

Neutral Citation Number: [2017] EWHC 210 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 February 2017

Before :

MRS JUSTICE LANG DBE

Between :

BAR STANDARDS BOARD
- and -
STEPHEN HOWD

CO/2670/2016:
Appellant

Respondent

STEPHEN HOWD
- and -
BAR STANDARDS BOARD

CO/2714/2016:
Appellant

Respondent

Anton Lodge QC (instructed by **Direct Access**) and **Stephen Howd** (in person)
for **Stephen Howd**

Matthew McDonagh (instructed by **the Bar Standards Board**) for the **Bar Standards Board**

Hearing dates: 10 November 2016 & 20 January 2017

Judgment

Mrs Justice Lang:

1. On 4 and 5 May 2016, a Disciplinary Tribunal of the Council of the Inns of Court¹ (hereinafter “the Tribunal”) heard and determined eight charges of professional misconduct against Mr Howd, who is a practising barrister. Six charges were found proved; two were dismissed. By way of sanction, the Tribunal imposed a fine of £1,800 and he was ordered to pay £400 towards witness expenses.
2. Mr Howd appeals against the Tribunal’s findings of guilt. The Bar Standards Board (“the BSB”) appeals against the sanction imposed by the Tribunal, submitting that a more severe sanction should have been imposed.

The charges

3. The charges arose from complaints made about Mr Howd’s behaviour towards female colleagues and staff at a party held at his former chambers, Zenith Chambers in Leeds, on 11 July 2014.
4. The complainants were anonymised. A and B were two barristers practising in Zenith Chambers. C was an apprentice administrative assistant and D was a junior clerk, both employed by Zenith Chambers.
5. There were two charges in respect of each complainant, each based on the same facts, but alleging different breaches of the Code of Conduct. The charges, and the findings, were as follows:

“Charge 1: Proved

Statement of Offence

Professional misconduct contrary to Core Duty 3 of the Code of Conduct of the Bar of England and Wales (9th Edition).

Particulars of Offence

Stephen Howd, a barrister, failed to act with integrity in that at Zenith Chambers summer party on 11 July 2014 he pestered A by his conduct towards her in that:

- a. At approximately 10pm Stephen Howd took her right hand, pulled her towards him and attempted to kiss her on or near the lips;

¹ The members of the Tribunal were Nigel Poole QC (Chairman) Kenneth Crofton-Martin (Lay Member) and Georgina Gibbs (Barrister Member).

- b. At approximately 10pm Stephen Howd held onto A's hand and kept it on or near his crotch area for about 5 seconds until she was able to release her hand from his grip;
- c. Later in the same evening Stephen Howd approached A whilst she was conversing with others and put his hand around her, squeezing her against him and attempted to kiss her on or near her lips again; and/or
- d. Later in the same evening Stephen Howd approached A and put his arm around her and placed his face uncomfortably close to hers.

Charge 2: Proved

Statement of Offence

Professional misconduct contrary to Core Duty 5 of the Code of Conduct of the Bar of England and Wales (9th Edition).

Particulars of Offence

Stephen Howd, a barrister, behaved in a way likely to diminish the trust and confidence the public places in him or the profession in that at Zenith Chambers summer party on 11 July 2014 he pestered A by his conduct towards her in that:

- a. At approximately 10pm Stephen Howd took her right hand, pulled her towards him and attempted to kiss her on or near the lips;
- b. At approximately 10pm Stephen Howd held onto A's hand and kept it on or near his crotch area for about 5 seconds until she was able to release her hand from his grip;
- c. Later in the same evening Stephen Howd approached A whilst she was conversing with others and put his hand around her, squeezing her against him and attempted to kiss her on or near her lips again; and/or
- d. Later in the same evening Stephen Howd approached A and put his arm around her and placed his face uncomfortably close to hers.

Charge 4: Proved

Statement of Offence

Professional misconduct contrary to Core Duty 3 of the Code of Conduct of the Bar of England and Wales (9th Edition).

Particulars of Offence

Stephen Howd, a barrister, failed to act with integrity in that at Zenith Chambers summer party on 11 July 2014 he pestered B by his conduct towards her in that:

- a. At approximately 11pm Stephen Howd took B by the wrist and pulled her towards him;
- b. Shortly after this Stephen Howd grabbed B by the waist and pulled her towards him, placing his hands on the small of her back and placing his cheek next to hers, saying that they should dance “cheek to cheek” and then saying “no, crotch to crotch;” and/or
- c. Later in the same evening he referred to B to her face as a “good girl” while poking her in the breast area of her chest and then kissing her on the cheek, near her mouth.

Charge 5: Proved

Statement of Offence

Professional misconduct contrary to Core Duty 5 of the Code of Conduct of the Bar of England and Wales (9th Edition).

Particulars of Offence

Stephen Howd, a barrister, behaved in a way likely to diminish the trust and confidence the public places in him or the profession in that at Zenith Chambers summer party on 11 July 2014 he pestered B by his conduct towards her in that:

- a. At approximately 11pm Stephen Howd took B by the wrist and pulled her towards him;
- b. Later in the same evening Stephen Howd grabbed B by the waist and pulled her towards him, placing his hands on the small of her back and placing his cheek next to hers, saying that they should dance “cheek to cheek” and then saying “no, crotch to crotch;” and/or
- c. Later in the same evening he referred to B to her face as a “good girl” while poking her in the breast area of her chest and then kissing her on the cheek, near her mouth.

Charge 7: Proved

Statement of Offence

Professional misconduct contrary to Core Duty 3 of the Code of Conduct of the Bar of England and Wales (9th Edition).

Particulars of Offence

Stephen Howd, a barrister, failed to act with integrity in that at the Zenith Chambers summer party on 11 July 2014 he pestered C by his conduct towards her in that, at some point in the evening, whilst at the party, Stephen Howd got hold of the hands of C, made her dance and told her she looked “gorgeous” and attempted to kiss her.

Charge 8: Proved

Statement of Offence

Professional misconduct contrary to Core Duty 5 of the Code of Conduct of the Bar of England and Wales (9th Edition).

Particulars of Offence

Stephen Howd, a barrister, behaved in a way likely to diminish the trust and confidence the public places in him or the profession in that at the Zenith Chambers summer party on 11 July 2014 he pestered C by his conduct towards her in that, at some point in the evening, whilst at the party, Stephen Howd got hold of the hands of C, made her dance and told her she looked “gorgeous” and attempted to kiss her.

Charge 10: Dismissed

Statement of Offence

Professional misconduct contrary to Core Duty 3 of the Code of Conduct of the Bar of England and Wales (9th Edition).

Particulars of Offence

Stephen Howd, a barrister, failed to act with integrity in that at Zenith Chambers summer party on 11 July 2014 he pestered D by his conduct towards her in that:

- a. Early in the evening, Stephen Howd put his hand on the shoulder of D in an attempt to make her dance; and/or

- b. Later in the same evening Stephen Howd, on the stairs in chambers, stood very close to D making her feel uncomfortable.

Charge 11: Dismissed

Statement of Offence

Professional misconduct contrary to Core Duty 5 of the Code of Conduct of the Bar of England and Wales (9th Edition).

Particulars of Offence

Stephen Howd, a barrister, behaved in a way likely to diminish the trust and confidence the public places in him or the profession in that at the Zenith Chambers summer party on 11 July 2014 he pestered D by his conduct towards her in that:

- a. Early in the evening, Stephen Howd put his hand on the shoulder of D in an attempt to make her dance; and/or
 - b. Later in the same evening Stephen Howd, on the stairs in chambers, stood very close to D making her feel uncomfortable.”
6. Initially, Mr Howd was also charged with four other offences² of behaving in an unlawfully discriminatory manner by sexually harassing the complainants or otherwise treating them unfavourably by reason of their gender, contrary to Core Duty 8 of the Code of Conduct of the Bar of England and Wales (hereinafter “the Code of Conduct”). At a preliminary hearing, these charges were struck out because, even taking the prosecution case at its highest, it could not be established that his conduct amounted to unlawful harassment and/or unlawful discrimination contrary to the Equality Act 2010, which applies only in the circumstances specified, e.g. employment, provision of services, and in the case of barristers, the specific situations set out in section 47.
7. Originally, charges 1, 2, 4, 5, 7, 8, 10 and 11 alleged that Mr Howd “harassed” rather than “pestered” the complainants. The term “harassment” is defined in the BSB Handbook by reference to section 26 of the Equality Act 2010. In response to Mr Howd’s submission that his conduct did not fall within the scope of section 26, the BSB successfully applied to amend the charges so as to remove the allegations of harassment, and substitute the word “pestering”.

The statutory framework

8. The Courts and Legal Services Act 1990 designated the Bar Council as the authorised body for the profession. The BSB was set up under the Legal Services Act 2007 to

² Charges 3,6,9 and 12 were struck out

act as the specialist regulator of barristers in England and Wales. Its regulatory objectives derive from the Legal Services Act 2007, section (1). The BSB publishes the Bar Standards Handbook (“the Handbook”) which contains *inter alia* the Code of Conduct, comprising the Core Duties and rules which supplement the Core Duties. “Outcomes” and “Guidance” on the Code of Conduct are also published.

9. Pursuant to the Complaints Regulations, after the investigation of a complaint, the Professional Conduct Committee (“PCC”) of the BSB decides whether to dismiss it; or administer an administrative sanction (a fine or a warning); or direct that it shall form the subject of a charge to be heard by a Disciplinary Tribunal.
10. The proceedings of the Tribunal are governed by the Disciplinary Tribunals Regulations 2014. By regulation E143, the Tribunal must apply the criminal standard of proof when deciding charges of professional misconduct. Regulation E155 sets out the procedure for the findings on each charge, which are to be announced and recorded. By regulation E157, if the Tribunal finds any of the charges proved, it will hear evidence of any previous adverse findings, and representations on behalf of the practitioner, before announcing and recording its decision on sentence. There is no provision for the prosecutor to make representations on the appropriate sentence. I am satisfied that the usual practice is for the prosecutor merely to draw the Tribunal’s attention to the Sentencing Guidance.
11. As to rights of appeal, section 24 of the Crime and Courts Act 2013 abolished the jurisdiction of the Visitors of the Inns of Court, and made provision in subsection (2) for the General Council of the Bar and the Inns of Court to confer a right of appeal to the High Court in respect of, *inter alia*, a matter relating to regulation of barristers. Subsection (6) provides that the High Court may make such order as it thinks fit on an appeal.
12. Rights of appeal were duly provided in the Disciplinary Tribunal Regulations 2014. Those applicable to this case are set out in regulations E183 to E185. Mr Howd has a right of appeal against conviction or sentence. The BSB has a right of appeal against sentence, with the consent of the Chairman of the BSB or the Professional Conduct Committee.
13. CPR Part 52 (prior to amendment on 3 October 2016) applies to this appeal.
14. Rule 52.10 confers power on the appeal court to affirm, set aside or vary the orders of the Tribunal. It has the same powers as the Tribunal.
15. Rule 52.11 provides, so far as is material:

“Hearing of appeals

52.11

(1) Every appeal will be limited to a review of the decision of the lower court unless –

(a) a practice direction makes different provision for a particular category of appeal; or

(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

....

(3) The appeal court will allow an appeal where the decision of the lower court was –

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

(4) The appeal court may draw any inference of fact which it considers justified on the evidence.”

16. An appeal against the decision of a Disciplinary Tribunal is by way of review, not re-hearing. However, the nature of an appeal by way of review under rule 52.11 is flexible and differs according to the nature of the body which is appealed against, and the grounds upon which the appeal is brought. In *E I Dupont de Nemours & Co v S T Dupont* [2003] EWCA Civ 1368, [2006] 1 WLR 2793, Aldous L.J said, at [92] - [94], [96]:

“92. CPR Pt 52 draws together a very wide range of possible appeals. It applies, not only to the Civil Division of the Court of Appeal, but also to appeals to the High Court and county courts....it applies to a wide variety of statutory appeals where the nature of the decision appealed against and the procedure by which it is reached may differ substantially.... .

93. It is accordingly evident that rule 52.11 requires, and in my view contains, a degree of flexibility necessary to enable the court to achieve the overriding objective of dealing with individual cases justly. But as Mance LJ said on a related subject in *Todd v Adams and Chope (trading as Trelawney Fishing Co)* [2002] 2 All ER (Comm) 97, it cannot be a matter of simple discretion how an appellate court approaches the matter.

94. As the terms of rule 52.11(1) make clear, subject to exceptions, every appeal is limited to a review of the decision of the lower court. A review here is not to be equated with judicial review. It is closely akin to, although not conceptually identical with, the scope of an appeal to the Court of Appeal under the former RSC. The review will engage the merits of the appeal. It will accord appropriate respect to the decision of the lower court. Appropriate respect will be tempered by the nature of the lower court and its decision making process. There will also be a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged.

At one end of the spectrum will be decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum will be multi-factorial decisions often dependent on inferences and an analysis of documentary material. Rule 52.11(4) expressly empowers the court to draw inferences.....

....

96. Submissions to the effect that an appeal hearing should be a rehearing are often motivated by the belief that only thus can sufficient reconsideration be given to elements of the decision of the lower court. In my judgment, this is largely unnecessary given the scope of a hearing by way of review under rule 52.11(1). Further the power to admit fresh evidence in rule 52.11(2) applies equally to a review or rehearing. The scope of an appeal by way of review, such as I have described, in my view means that the scope of a rehearing under rule 52.11(1)(b) will normally approximate to that of a rehearing “in the fullest sense of the word” such as Brooke LJ referred to in *Tanfern's* case [2000] 1 WLR 1311, para 31. On such a rehearing the court will hear the case again. It will if necessary hear evidence again and may well admit fresh evidence. It will reach a fresh decision unconstrained by the decision of the lower court, although it will give to the decision of the lower court the weight that it deserves. The circumstances in which an appeal court hearing an appeal from within the court system will decide to hold such a rehearing will be rare, not least because the appeal court has power under rule 52.10(2)(c) to order a new trial or hearing before the lower court....”

17. In *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642, [2003] 1 WLR 577 Clarke L.J. said at [13]- [16], [23]:

“13. I observe that CPR rule 52.11.1(4) expressly gives the appeal court ... power to draw any inference of fact which it considers justified on the evidence. There is no suggestion that that rule applies only to appeals by way of rehearing under rule 52.11(1)(b) , so that the court has that power when conducting a review. In these circumstances, it seems to me that in the type of appeal in which the court is asked to reverse findings of fact based upon the credibility of the witnesses, the same approach should be adopted in this court whether the appeal is by way of review or rehearing.

14. The approach of the court to any particular case will depend upon the nature of the issues ... determined by the judge.....In some cases the trial judge will have reached conclusions of primary fact based almost entirely upon the view which he formed of the oral evidence of the witnesses. In most cases, however, the position is more complex. In many such cases the

judge will have reached his conclusions of primary fact as a result partly of the view he formed of the oral evidence and partly from an analysis of the documents. In other such cases, the judge will have made findings of primary fact based entirely or almost entirely on the documents. Some findings of primary fact will be the result of direct evidence, whereas others will depend upon inference from direct evidence of such facts.

15. In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. As I see it, that was the approach of the Court of Appeal on a “rehearing” under the Rules of the Supreme Court and should be its approach on a “review” under the Civil Procedure Rules 1998.

16. Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way.

...

23. Finally, I would add that it seems to me that the approach of this court in this kind of case, where it is not suggested that we could rehear the evidence, is or should be the same whether it is conducting a “review” or “rehearing” as those expressions are used in CPR r 52.11. Where the court is concerned with the exercise of a discretion, the difference will be of considerable importance (see eg *Audergon v La Baguette Ltd* [2002] EWCA Civ 10 and *Asiansky Television plc v Bayer-Rosin* [2001] EWCA Civ 1792), but in a case in which the appeal is after a trial on the facts where the judge's findings of fact are challenged on appeal, this is an example of the kind of case which, as Jonathan Parker LJ (with whom Pill and Tuckey LJ agreed) said in *Audergon's* case [2002] EWCA Civ 10 at [85], a decision by the appeal court whether to hold a rehearing may make little practical difference.”

18. In *Assicurazioni* Ward L.J. set out the test which the appellate court should apply under rule 52.11, in circumstances where the lower court has heard the witnesses, at [197] :

“Bearing these matters in mind, the appeal court conducting a review of the trial judge's decision will not conclude that the decision was wrong simply because it is not the decision the appeal judge would have made had he or she been called upon to make it in the court below. Something more is required than personal unease and something less than perversity has to be established. The best formulation for the ground in between where a range of adverbs may be used - ”clearly”, “plainly”, “blatantly”, “palpably” wrong, is an adaptation of what Lord Fraser of Tullybelton said in *G v G (Minors: Custody Appeal)* [1985] 1 WLR 642 , 652, admittedly dealing with the different task of exercising a discretion. Adopting his approach, I would pose the test for deciding whether a finding of fact was against the evidence to be whether that finding by the trial judge exceeded the generous ambit within which reasonable disagreement about the conclusion to be drawn from the evidence is possible. The difficulty or ease with which that test can be satisfied will depend on the nature of the finding under attack. If the challenge is to the finding of a primary fact, particularly if founded upon an assessment of the credibility of witnesses, then it will be a hard task to overthrow. Where the primary facts are not challenged and the judgment is made from the inferences drawn by the judge from the evidence before him, then the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with an evaluation of those facts. The judgment of the Court of Appeal in *The Glannibanta* (1876) 1 PD 283, 287 seems as apposite now as it did then:

“Now we feel, as strongly as did the Lords of the Privy Council in the cases just referred to [*The Julia* (1860) 14 Moo PC 210 and *The Alice* (1868) LR 2 PC 245], the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to a cause are nevertheless entitled, as well on question of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, even though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect.””

Grounds of appeal against the findings of guilt

19. Mr Howd's grounds of appeal (as amended) were as follows:
- i) The Tribunal misinterpreted and failed to give due regard to the medical evidence concerning Mr Howd's medical condition.
 - ii) The Tribunal erred in finding B's evidence reliable, as her credibility was fundamentally undermined by other witnesses.
 - iii) The Tribunal erred in concluding that Core Duty 3 ("CD3") could be engaged at all during a Chambers party, on a proper interpretation of the Code of Conduct and the BSB Handbook.
 - iv) The Tribunal misconstrued the meaning of "integrity" in CD3, and so wrongly concluded that the proved facts demonstrated a breach of CD3.
 - v) The Tribunal erred in concluding that Core Duty 5 ("CD5") had been breached as the proved facts could only have adversely affected his personal reputation (if at all), not his professional reputation, and were not likely to diminish the public's trust and confidence in his capacity as a barrister or the standing of the profession.
 - vi) The Tribunal erred in concluding that the allegations against him, even if found proved, were capable of amounting to "professional misconduct", correctly interpreted. Pestering, as opposed to harassment, did not reach the high threshold of serious professional misconduct.

Ground 1: Mr Howd's medical condition

20. Mr Howd's medical condition is described in the confidential Annex to this Judgment.
21. For the reasons set out in the Annex, I am satisfied that the Tribunal's conclusions on Mr Howd's medical condition were mistaken, and that they misunderstood and misapplied the medical evidence, when they concluded that his medical condition did not make a significant contribution to his conduct, and that it was caused by excessive consumption of alcohol. I have had the benefit of seeing more comprehensive medical evidence than the Tribunal, as further evidence was adduced at the appeal. In my judgment, the medical evidence established, on the balance of probabilities, that his inappropriate, and at times offensive, behaviour was a consequence of his medical condition. It also established that his excessive consumption of alcohol was very likely to have been a response to the onset of his medical condition, and it probably had the unfortunate consequence of exacerbating his disinhibition and loss of judgment on that occasion.

Ground 2: B's evidence

22. Mr Howd submitted that the Tribunal wrongly failed to find that the evidence of the complainant B in relation to charges 4 and 5 was entirely unreliable, as her credibility had been fundamentally undermined and/or that her evidence could not be accepted beyond reasonable doubt. B levelled a serious allegation that Mr Howd had on other occasions behaved indecently towards female clerks in chambers, including complainant D. Mr Howd denied this allegation and his evidence was not challenged in cross-examination. Importantly, neither D nor the senior clerk, Mr Taylor, supported B's allegations.
23. There were also discrepancies in the evidence in relation to the charges concerning complainant B. Initially she alleged she had been touched on the chest, but later changed this to her breast, saying that it was the same in her view. The evidence of the main eye-witness was that she had been touched on the arm, not on the chest or breast.
24. Applying the principles set out in paragraphs 16 to 18 above, I have concluded that Mr Howd's challenge on this ground must fail. The Tribunal expressly addressed their minds to these issues, understanding that they raised questions about B's credibility and the reliability of her evidence. Having heard oral evidence from B and other witnesses, the Tribunal concluded:

“Weighing the evidence as a whole we are sure that B's account of events on the night in question was true. Notwithstanding the inconsistency with other evidence that we have referred to we found B to be a careful and credible witness....She has been consistent, we find, in her complaints against Mr Howd. We find that the conduct alleged under Charges 4 and 5 occurred.”
25. In my judgment, there is no proper basis upon which this Court can interfere with the Tribunal's conclusions, as they were based upon the Tribunal's assessment of B when she gave evidence before them. They were able to assess her credibility in a way which I cannot.

Ground 3: was CD3 engaged at a Chambers party, on a proper interpretation of the Code of Conduct and the BSB Handbook

Ground 4: did the Tribunal misconstrue the term “integrity” in CD3 and so wrongly conclude that the proved facts demonstrated a breach of CD3

Ground 5: did the Tribunal err in concluding that Core Duty 5 (“CD5”) had been breached as the proved facts could only have adversely affected his personal reputation (if at all), not his professional reputation, and were not likely to diminish the public's trust and confidence in his capacity as a barrister or the standing of the profession.

26. It is convenient to consider Grounds 3, 4 and 5 together because of the overlap in the regulatory provisions.

The Handbook

27. The Handbook explains in the Introduction at I5 that *“the Code of Conduct includes the ten Core Duties which underpin the Bar Standards Board’s entire regulatory framework, as well as the rules which supplement the Core Duties. Compliance with both the Core Duties and the rules is mandatory. The Code of Conduct also contains details of the outcomes which compliance with the Core Duties and the rules is intended to achieve....”*.
28. At I6.3, the Handbook explains that the Conduct Rules are not intended to be exhaustive, and compliance with the Rules alone will not necessarily be sufficient to comply with the Core Duties.
29. At I6.2, the Handbook explains that the Outcomes are not themselves mandatory but the BSB will take into account whether an outcome has or might have been adversely affected when considering how to respond to an alleged breach of the Core Duties or Rules.
30. At I6.4.a, the Handbook explains the purpose of the Guidance:
- “i to assist in the interpretation and application of the Core Duties or Rules to which such Guidance relates.
- .ii to provide examples of the types of conduct or behaviour that the Rules are intended to encourage or which may constitute non-compliance with the Rule to which such Guidance relates.
-”
31. At 16.4.b, the Handbook states how the Guidance will be applied, and confirms that failure to comply with the guidance is not itself proof of a breach of the obligations imposed on a barrister:
- “In carrying out their obligations or meeting the requirements of this Handbook, BSB regulated persons must have regard to any relevant guidance issued by the Bar Standards Board which will be taken into account by the Bar Standards Board if there is an alleged breach ... of the obligations imposed on a BSB regulated person under this Handbook. Failure to comply with the guidance will not itself be proof of such breach But the BSB regulated person will need to be able to show how the obligation has been met notwithstanding the departure from the relevant guidance.”
32. The Core Duties are as follows:
- “CD1 You must observe your duty to the court in the administration of justice [CD1].
- CD2 You must act in the best interests of each client [CD2].

CD3 You must act with honesty and integrity [CD3].

CD4 You must maintain your independence [CD4].

CD5 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 [CD5].

CD6 You must keep the affairs of each client confidential [CD6].

CD7 You must provide a competent standard of work and service to each client [CD7]

CD8 You must not discriminate unlawfully against any person [CD8].

CD9 You must be open and co-operative with your regulators [CD9].

CD10 You must take reasonable steps to manage your practice, or carry out your role within your practice, competently and in such a way as to achieve compliance with your legal and regulatory obligations [CD10].”

33. The Rules provide when and to whom the Core Duties apply:

“**rC1** Who?

.1 Section 2.B (Core Duties): applies to all *BSB regulated persons* except where stated otherwise, and references to “you” and “your” in Section 2.B shall be construed accordingly.

.2 Section 2.C (Conduct Rules):

.a Applies to all *BSB regulated persons* apart from *unregistered barristers* except where stated otherwise.

.b Rules C3.5, C4, C8, C16, C19 and C64 to C70 (and associated guidance to those rules) and the guidance on Core Duties also apply to *unregistered barristers*.

References to “you” and “your” in Section 2.C shall be construed accordingly

.3 Section 2.D (Specific Rules): applies to specific groups as defined in each sub-section and references to “you” and “your” shall be construed accordingly.

rC2 When?

.1 Section 2.B applies when practising or otherwise providing *legal services*. In addition, CD5 and CD9 apply at all times.

.2 Section 2.C applies when practising or otherwise providing *legal services*. In addition, rules C8, C16 and C64 to C70 and the associated guidance apply at all times.

.3 Section 2.D applies when practising or otherwise providing *legal services*.”

34. The terms used in the Core Duties and the Rules are defined in the Handbook:

“Definitions

(124) legal services

includes legal advice representation and drafting or settling any statement of case witness statement affidavit or other legal document but does not include:

- a) sitting as a judge or arbitrator or acting as a mediator;
- b) lecturing in or teaching law or writing or editing law books articles or reports;
- c) examining newspapers, periodicals, books, scripts and other publications for libel, breach of copyright, contempt of court and the like;
- d) communicating to or in the press or other media;
- e) giving advice on legal matters free to a friend or relative or acting as unpaid or honorary legal adviser to any charitable benevolent or philanthropic institution;
- f) in relation to a *barrister* who is a non-executive director of a company or a trustee or governor of a charitable benevolent or philanthropic institution or a trustee of any private trust, giving to the other directors trustees or governors the benefit of his learning and experience on matters of general legal principle applicable to the affairs of the company institution or trust;
- g) early neutral evaluation, expert determination and adjudications”

“(157) practice

means the activities, including business related activities, in that capacity, of:

- a) a *practising barrister*;

c) a BSB authorised body;

d) a *manager* of a *BSB authorised body* or a *BSB licensed body*;

e) an employee of a *BSB authorised body* or a *BSB licensed body*;

“practise”, “*practising*” and “*practised*” should be construed accordingly”

“(159) practising barrister

means a *barrister* who *practises* as a *barrister* as defined in Rule S9.”

35. Rule S9 provides:

“For the purposes of this Handbook, you practise as a *barrister* or a BSB authorised body if you are supplying legal services and:

.1 you are an individual and you hold a practising certificate; or

.2 you hold yourself out as a *barrister*”

36. Section C2, headed “*Behaving ethically*” sets out the Outcomes, Rules and Guidance relied upon by the BSB in the case against Mr Howd.

37. The Outcomes are:

“oC6 Those and entities regulated by the *Bar Standards Board* maintain standards of honesty, integrity and independence, and are seen as so doing.

oC7 The proper administration of justice, access to justice and the best interests of *clients* are served.

oC8 Those and entities regulated by the *Bar Standards Board* do not discriminate unlawfully and take appropriate steps to prevent *discrimination* occurring in their practices.

oC9 Those and entities regulated by the *Bar Standards Board* and *clients* understand the obligations of honesty, integrity and independence.”

38. The Rules supplement CD3:

“Honesty, integrity and independence”

rC8 You must not do anything which could reasonably be seen by the public to undermine your honesty, integrity (CD3) and independence (CD4).

rC9 Your duty to act with honesty and integrity under CD3 includes the following requirements:

.1 you must not knowingly or recklessly mislead or attempt to mislead anyone;

.2 you must not draft any statement of case, witness statement, affidavit or other document containing:

.a any statement of fact or contention which is not supported by your *client* or by your *instructions*;

.b any contention which you do not consider to be properly arguable;

.c any allegation of fraud, unless you have clear instructions to allege fraud and you have reasonably credible material which establishes an arguable case of fraud;

.d (in the case of a witness statement or affidavit) any statement of fact other than the evidence which you reasonably believe the witness would give if the witness were giving evidence orally;

.3 you must not encourage a witness to give evidence which is misleading or untruthful;

.4 you must not rehearse, practise with or coach a witness in respect of their evidence;

.5 unless you have the permission of the representative for the opposing side or of the *court*, you must not communicate with any witness (including your *client*) about the case while the witness is giving evidence;

.6 you must not make, or offer to make, payments to any witness which are contingent on his evidence or on the outcome of the case;

.7 you must only propose, or accept, fee arrangements which are legal.”

39. The Guidance provides:

“Guidance on Rules C8 and C9 and their relationship to CD1, CD2, CD3, CD4 and CD5

gC14 Your honesty, integrity and independence are fundamental. The interests of justice (CD1) and the *client's* best interests (CD2) can only be properly served, and any conflicts between the two properly resolved, if you conduct yourself honestly and maintain your independence from external pressures, as required by CD3 and CD4. You should also refer to Rule C16 which subjects your duty to act in the best interests of your *client* (CD2) to your observance of CD3 and CD4, as well as to your duty to the *court* (CD1).

gC15 Other rules deal with specific aspects of your obligation to act in your *client's* best interests (CD2) while maintaining honesty, integrity (CD3) and independence (CD4), such as rule C21.10 (not acting where your independence is compromised), rule C10 (not paying or accepting *referral fees*) and C21 (not acting in circumstances of a conflict of interest or where you risk breaching one *client's* confidentiality in favour of another's).

gC16 Rule C3 addresses how your conduct is perceived by the public. Conduct on your part which the public may reasonably perceive as undermining your honesty, integrity or independence is likely to diminish the trust and confidence which the public places in you or in the profession, in breach of CD5. Rule C8 is not exhaustive of the ways in which CD5 may be breached.

.....

Examples of what your duty to act with honesty and integrity may require

gC23 Rule C9 sets out some specific aspects of your duty under CD3 to act with honesty and integrity.

gC24 In addition to the above, where the other side is legally represented and you are conducting correspondence in respect of the particular matter, you are expected to correspond at all times with that other party's legal representative – otherwise you may be regarded as breaching CD3 or Rule C9.

Other possible breaches of CD3 and/or CD5

gC25 A breach of Rule C9 may also constitute a breach of CD3 and/or CD5. Other conduct which is likely to be treated as a breach of CD3 and/or CD5 includes (but is not limited to):

- .1 subject to Guidance C26 below, breaches of Rule C8;
- .2 breaches of Rule C10;

.3 criminal conduct, other than *minor criminal offences* (see Guidance C27);

.4 seriously offensive or discreditable conduct towards third parties;

.5 dishonesty;

.6 unlawful *victimisation* or *harassment*; or

.7 abuse of your professional position.

gC26 For the purposes of Guidance C25.7 above, referring to your status as a *barrister*, for example on professional notepaper, in a context where it is irrelevant, such as in a private dispute, may well constitute abuse of your professional position and thus involve a breach of CD3 and/or CD5.

gC27 Conduct which is not likely to be treated as a breach of Rules C8 or C9, or CD3 or CD5, includes (but is not limited to):

.1 *minor criminal offences*;

.2 your conduct in your private or personal life, unless this involves:

.a abuse of your professional position; or

.b committing a *criminal offence*, other than a *minor criminal offence*.”

The scope of CD3

40. The Tribunal concluded that this particular Chambers party was a marketing event for Chambers and its members. It was organised by Chambers staff, and members of Chambers were asked to nominate professional clients they wished to invite. There were approximately 100 guests, comprising professional clients and judges. Personal guests such as partners and spouses were not invited. Food, drink and entertainment were supplied by Chambers, and the party took place on Chambers premises.
41. Mr Howd submitted that CD3 applied to him in his capacity as a “practising barrister”, defined solely as someone who supplies legal services (Rule rS9). The definition of “legal services” was limited to legal advice and representation but expressly excluded a number of other activities. It was anomalous that a Chambers party should be included as part of a barrister’s practice when these other activities were not. The BSB submitted that these activities, such as teaching or writing, were conducted by barristers outside of their practice.
42. I do not accept Mr Howd’s submission. By Rule rC2.1, CD3 applies when a barrister is “*practising or otherwise providing legal services*”. In my judgment, the Tribunal

was correct to conclude that a marketing event directed at professional clients was a “*business-related*” activity of a practising barrister and thus fell within the wide definition of “*practice*” in the Handbook (set out above). The term “*practising*” has to be construed in accordance with the definition of “*practice*”. This interpretation is not anomalous. In my view, the BSB must have intended the duty in CD3 to go beyond the provision of legal services and to apply also to the way in which barristers conduct themselves in Chambers’ business activities.

Integrity in CD3

43. Mr Howd submitted that the Tribunal misconstrued the meaning of “integrity” in CD3. It was intended to cover professional integrity not personal/sexual morality. The term “integrity” must take its colour from the term “honesty” in CD3. An analogous submission was accepted in *Bar Standards Board v Sivanadan* PC 2009/0280/D3 by the Disciplinary Tribunal, chaired by Mr John Hendy QC, when considering paragraph 301 of an earlier iteration of the Code of Conduct which provided that a barrister must not engage in conduct which is “*dishonest or otherwise discreditable to a barrister*”. The Tribunal held:

“17. The juxtaposition of dishonesty and discreditable is, in our view, significant. We do not think that the word “discreditable” has to be construed as the lawyers would say, *eiusdem generis*, but we do think that the gravity of the conduct takes colour from the fact that the first description of the untoward conduct is ‘dishonest’.”

44. Both parties relied upon the definition of “*integrity*” in the New Oxford English Dictionary as “*the quality of being honest and having strong moral principles: moral uprightness*”. The BSB referred to *Scott v Solicitors Regulation Authority* [2016] EWHC 1256 (Admin) in which the Divisional Court upheld a finding that the financial irregularities committed by a solicitor were not dishonest but lacked integrity. Sharp L.J. referred, at [37] – [39] to *Hoodless v FSA* [2003] UKFTT FSM007 (3 October 2003) in which the Financial Services and Markets Tribunal said, at [19]:

“In our view ‘integrity’ connotes moral soundness, rectitude and steady adherence to an ethical code. A person lacks integrity if unable to appreciate the distinction between what is honest or dishonest by ordinary standards. (This presupposes, of course, circumstances where ordinary standards are clear. Where there are genuinely grey areas, a finding of lack of integrity would not be appropriate.)”

Sharp L.J. agreed with the approach taken in *Solicitors Regulation Authority v Chan* [2015] EWHC 2659 (Admin) where Davis L.J. declined to define integrity, concluding that a lack of integrity could be identified by reference to the facts of a particular case. I do not consider that this line of authorities assists the BSB since they concerned financial irregularities in the course of professional practice, and the charges of lack of integrity undoubtedly did “take their colour” from dishonesty. The issue raised in this case was not before the court in *Scott* or *Chan*.

45. I agree with the construction adopted in *Sivanadan* and, reading the Core Duties and Rules as a whole, I consider that Mr Howd’s construction of CD3 is correct. “Integrity” in CD3 takes its colour from the term “honesty” in CD3 and connotes probity and adherence to ethical standards, not inappropriate and offensive social or sexual behaviour. In support of his construction, Chapter C2 is headed “*Behaving ethically*” and Rule rC9, which supplements CD3, only lists requirements which accord with Mr Howd’s construction, and does not list requirements which accord with the BSB’s wider use of the term integrity to cover personal conduct unrelated to honesty or probity.
46. The basis upon which the Tribunal found that these allegations could amount to a lack of integrity was the Guidance at gC25 which lists “*other conduct which is likely to be treated as a breach of CD3 and/or CD5*” including “*seriously offensive or discreditable conduct towards third parties*”. It is clear from the manner in which the Tribunal’s judgment is expressed that they proceeded on the footing that, if they found the conduct to be seriously offensive or discreditable towards the complainants, then the conduct necessarily amounted to conduct which breached CD3. In my view, the Tribunal erred in applying the Guidance as if it was a mandatory rule of conduct, and they lost sight of the need to be satisfied that the “*seriously offensive or discreditable conduct*” in this particular case amounted to a failure to “*act with honesty and integrity*” within the meaning of CD3. Their error may have resulted, at least in part, from the fact that the Guidance is expressed in very broad terms, and does not distinguish between the requirements of CD3 and CD5. In my view, Mr Howd’s conduct was not appropriately charged as a breach of CD3, because, although it was inappropriate and at times offensive, it did not demonstrate a lack of honesty or integrity. The charges under CD3 ought to have been dismissed.

The application of CD5

47. Mr Howd submitted that the proved facts, which had nothing to do with his practice as a barrister, could only have adversely affected his personal reputation, not his professional reputation, and were not likely to diminish the public’s trust and confidence in his capacity as a barrister or the standing of the profession. He referred to *Livingstone v Adjudication Panel for England* [2006] EWHC 2533 (Admin) in which Collins J. held:
- “There is a danger in regarding any misconduct as particularly affecting the reputation of the office rather than the man. If a councillor commits sexual misconduct or is convicted of theft, I do not think that the reputation of the office is thereby necessarily brought into disrepute. His certainly will be. If the high profile test is correct, anything done by the appellant which can be regarded as improper may fall within para 4, however remote from his official position.”
48. In principle, I consider that Mr Howd’s inappropriate, and at times, offensive behaviour towards female barristers and junior members of staff, at a Chambers marketing event attended by professional clients, could be capable of diminishing the trust and confidence which the public placed in him, as a barrister, or in the profession, contrary to CD5, since it occurred in the course of his professional life,

and was not an entirely private matter. However, if the public was aware that his behaviour was a consequence of a medical condition, and so lacked any reprehensible or morally culpable quality, it would be unlikely to diminish their trust and confidence in the profession or in Mr Howd as a barrister, provided he was fit to practise. I consider whether or not it amounted to serious professional misconduct under Ground 6.

Ground 6: Did the Tribunal err in concluding that the facts proved against Mr Howd met the high threshold of serious professional misconduct.

49. The Tribunal correctly directed themselves that they had to be sure that the conduct proved amounted to professional misconduct, applying the criminal standard of proof i.e. beyond reasonable doubt.

50. The Handbook defines professional misconduct as follows:

“(161) professional misconduct

means a breach of this Handbook by a *BSB regulated person* which is not appropriate for disposal by way of the imposition of *administrative sanctions*, pursuant to Section 5.A”

51. In *Walker v BSB* PC 2011/0219, 19 September 2013, Sir Anthony May, the former Lord Justice of Appeal, sitting as a Visitor to the Inns of Court, considered the meaning of “*professional misconduct*” in an earlier edition of the Bar’s Code of Conduct which was in similar terms. He concluded that on a literal interpretation, any breach of the Code however trivial would constitute professional misconduct. He held that this could not be the correct approach, saying:

“11. ...consistent authorities (including, it appears, other decisions of Bar Standards Board Tribunals) have made clear that the stigma and sanctions attached to the concept of professional misconduct across the professions generally are not to be applied for trivial lapses and, on the contrary, only arise if the misconduct is properly regarded as serious.”

.....

“16. ...the concept of professional misconduct carries resounding overtones of seriousness, reprehensible conduct which cannot extend to the trivial.”

52. In *R (Remedy UK Ltd) v General Medical Council* [2010] EWHC 1245 (Admin) Elias LJ reviewed the authorities and said, at [37]:

“(1) Misconduct is of two principal kinds. First it may involve sufficiently serious misconduct in the exercise of professional practice such that it can properly be described as misconduct going to fitness to practise. Second, it can involve conduct of a morally culpable or otherwise disgraceful kind which may, and often will, occur outwith the course of professional practice

itself, but which brings disgrace upon the doctor and thereby prejudices the reputation of the profession.”

53. Curiously, the Handbook does not contain any guidance on the meaning of professional misconduct, in particular, there is no reference to the requirement that the misconduct must be serious. However, it appears that the Tribunal was aware of this requirement, and applied it, since they dismissed the charges in respect of complainant D on the grounds that “*we are not satisfied that the conduct in relation to these charges was sufficiently serious to meet the threshold of professional misconduct*”.
54. The Tribunal accepted that Mr Howd did not intend his actions to cause offence to the complainants or to make them feel uncomfortable, however, they concluded that the lack of intent in his drunken state did not excuse his conduct. The Tribunal found that excessive consumption of alcohol drove him to act as he did and his medical condition did not make a significant contribution to his conduct.
55. As I have already said, in the light of the further medical evidence adduced on appeal, I have concluded that the Tribunal misunderstood and misapplied the medical evidence, and thus assessed Mr Howd’s conduct on an erroneous basis. The medical evidence established, on the balance of probabilities, that his inappropriate, and at times offensive, behaviour was a consequence of his medical condition. It also established that his excessive consumption of alcohol was very likely to have been a response to the onset of his medical condition, and it probably had the unfortunate consequence of exacerbating his disinhibition and loss of judgment. In these circumstances, Mr Howd’s behaviour plainly was not reprehensible, morally culpable or disgraceful, as it was caused by factors beyond his control. In my judgment, it did not reach the threshold for a finding of serious professional misconduct.

Conclusions

56. For the reasons set out above, Mr Howd’s appeal against the findings of guilt is allowed. It follows that the BSB’s appeal against sanction has to be dismissed.