, expertise and training in the task, and is particularly well-placed to assess what measures are required to deal with professionals who have misconducted themselves, and to protect the reputation of the profession and the public interest; and (iii) it has usually had the advantage of having heard oral evidence.

52. Consequently, when asked to consider a sanction on appeal in such a case, this court approaches its task with some considerable caution, and will be slow to interfere. That has been formulated in different ways. The trigger of the sanction being "clearly inappropriate" was the formulation used by Jackson LJ in Salsbury and adopted by Beatson LJ in Ballard. Recently, Carr J referred to this court only interfering "in a clear case" (Benyu v Solicitors Regulation Authority [2015] EWHC 4085 (Admin)). The precise formulation is, in my view, of little moment. The substantive task of this court, and the proper approach, are clear.

53. However, that is the case where this court is exercising a full appellate function. In exercising its right of appeal under regulations rE183 and rE185 of the 2014 Regulations, the bar for the BSB is even higher: it must show that no reasonable tribunal could have decided to impose the sanction the tribunal in the case did in fact impose.

54. In my view, the BSB has, in this case, fallen far short of overcoming that hurdle.

55. Nothing filed or served by the BSB suggested what a reasonable sanction in the Respondent's case might have been. Mr Clarke said that the BSB were coy in making any such suggestion: but, having contended that a reprimand was legally perverse, it was incumbent upon the BSB to identify the range of sanctions which it considers was properly available to the tribunal; even if, within that range, the BSB contended that one particular sanction was the most appropriate.

56. Before us, Mr Clarke submitted that, given his past history of offending over several years, the most appropriate sanction would have been disbarment; but he accepted that a "very lengthy" period of suspension might also have fallen within the range of

appropriate sanctions. Whilst he would not be drawn on what he meant by "very lengthy" in this context, he suggested that a starting point of three years might have been appropriate.

57. However, in my view, Mr Speaight, with some forensic ruthlessness, successfully displayed the flaws in that submission.

58. The starting point must be the Bar Tribunal and Adjudication Service ("BTAS") publication, "Sentencing Guidance: Breaches of the BSB Handbook (Version 3 (Revised)" ("the Sentencing Guidance"). BTAS is an arm of COIC, and the Sentencing Guidance is expressly endorsed by COIC to assist its Disciplinary Tribunals by promoting consistency in disciplinary sanctions. It is expressly guidance, and not prescriptive, emphasising on its frontsheet that it "is not intended to inhibit decision-makers from using their own discretion when considering an appropriate sanction in individual cases".

59. Paragraph 5.4 sets out the available sanctions, including disbarment and suspension from practice. In relation to the latter, it confirms that, whilst there is no limit on the period of suspension a five-person panel can impose, "more than 3 years is thought to be tantamount to disbarment". Paragraph 6.7 indicates that, where a period of suspension of more than three years is considered appropriate, then the Disciplinary Tribunal should give serious thought to disbarment; and reference is made to the fact that the courts had held three years was the maximum period of suspension that was in practice imposed under the previous Visitors' jurisdiction. As I understand it, for those reasons, periods of suspension are now generally restricted to three years. That is possibly why Mr Clarke referred to three years when pressed about the length of suspension he considered might have been appropriate in this case.

60. Paragraph 6.3 deals with disbarment, and it emphasises that it "should be reserved for cases where the need to protect the public or the need to maintain confidence in the profession is such that the barrister should be removed from the profession". It goes on to identify factors that may make disbarment appropriate, the only one which appears potentially relevant here being "the barrister has shown a persistent lack of insight into the seriousness of his/her actions or the consequences for his/her practice, the administration of justice or the reputation of the Bar"; although the Respondent's own evidence indicates that, despite his multiple convictions, he does understand and is insightful of the seriousness of his conduct in breaching the restraining order.

61. Paragraph 6.17 suggests that a reprimand, which is backward-looking in that it represents a censure on previous behaviour, may be appropriate where the behaviour is unlikely to be repeated.

62. In respect of individual offences, paragraph C5 (breach of court direction or failure to comply with a court order) appears to be the closest equivalent to the Respondent's misconduct, particularly as it expressly refers to circumstances in which a barrister, in relation to a personal matter, breaches a restraining order. Where the breach is deliberate and to gain personal advantage, the Sentencing Guidance starting point is a medium fine and/or medium suspension. Mr Speaight submitted that the Respondent did not really fall within this category – his culpability was less – because the tribunal found that his breaches were not deliberate in the sense of premeditated, but were rather made in the heat of the moment.

63. In any event, Mr Speaight submitted that, far from being outside the legitimate range of sanctions, given that the Respondent had effectively served a two-year suspension, it would have been outside the range suggested by the Sentencing Guidance (and outside the legitimate range) if the tribunal had disbarred the Respondent or imposed a suspension of such a length as to be the equivalent of disbarring.

64. I consider that there is substantial force in that submission. However, this court does not have to go so far. As I have described, we are concerned with the question of whether we are persuaded that no reasonable Disciplinary Tribunal could properly have imposed the sanction of reprimand that this tribunal did: in other words, did that sanction fall within the range of sanctions properly open to the tribunal to impose. It is my firm view that it did.

65. As I have described, the tribunal properly took into account the seriousness of the charge against the Respondent. Mr Clarke submitted that the charge was aggravated by the fact that the Respondent had, as a barrister, deliberately breached an order of the court (i.e. the restraining order), and had done so repeatedly over several years. I agree; but, as I have explained, the tribunal took that into account.

66. However, it also properly took into account the very substantial mitigation which the Respondent could muster, including his professional achievements and public service; his early admission of, not only the facts, but that what had occurred amounted to professional misconduct; and his full cooperation with the BSB. As I have described, his culpability was substantially reduced by the fact that, as found by the tribunal, the conduct which formed the basis of the criminality occurred in circumstances of high emotion, typically as heat of the moment responses to disagreeable texts from Miss Jenkins; and the fact that there had been no incident or complaint for four years.

67. The tribunal said that they were confident that there would be no more breaches "because of the ages of the children, who are now 18 and 16". Mr Clarke sought to persuade us that it was legally perverse of the tribunal to proceed on that basis, because the Disciplinary Tribunal in 2009 had found that it was unlikely that there would be any more breaches, and more breaches there had been. However, it is simply not arguable that this tribunal erred in law in having confidence for the future, because, as the tribunal itself emphasised, there had been a substantial change of circumstance since 2009, namely that the offensive communications between the Respondent and Miss Jenkins had been in the context of access arrangements and the children were both now nearly adult.

68. Furthermore, the Respondent had been the subject of a self-suspension for nearly two years, at considerable personal cost, the tribunal recording that he was, as a result, in "a very poor financial state". This was clearly a factor to which the tribunal gave considerable weight. It was entitled to do so.

69. The tribunal was required to balance these mitigating factors against the aggravating features. In doing so, in my view, it did not err in law in considering that a 12 month suspension would have been an appropriate sanction, but for the Respondent's self-suspension by way of undertaking. In any case, in concluding that any further suspension would be unnecessary and inappropriate, the tribunal was quite properly able to take into account the fact that the Respondent had, in effect, been suspended for, not one year, but nearly two years. The tribunal indicated that it reduced the

sanction by one-third to reflect the Respondent's considerable mitigation. By his self-suspension, he had served a two-year suspension, i.e. the equivalent of three years prior to his mitigation being taken into account. The Sentencing Guidance makes clear that it is just that – guidance, which may bow to the circumstances of a specific case (and the circumstances of this case are particular) – but, in my view, that sort of suspension fell within the guidelines in any event.

70. In my judgment, the sanction imposed fell well within the appropriate range open to the tribunal. Mr Clarke has therefore failed to make good the only remaining ground of appeal.

Conclusion

71. Those are the reasons for which I concluded that this appeal should be dismissed.

Post-script

72. Mr Clarke suggested that this court should lay down some principles for the assistance of Disciplinary Tribunals considering sanctions, and the BSB when considering an appeal against sanction under regulations rE183 and rE185 of the 2014 Regulations. Green J and I have considered this aspect of the case carefully, and this part of the judgment has greatly benefited from Green J's input.

73. It is difficult for this court to give prescriptive guidance in relation to sanction, because each case is bound to turn upon its own facts and circumstances, and the Disciplinary Tribunals are assigned (ultimately by Parliament) to consider and determine sanctions and, for the reasons I have already given, are also best equipped and qualified to do so.

74. We appreciate that few appeals have been made under the new COIC regime, and certainly this is one of the first appeals by the BSB against a sanction. However, in our view, this appeal was not optimally prepared or presented by the BSB; and we consider we can make some observations arising out of this appeal that may assist future appeals by the BSB.

75. A real difficulty faced by the court in this case was the absence of any particulars explaining why the BSB considered that the tribunal had erred. Such particulars appeared in neither the grounds of appeal, nor the BSB skeleton argument. In future, in any appeal by the BSB the court will expect to see, set out in the grounds of appeal and properly elaborated upon in the skeleton, proper identification of the specific findings of fact, statements of law or principle made by the Tribunal, or other errors of law which the BSB criticises and to which it objects, with proper reference to the available grounds of appeal as set out in regulation rE185.

76. That identification must be done with an appropriate amount of care and precision. As I have indicated, in this case, the BSB argued that the tribunal's conclusion that it was unlikely that the Respondent's past misconduct would be repeated was perverse. However, that was not set out in the grounds of appeal, or in the skeleton. It was first raised during the appeal hearing. Neither the Respondent (who had a right to prior notice of the case against him) nor the Court was given any notice of the factual or other basis upon which this submission was made. The tribunal had held that the risk

in the future was much lower since the children were now older and, in effect, the occasions when mother and father would have to be in contact had consequently dramatically diminished. On the face of it, that was uncontroversial. If the BSB wished to challenge that finding, it was incumbent it to explain how, and why, and upon what evidential basis.

77. Furthermore, where it is contended by the BSB on appeal that the sanction fell within regulation rE185(d) (i.e. it was legally perverse), the court will also expect proper assistance on the range of sanction which, the BSB contend, would have been appropriate and lawful. In this case, nowhere in the grounds nor skeleton was there any identification of the sanction that the BSB considered was appropriate. In the course of argument, Mr Clarke submitted that the *only* rational sanction in a case such as the present was permanent disbarment. However, on reflection and upon taking instructions, he accepted that a "very lengthy" suspension might be appropriate. Neither proposition was advanced until the BSB was compelled to respond to questions from the court towards the end of oral submissions; and it follows that the Respondent was given no forewarning of the stance being taken. In the event, Mr Speaight was more than able to respond to the submission eventually made, fully, forcefully and effectively. However, in a challenge to sanction, it is incumbent upon the BSB to identify, in advance, what it contends is the appropriate range of sanction, and to provide the court with relevant background material (e.g. appropriate references from the Sentencing Guidance, and any relevant precedents).

78. These observations are intended to assist in future BSB appeals. Clarity in the BSB's case is important, not just to assist the Court, but, crucially, to enable the Respondent, whose sanction the BSB is seeking to increase, to know the case he is facing and to have a fair opportunity to respond to it.

Mr Justice Green :

79. I agree.