The Bar Tribunals & Adjudication Service

The Council of the Inns of Court

# Report of Finding and Sanction

**Case Reference: PC 2021/7478/D3**

**James Bogle**

The Director-General of the Bar Standards Board

The Chair of the Bar Standards Board

The Treasurer of the Honourable Society of: Middle Temple [1991]

## Disciplinary Tribunal

### James Bogle

1. In accordance with an appointment made by the President of the Council of the Inns of Court in a Convening Order dated the 21st July 2023 we sat as a Disciplinary Tribunal on the 12th and 13th September 2023 to hear and determine four charges of professional misconduct contrary to the BSB Handbook against James Bogle, barrister of the Honourable Society Middle Temple. On the 27th November 2023 we announced our findings on the charges and heard submissions in relation to sanction.

### Panel Members

2. The other members of the Tribunal were:

   Tom Cosgrove KC [Panel Chair]

   Ashley Serr [Barrister Member]

   Janine Green [Lay Member]

### Charges

3. The Respondent, Mr Bogle faced 4 charges. The charges were amended with the agreement of both parties at the hearing so that they read as follows:

**Charge 1**

**Statement of Offence**

Professional misconduct contrary to Core Duty [CD]1 and Rules rC3.1 of the Conduct Rules (Part 2 of the Bar Standards Board's Handbook – Version 4)

**Particulars of Offence**

**James Bogle**, a barrister, failed to observe his duty to the court in the administration of justice (CD1) and recklessly misled or attempted to mislead the Court (rC3.1), in that, during the course of proceedings before the Business and Property Courts of England & Wales in case BL-2009-000006 he made submissions relating to whether his lay client ("Mr F") had complied with an order of Mr Justice Henderson dated 15 December 2011 but recklessly failed to bring to the Court's attention matters that were known to him, were relevant to that issue and ought properly to have been drawn to the Court's attention so that the Court was not misled. In particular:

(1) At a hearing on 30 June 2021, Mr Bogle submitted that an application notice (which must necessarily have been prepared if there had, as submitted by Mr Bogle, been compliance with the order of Henderson J) had been drafted by Richard Wilson KC on Mr F's behalf. However, Mr Bogle failed to then draw to the Deputy Master's attention that in proceedings brought by Mr F against Richard Wilson KC, Mr Wilson KC had filed a defence in which he denied having drafted the application notice.

(2) At a hearing on 30 June 2021, Mr Bogle stated to the Deputy Master "I accept it would be helpful to have from Mr Wilson a statement saying 'I drafted this document'…I understand that, but because there is an issue between [Mr F] and Mr Wilson, that is not forthcoming. However, Mr Bogle failed to then draw to the Deputy Master's attention that in proceedings brought by Mr F against Richard Wilson KC, Mr Wilson KC had filed a defence in which he denied having drafted the application notice.

(3) At a hearing on 30 June 2021, Mr Bogle referred the Deputy Master to evidence (including a statement from a Mr Green, Mr Wilson KC's former clerk) said to support that an application notice had been drafted by Mr Wilson KC but failed to draw to the Deputy

Master's attention that in proceedings brought by Mr F against Richard Wilson KC, Mr Wilson KC had filed a defence in which he denied having drafted the application notice.

(4) Having submitted both orally (at a hearing on 30 June 2021) and in writing (in a skeleton argument dated 4 October 2020) that Mr F had complied with the order of Henderson J, Mr Bogle did not draw to the Court's attention that in the extant proceedings between Mr F and Mr Wilson KC, Mr F's pleaded case was that Mr Wilson KC had said he or his clerks would arrange for the documents necessary to comply with the order of Henderson J to be filed with the court and served as required and that (as set out in paragraphs 43(3), 43(5) and 43(9) of Mr F's Particulars of Claim in those proceedings) Mr Wilson had failed to draft, and failed to arrange for the filing of, any application notice for the application to amend.

**Charge 2**

**Statement of Offence**

Professional misconduct contrary to Core Duty [CD]3 and Rules rC6.1 of the Conduct Rules (Part 2 of the Bar Standards Board's Handbook – Version 4)

**Particulars of Offence**

**James Bogle**, a barrister, failed to act with integrity (CD3) in that, during the course of proceedings before the Business and Property Courts of England & Wales in case BL-2009-000006 he made submissions relating to whether his lay client ("Mr F") had complied with an order of Mr Justice Henderson dated 15 December 2011 but failed to bring to the Court's attention matters that were known to him, that were relevant to that issue and which ought properly to have been drawn to the Court's attention so that the Court was not given a misleading and/or incomplete impression of relevant events. In particular:

(1) At a hearing on 30 June 2021, Mr Bogle submitted that an application notice (which must necessarily have been prepared if there had, as submitted by Mr Bogle, been compliance with the order of Henderson J) had been drafted by Richard Wilson KC on Mr F's behalf. However, Mr Bogle failed to then draw to the Deputy Master's attention that in proceedings brought by Mr F against Richard Wilson KC, Mr Wilson KC had filed a defence in which he denied having drafted the application notice.

(2) At a hearing on 30 June 2021, Mr Bogle stated to the Deputy Master "I accept it would be helpful to have from Mr Wilson a statement saying 'I drafted this document'…I understand that, but because there is an issue between [Mr F] and Mr Wilson, that is not forthcoming. However, Mr Bogle failed to then draw to the Deputy Master's attention that in proceedings brought by Mr F against Richard Wilson KC, Mr Wilson KC had filed a defence in which he denied having drafted the application notice.

(3) At a hearing on 30 June 2021, Mr Bogle referred the Deputy Master to evidence (including a statement from a Mr Green, Mr Wilson KC's former clerk) said to support that an application notice had been drafted by Mr Wilson KC but failed to draw to the Deputy Master's attention that in proceedings brought by Mr F against Richard Wilson KC, Mr Wilson KC had filed a defence in which he denied having drafted the application notice.

(4) Having submitted both orally (at a hearing on 30 June 2021) and in writing (in a skeleton argument dated 4 October 2020) that Mr F had complied with the order of Henderson J, Mr Bogle did not draw to the Court's attention that in the extant proceedings between Mr F and Mr Wilson KC, Mr F's pleaded case was that Mr Wilson KC had said he or his clerks would arrange for the documents necessary to comply with the order of Henderson J to be filed with the court and served as required and that (as set out in paragraphs 43(3), 43(5) and 43(9) of Mr F's Particulars of Claim in those proceedings) Mr Wilson had failed to draft, and failed to arrange for the filing of, any application notice for the application to amend.

**Charge 3**

**Statement of Offence**

Professional misconduct contrary to Core Duty [CD]3 and Rule rC9.1 of the Conduct Rules (Part 2 of the Bar Standards Board's Handbook – Version 4)

**Particulars of Offence**

**James Bogle,** a barrister**,** failed to act with integrity (CD3) and recklessly misled or attempted to mislead Defendants in case BL-2009-000006, and their legal representatives (rC9.1), in that, in case BL-2009-000006 he made submissions relating to whether his lay client ("Mr F") had complied with an order of Mr Justice Henderson dated 15 December 2011 but failed to

refer to matters that were known to him, were relevant to that issue and ought properly to have been referred to so that the Defendants and their legal representatives were not misled. In particular:

(1) At a hearing on 30 June 2021, Mr Bogle submitted that an application notice (which must necessarily have been prepared if there had, as submitted by Mr Bogle, been compliance with the order of Henderson J) had been drafted by Richard Wilson KC on Mr F's behalf. However, Mr Bogle failed to then draw to the Deputy Master's attention that in proceedings brought by Mr F against Richard Wilson KC, Mr Wilson KC had filed a defence in which he denied having drafted the application notice.

(2) At a hearing on 30 June 2021, Mr Bogle stated to the Deputy Master "I accept it would be helpful to have from Mr Wilson a statement saying 'I drafted this document'…I understand that, but because there is an issue between [Mr F] and Mr Wilson, that is not forthcoming. However, Mr Bogle failed to then draw to the Deputy Master's attention that in proceedings brought by Mr F against Richard Wilson KC, Mr Wilson KC had filed a defence in which he denied having drafted the application notice.

(3) At a hearing on 30 June 2021, Mr Bogle referred the Deputy Master to evidence (including a statement from a Mr Green, Mr Wilson KC's former clerk) said to support that an application notice had been drafted by Mr Wilson KC but failed to draw to the Deputy Master's attention that in proceedings brought by Mr F against Richard Wilson KC, Mr Wilson KC had filed a defence in which he denied having drafted the application notice.

(4) Having submitted both orally (at a hearing on 30 June 2021) and in writing (in a skeleton argument dated 4 October 2020) that Mr F had complied with the order of Henderson J, Mr Bogle did not draw to the Court's attention that in the extant proceedings between Mr F and Mr Wilson KC, Mr F's pleaded case was that Mr Wilson KC had said he or his clerks would arrange for the documents necessary to comply with the order of Henderson J to be filed with the court and served as required and that (as set out in paragraphs 43(3), 43(5) and 43(9) of Mr F's Particulars of Claim in those proceedings) Mr Wilson had failed to draft, and failed to arrange for the filing of, any application notice for the application to amend.

**Charge 4**

**Statement of Offence**

Professional misconduct contrary to Core Duty [CD]5 and Rule rC8 of the Conduct Rules (Part 2 of the Bar Standards Board's Handbook – Version 4)

**Particulars of Offence**

**James Bogle,** a barrister, behaved in a way which was likely to diminish the trust and confidence which the public places in him or in the profession (CD5) and behaved in a way which could reasonably be seen by the public to undermine his integrity (rC8), in that, during the course of proceedings before the Business and Property Courts of England & Wales in case BL-2009-000006 he made submissions relating to whether his lay client ("Mr F") had complied with an order of Mr Justice Henderson dated 15 December 2011 but failed to bring to the Court's attention matters that were known to him, that were relevant to that issue and which ought properly to have been drawn to the attention of the Court and/or the Defendants and their legal representatives so that the Court and/or the Defendants and their representatives were not given a misleading and/or incomplete impression of relevant events. In particular:

(1) At a hearing on 30 June 2021, Mr Bogle submitted that an application notice (which must necessarily have been prepared if there had, as submitted by Mr Bogle, been compliance with the order of Henderson J) had been drafted by Richard Wilson KC on Mr F's behalf. However, Mr Bogle failed to then draw to the Deputy Master's attention that in proceedings brought by Mr F against Richard Wilson KC, Mr Wilson KC had filed a defence in which he denied having drafted the application notice.

(2) At a hearing on 30 June 2021, Mr Bogle stated to the Deputy Master "I accept it would be helpful to have from Mr Wilson a statement saying 'I drafted this document'…I understand that, but because there is an issue between [Mr F] and Mr Wilson, that is not forthcoming. However, Mr Bogle failed to then draw to the Deputy Master's attention that in proceedings brought by Mr F against Richard Wilson KC, Mr Wilson KC had filed a defence in which he denied having drafted the application notice.

(3) At a hearing on 30 June 2021, Mr Bogle referred the Deputy Master to evidence (including a statement from a Mr Green, Mr Wilson KC's former clerk) said to support that an application notice had been drafted by Mr Wilson KC but failed to draw to the Deputy Master's attention that in proceedings brought by Mr F against Richard Wilson KC, Mr Wilson KC had filed a defence in which he denied having drafted the application notice.

(4) Having submitted both orally (at a hearing on 30 June 2021) and in writing (in a skeleton argument dated 4 October 2020) that Mr F had complied with the order of Henderson J, Mr Bogle did not draw to the Court's attention that in the extant proceedings between Mr F and Mr Wilson KC, Mr F's pleaded case was that Mr Wilson KC had said he or his clerks would arrange for the documents necessary to comply with the order of Henderson J to be filed with the court and served as required and that (as set out in paragraphs 43(3), 43(5) and 43(9) of Mr F's Particulars of Claim in those proceedings) Mr Wilson had failed to draft, and failed to arrange for the filing of, any application notice for the application to amend.

4. The Burden of proving these charges falls on the BSB throughout and we cannot find the charges made out unless we are satisfied the BSB has established that their case is more probable than not.

5. The charges raise issues as to whether or not (and to what extent) the Respondent may have misled or attempted to mislead the court and others at a hearing on the 30th June 2021 (before Deputy Master Linwood) by non disclosure of matters pleaded in associated professional negligence proceedings which it is said were known to him.

6. We note that each of the numbered particulars (1)-(4) is identical in each of the four charges. We also note from the outset that the BSB makes no allegations of dishonesty and it made it clear at the hearing that it did not seek to allege that the Respondent knowingly misled (or sought knowingly to mislead) anyone through the actions as alleged in the charges.

7. We have heard and received substantial evidence contained in the documentation provided to us in the BSB bundle and the Defence bundle and heard oral evidence from the Respondent. We have carefully considered this with the helpful skeleton arguments and submissions/caselaw provided to us by counsel for each side. We have also considered supplementary written submissions dated the 2nd October 2023 from the Respondent and a short response to them from the BSB in an email dated the 3rd October 2023.

## Factual Background - findings

8. Much of the factual background is not in dispute. We find the key aspects of the background to be as follows.

9. There were 2 pieces of litigation pursued by 'Mr F' – one against 'FBL' and one against Richard Wilson KC 'RWKC'. The Respondent acted for Mr F in both sets of litigation at various times.

10. Mr F and Mr H ran a bar and nightclub from a property in Tottenham. It is Mr F's case that he (with a small contribution from Mr H) invested in the refurbishment of the Property in reliance upon an agreement they allege they had with FBL to sell the Property to them. Mr F alleges that FBL excluded him and Mr H from the Property and refused to honour the agreement to sell it to them.

11. In December 2009, Mr F issued proceedings against FBL in relation to these matters ("the FBL Claim").

12. On 3 November 2010, following an application by FBL, the FBL Claim was thrown out by Master Teverson.

13. In or about December 2010, Mr F instructed RWKC and steps were taken to appeal the Teverson Order and to introduce by amendment two new matters comprising a claim for rectification and a claim in restitution.

14. On 4 May 2011, permission to appeal was granted by Mr Justice Briggs.

15. The appeal came before Mr Justice Henderson who dismissed it in a judgment dated 15 December 2011 save in relation to the proposed restitution claim.

16. On the 15th December 2011, Mr Justice Henderson, made an order ("the Henderson Order") which referred to in the charges. It stated (in part):

*"…upon the Court adjudging – …*

*(c) that the appeal should be allowed to the limited extent of permitting the Claimant to make an application for permission to amend so as to raise the proposed alternative claim for restitution;*

*IT IS ORDERED THAT:*

*(1) The Claimant has permission to make an application for permission to amend the Claim Form and Particulars of Claim (if so advised) to raise the proposed alternative claim for restitution;*

*(2) If the claimant intends to apply for such permission, he must issue an Application Notice and file and serve it together with the proposed Amended Claim Form and Amended Particulars of Claim and any evidence upon which he intends to rely in support of the application by 4 pm on 5 January 2012…"*

17. We note that one of the main issues before Deputy Master Linwood in the subsequent hearing on the 30th June 2021 referred to in the charges was whether the amendment application had been made pursuant to the Henderson Order.

18. In emails in March 2012, FBL's solicitor, ("Mr I"), accepted that he had received from RWKC a draft Amended Claim Form and draft Amended Particulars of Claim. However, as set out in a letter to Mr F copied to RWKC dated 5 April 2012, Mr I denied having received an application notice or any supporting evidence for the Amendment Application. On 13 April 2012, RWKC's clerk wrote to Mr F setting out the steps taken on his behalf and stated **"***Please accept our apologies for this situation. Whilst we believe we have complied with the Judge's Directions/Order on your behalf we currently cannot provide evidence to support this."*

19. On 4 January 2013, Mr F (now acting in person) made an application for directions. Despite Mr F seeking its adjournment the application was heard and dismissed on the 18th February 2013.

20. Mr F first approached the Respondent on a direct access basis in late 2017 but matters did not progress due to a lack of documents and because the Respondent considered that Mr F needed to instruct a solicitor.

21. In or about late 2018, Mr F instructed solicitors ("AJA") to act for him in relation to the FBL Claim and a potential claim against RWKC. AJA thereafter instructed the Respondent in respect of both matters.

22. On 27 December 2018, Mr F issued proceedings against RWKC ("the RWKC Claim") which claim was pleaded by The Respondent in Particulars of Claim dated 23 April 2019.

23. We consider that that the Particulars of Claim drafted by the Respondent for his client in litigation against RWKC - accompanied by a statement of truth - in part at least[1] - alleged that RWKC had failed to draft and/or serve an application notice for permission to amend on or before 5.1.12 as required by an order of Henderson J made in December 2011 – which had resulted, it was alleged, in the non-compliance with that order.

24. In particular, paragraphs 43 (3), 43(5) and 43 (9) of that pleading drafted by the Respondent allege a failure to draft and failure to arrange for the filing of any application notice for the application to amend.

25. It is also plain to us that the Defence filed on the 20th June 2019 (which had a statement of truth attached to it) produced in that litigation by RWKC indicated clearly that it was his case that he had not settled or drafted any application notice.

[1] The Respondent makes the point that it was pleaded on two bases at paragraph 31.3 of his statement which we accept.

26. Indeed, RWKC indicated that he was not instructed to draft, did not agree to draft and had no duty to draft the application. Further, he stated he did not represent that he or his clerk would file and serve the application as it was work he could not professionally have done namely conducting litigation.

27. Thereafter, pursuant to orders dated 22 July 2019, 11 February 2020, 3 May 2020 and 1 July 20208 the RWKC Claim was stayed by consent. As set out in each Consent Order the purpose of the stay was to permit Mr F to "re-list/restore" the Amendment Application. The final order, dated 14 August 2020 contained agreed directions providing that the RWKC Claim be stayed until the determination of the FBL Claim[2].

28. In the litigation pursued by Mr F against FBL an application to allow the claim to proceed further (which was an application to relist the amendment application) was issued in July 2020 and eventually was listed to be heard before Deputy Master Linwood on the 20th June 2021.

29. The evidence originally filed in support of the Relisting Application was Mr F's third witness statement.

30. Thereafter, further evidence was filed.

31. In response to the Relisting Application, Mr I filed a fourth witness statement in which he said that to the best of his knowledge and belief the Amendment Application had not been issued.

32. The Relisting Application was originally listed for a hearing on 5 October 2020 before Master Teverson and, for the purposes of that hearing, the Respondent produced an extensive skeleton argument dated 4 October 2020.

[2] Had the amendment application ultimately been successful it may have rendered the RWKC claim otiose or at least reduced any loss, hence the stay.

33. In that skeleton reliance was placed on the new evidence that on the face of it indicated that an application had been filed and served in accordance with the order of Henderson J in January 2012 (in particular the witness statement of David Green, the clerk to chambers dated 29 September 2020- see paragraph 19.1). The skeleton put forward the case of Mr F that his evidence showed that the application notice was filed and served in accordance with the order of Henderson J. There was no reference in the skeleton to the proceedings against RWKC or the pleadings therein or to either the contention by Mr F in those proceedings that RWKC had failed to draft or serve the application notice or to the denial by RWKC of having drafted or arranged for the filing of any application notice.

34. We note that at paragraph 27 of the skeleton the Respondent submitted: *there is no evidence before the court, nor, it seems, any likely to be available, as to whether or not the court received the application notice, whether by email or fax*,

35. The hearing was adjourned due to the ill health of Mr F.

36. On 27 October 2020, a witness statement supporting Mr F's position by Mr F's then girlfriend, PCP, was filed and served.

37. In due course the Application was heard by Deputy Master Linwood at an online hearing on 30 June 2021. The hearing lasted for one day.

38. Mr F was represented by the Respondent and FBL by Ms Ife. We have considered the transcript of the hearing in full and heard and received evidence and submissions in relation to it. We have also considered the Deputy Master's judgment. We return to those matters below.

39. The Deputy Master dismissed the Relisting Application finding that the Amendment Application had not been made and refusing Mr F's application for a retrospective extension of time to make an Amendment Application.

40. In relation to the hearing we find in particular that the issues of whether RWKC had prepared an application notice with evidence (either on the face of the notice or separately) and whether RWKC/his clerks had filed and served any such documentation before close of business on the 5th January 2012 were material ones for the Deputy Master to consider.

41. No mention was made to the Deputy Master or to the legal team representing FBL – in either the skeleton of the Respondent or in submissions during the hearing of the application – which lasted for most of the day - to the litigation against RWKC and the position that had been taken by Mr F and RWKC in their pleadings.

42. Before the Deputy Master the Respondent submitted that Mr F had complied with an Order of Henderson J ("the Order") as his then counsel, RWQC, had drafted an application notice for Mr Francis for permission to amend his pleadings, that Mr Francis then signed in his chambers. Then Mr Wilson's clerks transmitted the application notice and certain amended pleadings to the court. In the alternative it was said that if this had not happened relief against sanctions should be granted to Mr F. It was accordingly plainly important for Mr F to establish compliance with the Henderson Order as that would obviate a need to obtain relief from sanctions.

43. We find that this position pursued by Mr F and submitted on his behalf by the Respondent at the application hearing before the Deputy Master represented a position that was contrary to the position previously alleged by Mr F in his Claim against RWKC which had been drafted by the Respondent. It was also contrary to the contentions and denials made by RWKC in his pleaded Defence in those proceedings.

44. We find that the position and the nature of evidence before the Deputy Master was complex and less than straightforward on the issue of the application notice. Although copies of the draft Amended Claim Form and Particulars of Claim were available, no-one was able to produce any copy of an Application Notice, or of any document clearly evidencing the filing, service or receipt of one. It appeared that the court files had been destroyed some while earlier, in accordance with established protocols.

45. FBL's solicitors denied ever having received, or indeed ever having seen, any Application Notice, although those letters in evidence did refer to (late) receipt of the draft Amended Pleadings. There was no contemporaneous document referring to any Application Notice.

46. During the Hearing the transcript indicates that the Respondent repeatedly put forward his clients case about the application notice but did not draw to the attention of the Court either that this position contradicted what Mr F had said in his pleaded case in litigation against RWKC or that RWKC denied any involvement with drafting or filing such an application notice in his Defence.

47. This, we find, was despite the Deputy Master putting probing questions to the Respondent about the absence of evidence (direct or otherwise) from RWKC. We consider this context to be important.

48. At pp 9-10 of the transcript we note the following exchange (emphasis in bold):

*THE DEPUTY MASTER: And Mr Wilson has not featured in this. Why is that please?*

*MR BOGLE: Well, Mr Wilson, the relationship between Mr Wilson and the claimant is obviously governed by legal professional privilege, he being Mr Francis's Direct Access counsel, so there is a limit to what can actually be said in relation to their relationship. In essence, he is not --* ***there is no evidence before the court from Mr Wilson. That is all I can say.***

*THE DEPUTY MASTER: Sorry, there is no evidence …?*

*MR BOGLE:* ***There is no evidence before the court from Mr Wilson****.*

*THE DEPUTY MASTER: I know; I am asking why not.*

*MR BOGLE: Sorry?*

*THE DEPUTY MASTER: I am asking why there is no evidence from him.*

***MR BOGLE: Well, there is a contest between Mr Francis and Mr Wilson as to when he relinquished his retainer and whether he should have done and at what point.***

*THE DEPUTY MASTER: Okay, but the point is a matter of –*

*MR BOGLE: So, in essence –*

*THE DEPUTY MASTER: Sorry, just a minute. The point is a matter of pure fact. Mr Francis says that Mr Wilson drafted the application notice.*

*MR BOGLE: Yes.*

*THE DEPUTY MASTER: If Mr Francis had been represented by solicitors, there is no question of legal professional privilege in that the solicitor would say, as Mr Ince has, "I received this" or "I didn't receive this" or "I did this" or "I did that". It is an administrative function. There is no question of privilege.*

*MR BOGLE:* ***As I said, there is an issue between Mr Francis and Mr Wilson regarding his retainer****.*

*THE DEPUTY MASTER: So Mr Wilson –*

***MR BOGLE: Such that Mr Wilson is not in a position -- I cannot go so far as to say he has directly refused -- to provide a witness statement.***

*THE DEPUTY MASTER: Okay. Obviously I have to look at the evidence in the round, have I not, obviously. Therefore, on the basis that he obviously is aware of this and he has not given evidence yet it is him, in a lot of ways it comes back to him, does it not. His recollection as to what he drafted.*

*MR BOGLE: What really the issue comes back to is what was filed and served, when and how.*

*THE DEPUTY MASTER: Yes I know, but the preliminary step is the actual creation of the application notice and you are relying on Mr Francis saying that Mr Wilson drafted it, are you not?*

*MR BOGLE: And his clerk.*

*THE DEPUTY MASTER: Sorry?*

*MR BOGLE: And the clerk.*

*THE DEPUTY MASTER: No, no, the clerk did not draft it, Mr Bogle. If the clerk had drafted it –*

*MR BOGLE: No, he did not draft it.*

*THE DEPUTY MASTER: -- there is something seriously wrong.*

*MR BOGLE: But he did witness it.*

***THE DEPUTY MASTER: No, I am sorry, the actual drafting, the production of it was by Mr Wilson.***

***MR BOGLE: Yes.***

*THE DEPUTY MASTER: Right. That is why it is such an important point –*

*MR BOGLE: I understand.*

*THE DEPUTY MASTER: -- in my view. It is not a question of the clerk -- the clerk really again is someone who observed what was happening as opposed to producing the crucial document in all this.*

***MR BOGLE: I accept it would be helpful to have from Mr Wilson a statement saying, "I drafted this document", yes.***

*THE DEPUTY MASTER: That is my concern.*

***MR BOGLE: Yes, I understand that, but because there is an issue between Mr Francis and Mr Wilson, that is not forthcoming.***

*THE DEPUTY MASTER: All right. But do you, from your perspective, Mr Bogle, do you think I should continue on the basis of the lack of evidence as to compliance with PD5C or whatever applied at the time.*

49. Further we note that at p.27 of the transcript the Respondent submitted:

*However, the evidence in reply by the claimant shows that the first defendant and Mr Ince are wrong about that.* ***In brief, you have seen the evidence from Mr Green. There is unfortunately no evidence from Mr Wilson for the reasons I have said.*** *The evidence of Mr Green is supported by the evidence of the claimant, which also addresses the other points raised by Mr Ince in his third and fourth witness statements.*

50. At pps 82-83 of the transcript in relation to the issue of whether RWKC could properly file and serve documentation such as an Application Notice (or a proposed Amended Statement of Case), the following exchange took place:

*MS IFE: Yes, quite. That is another point, Master. What on earth were barrister's chambers doing issuing applications anyway if that were true.*

*THE DEPUTY MASTER: They was a directive by the Bar Council that they should not do this.*

*MS IFE: Yes, you are right, sorry. You are not allowed to do it.*

*THE DEPUTY MASTER: There was a directive that they should not do this, full stop.*

*MS IFE: You are not insured to do it and you are not allowed to do it.*

*THE DEPUTY MASTER: Yes. It is conducting litigation.*

*MS IFE: Yes.*

*MR BOGLE: Master, that they should or should not have done does not tell us whether they did.*

*MS IFE: It makes it less likely.*

*MR BOGLE: (**over speaking**) tells us.*

*MS IFE: Anyway, there we are. They do not say they did is the real point.*

*THE DEPUTY MASTER: Sorry, Mr Bogle, if they should not do it, how can they do it?*

*MR BOGLE: **Because his clerk says he did it in a witness statement with a statement of truth and, as I earlier intimidated, there is an issue between my client and Mr Wilson and that, as I need hardly tell you, is going to be one of them.***

*MS IFE: But Master –*

*THE DEPUTY MASTER: Going to be one of what?*

*MR BOGLE: **The issues between Mr Wilson and my client, because Mr Wilson will undoubtedly say exactly what Ms Ife has said, barrister's chambers do not serve or file such documents. But the fact is, according to the clerk in his evidence, with a statement of truth, that is what happened.***

## Result of the hearing and subsequent events

51. As it turned out the Deputy Master did not accept the evidence relied on and held that the application for permission to amend was never issued, filed and served. He delivered judgment the following day after the hearing and found that that no Application Notice had been filed with the court – so that there had not been compliance with the Order of Henderson, J; and he declined to grant Mr F relief against sanctions.

52. The effect of this (subject to any possible appeal) was to bring to an unsuccessful conclusion Mr F's claims against FBL. Mr F did subsequently seek permission to appeal, but it was not granted.

53. The Deputy Master had been concerned at the application hearing as to the lack of evidence from RWKC. Subsequently, in September 2021, when checking over the transcript of his judgment, Deputy Master Linwood consulted the CE File7, and the proceedings

between Mr F and RWKC came to his attention. He discovered the material that had not been disclosed during the hearing and wrote to JB (copied to FBL's counsel Ms Linden Ife) about what he considered to be inconsistencies and contradictions on 6 September 2021.

54. JB provided a substantive response on 17 September 2021. In it he indicated to the Judge that Mr F's case, pleaded two and a half years earlier, had "*changed substantially following extensive research carried out by instructing solicitors, in the intervening period, and upon review thereof by the client (now a protected party). Mr Fs' change of instructions, following his review of the extensive evidence found, was also later supported by the witness evidence before the court of Mr David Green, former clerk to Mr Wilson, and Ms Cornett-Parkinson.*"; he also indicated that although it would be necessary to amend as against Mr Wilson, this had not yet been done, given that the action had been stayed, and to save costs – and indeed, the outcome of the Deputy Master's judgment might well have an impact on the amended pleading. In relation to RWKC it was said: "*What Mr Wilson pleads in his Defence (including the parts you* refer *to) is contested by Mr F (save that Mr Wilson admits that he drafted the amended claim form and amended particulars of claim [21a] and, on 5 January 2012, "agreed to permit his chambers" facilities to be used and arranged for one of [his] clerks to send the draft amended claim form and particulars of claim to FBL's solicitors via use of that clerk's email account" [24b])*".

55. He concluded with an apology:

*On reflection, however, I see that, despite the fact that his case has changed substantially and needs to be re-pleaded, but given that Mr Francis signed the statement of truth to the particulars of claim (dated April 2019) in the case against Mr Wilson, those signed particulars can be said to have, and had, relevance to your decision in this case and so ought to have been raised before the court, if not indeed also disclosed.*

*I therefore must apologise to the court for that regrettable oversight and am grateful for your having raised it before your finalising of the text of your judgment.*

*No discourtesy was intended and I sincerely regret any inconvenience to the court as a result of that regrettable oversight*

## Evidence from the Respondent

56. We accept that the Respondent is a respected and experienced barrister of over 30 years call. Before us the Respondent indicated in evidence that at the time of the application he was broadly aware of the contents of the P of C in the RWKC litigation but that he was concerned – in the heat of the moment - that such matters were privileged (although he accepted that he understood on reflection that such pleadings were publicly available and not privileged). He also indicated that he had no recollection at that time of the detail of the RWKC defence. He indicated that he had not reviewed either the Particulars of Claim or the Defence before appearing at the relisted application hearing.

57. The Respondent explained to us that he had difficulties because of the nature of the online hearing in taking instructions and felt pressured to think quickly under some persistent questioning from the judge. In that regard, we do not underestimate difficulties that can be caused by online hearings in terms of taking instructions and we also appreciate and acknowledge that the Respondent may have felt under pressure.

58. However we find that it would have been possible for the Respondent to ask for time to take instructions and give his client advice had he felt it appropriate as to whether relevant pleadings should be disclosed given the issues raised by the Judge.

59. The Respondent was in our view clearly alive to the potential relevance of such matters to the issues before the judge. We note that in his written statement the Respondent explained that he had not drawn attention to the RWKC Claim as '*it was not in issue in the amendment application and was a separate claim that was now stayed*'. Moreover he suggested that in due course the pleadings in the RWKC litigation would have needed to be amended. We do not find this convincing as a basis for not mentioning such matters to the judge.

60. The Respondent explained in evidence that his submissions as to the drafting of the application notice by RWKC was in accordance with the 'fresh evidence' he had been provided with that was before the court. We note that in answer to questions from the

Deputy Master the Respondent appeared to avoid the issue of there being any evidence from RWKC before the court in part by reference to legal professional privilege – in relation to which the judge did not appear to agree or give any weight to.

61. The Respondent at one stage during such questioning referred to there being '*a contest between Mr F and Mr W as to when he relinquished his retainer*…'. He later told the judge there was '*an issue'* between Mr F and Mr W. But he avoided direct reference to the other legal proceedings.

62. In our view the Respondent must in this exchange have had in mind the legal proceedings between Mr F and RWKC although he did not bring these to the attention of the judge. We agree with the BSB that the Respondent was being evasive.

63. The Respondent indicated to us in his oral evidence that he only knew the general gist of the RWKC Defence having skim read it some time ago. He was challenged on this point and we did not find his answers convincing. We also consider that his responses to the Deputy Master indicating that there was an '*issue*' between Mr F and RWKC - in the context of whether RWKC could in fact properly undertake the issuing/filing applications – indicated at least a general knowledge of the nature of the Defence RWKC had pleaded. On balance we consider that the Respondent would have been aware at the time of the hearing before the Deputy Master that RWKC had filed a Defence in which he denied having drafted the application notice.

64. At the stage of the hearing when the Respondent indicated to the judge that

*I accept it would be helpful to have from Mr Wilson a statement saying, "I drafted this document", yes … but because there is an issue between Mr Francis and Mr Wilson, that is not forthcoming*"

it was in the context of a series of judicial questions relating to the existence or absence of evidence from RWKC on a key issue that the Court needed to grapple with.

65. We consider in this context that the indication from the Respondent that a statement from RWKC that set out he drafted the document would '*have been helpful'* is on the face of it

misleading[3] as it may at the very least have indicated to the judge that is what RWKC might have said in a statement. The Respondent in our view must have known that RWKC had said the opposite in a document supported by a statement of truth and filed in other proceedings about which the Deputy Master was unaware. But he did not disclose such matters to the judge. Whilst it is true that the Respondent did not directly submit that RWKC had pleaded that he had drafted the amendment application in our view his conduct was likely to have left the Court with the impression that there was no available evidence that contradicted the position being submitted to the court.

66. We also find that the suggestion that a statement from RWKC was not '*forthcoming*' because of the '*issue*' between Mr F and RWKC was in context misleading. It is not clear why such a dispute would prevent a statement and of course the Respondent was aware that RWKC had filed a Defence with a statement of truth that addressed the issue before the Deputy Master in a way that conflicted with the position the Respondent was now pursuing on behalf of Mr F. Had the judge been made aware of the other litigation and the nature of the dispute it would have been very clear why no statement was forthcoming that supported the position of Mr F (that is, because RWKC strongly denied ever having drafted such a notice). We find that the Respondent was aware of these matters. Moreover we see no reason in principle why the pleadings referred to in the charges could not have been disclosed to the Judge or the other parties.

67. Although it was submitted to us that by virtue of CPR 32.6 the RWKC Defence could not have been relied upon as evidence at a trial we see no reason why it could not have been disclosed to the judge in the context of the application he was dealing with. Further it clearly could constitute '*evidence*' in a more general sense that the court would have been entitled to consider had it been aware of it - especially given it was supported by a signed statement of truth. It was submitted to us (in the supplementary submissions received after the close of the Tribunal hearing) that the Defence from RWKC could not have been used as 'evidence' pursuant to CPR 32.6 (2) by anyone other than the party that signed it so that the Respondent had no obligation to disclose it. It seems to us this technical interpretation

[3] We set out below our approach to that term and to recklessness

of a particular part of the CPR rather misses the point. It was not disputed that the document was not privileged and was available generally to be seen. It was a relevant document that could have been brought to the attention of the court. We do not consider the terms of CPR 32 precluded that course of action. In our view it would have been possible to disclose the existence and content of the Defence to the judge. The Respondent was aware of the content of the Defence and failed to draw such matters to the attention of the judge. This in context was misleading for the reasons we have set out in these findings. The Respondent was aware that RWKC strongly denied ever having drafted an application notice in his Defence and should have drawn this to the attention of the judge.

68. Overall we consider the clear contradictions in the pleadings in the related litigation should have been drawn to the attention of the Judge.

69. Before turning to the specific charges we set out relevant guidance and caselaw relevant to the issues raised before us.

## Approach to Misleading and recklessness

70. Guidance on the approach to what is 'misleading' is found in the Handbook at gC4

*As to your duty not to mislead the court:*

*.1 knowingly misleading the court includes being complicit in another person misleading the court;*

*.2 knowingly misleading the court also includes inadvertently misleading the court if you later realise that you have misled the court, and you fail to correct the position;*

*.3 recklessly means being indifferent to the truth, or not caring whether something is true or false; and*

*.4 the duty continues to apply for the duration of the case.*

71. Also gC11 explains that:

*If there is a risk that the court will be misled unless you disclose confidential information which you have learned in the course of your instructions, you should ask the client for*

*permission to disclose it to the court. If your client refuses to allow you to make the disclosure you must cease to act, and return your instructions: see Rules rC25 to rC27 below. In these circumstances you must not reveal the information to the court.*

72. Barristers are under a clear duty to not knowingly or recklessly mislead or attempt to mislead the *court* (rC3.1 of the Code of Conduct). There are some situations where Counsel's professional obligations require him or her to draw matters to the Court's attention even if those matters are adverse to their client's interests. These situations include citation of relevant authorities and disclosure of adverse documents.

73. In principle, the concept of misleading might include actions which are taken inadvertently and being 'reckless' is in this context indicated in the Handbook as including '*being indifferent to the truth, or not caring whether something is true or false.'*

74. Context is important in determining whether conduct has been recklessly misleading. As guidance also makes clear (gC6):

Counsel's '*duty to the court does not prevent you from putting forward your client's case simply because you do not believe that the facts are as your client states them to be (or as you, on your client's behalf, state them to be), as long as any positive case you put forward accords with your instructions and you do not mislead the court*.'

75. This approach in guidance is in our view consistent with relevant caselaw[4]. It is important to appreciate that a barrister is entitled in principle to make every honest endeavour to succeed. He/she may put such matters in evidence or omit such matters as in his or her discretion he or she thinks will be most to the advantage of his or her client[5].

76. However a barrister must not act in a way either knowingly or recklessly which might leave the court with the impression that something is true when it is known by counsel not to

[4] We have considered a range of cases provided to us by Counsel including *Tombling v Universal Bulb Co Limited* [1951] 2 TLR 289; *Meek v Fleming* [1961] 2 QB 366; *Saif Ali v Sydney Mitchell & Co* AC 198
[5] See Tombling v Universal Bulb Co Ltd [1951] 2 TLR 289 at 297

be. Equally if there is a danger that the court will be misled it is the duty of counsel to advise his client that disclosure should be made.

77. In Vernon *v Bosley* [1999] QB18 the claim was a personal injury action in which the claimant adduced evidence from two medical experts which supported his claim for psychiatric damage. The claimant was also involved in family proceedings and adduced evidence from the same experts in those proceedings but that evidence was more optimistic than the evidence they gave in the other action. The claimant's legal advisors had known of the alternative evidence before judgment in the personal injury action was given but they advised him that he was not obliged to disclose it and he did not do so. The defendant in the personal injury action appealed to the Court of Appeal. The Court of Appeal (Evans LJ dissenting) found that the failure to inform the Court as to the claimant's altered medical position was misleading. In that case the Court was misled because it was given the impression that the claimant's condition and prognosis were other than his legal advisers knew them to be. The Court held that misleading conduct was - in cases where the case has been conducted on the basis of certain material facts which are an essential part of the party's case - '*the failure to correct an incorrect appreciation which the court would otherwise have as a result of their conduct'*[6]

78. Accordingly misleading conduct incorporates situations where a barrister makes a positive submission which he/she knows to be untrue or (b) fails to correct an impression which they have given to the Court by their conduct of the case to date[7].

79. Being reckless includes acting in *circumstances when he is aware of a risk that a court (or other relevant person) might or will be misled; and if he or she is aware of a risk that it a court (or person) will be misled and it is in the circumstances known to him, unreasonable to take the risk that (a court) will be misled".*[8]

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[6] *Vernon* at p.38E-G relying on *Meek v Fleming* [1961] 2 QB 366 to illustrate the point.
[7] *Vernon v Bosley* (No.2) [1999] QB 18 at 38F.
[8] See Brett v SRA [2015] PNLR 66 at 79

## Findings on charges

80. We turn now to consider the particular charges. We are conscious that the charges are drafted so as to identify (and are limited to) particular matters. We have considered all the evidence presented to us carefully.

81. We note that the BSB does not put forward a case that JB was dishonest, or that he knowingly misled (or sought to mislead) the Court, but rather that he was reckless, and sufficiently so in some instances as to betoken a want of integrity.

**Charge 1**

82. This charge alleges a breach of CD1 and rC3.1. These provide (so far as is relevant):
    a. CD1: "*You must observe your duty to the court in the administration of justice*"; and
    b. rC3.1: "*You must not …recklessly mislead or attempt to mislead the court".*

83. The allegation is that the Respondent recklessly failed to bring to the Court's attention matters that were known to him, were relevant to the issue and ought properly to have been drawn to the Court's attention so that the Court was not 'misled'.

84. In relation to the particulars (1)-(4) as pleaded to the charge – we make the following findings.

**Re Particular 1**

85. This particular relates to a specific allegation that the Respondent submitted that an application notice had been drafted by RW KC on Mr F's behalf. It is said that that the Respondent then failed to draw to the Courts attention the existence of the RW defence. It is not disputed, and we find proved that the Respondent made such a submission and that he did not draw to the attention of the Court the RWKC Defence when doing so.

86. However in this instance and after some deliberation we do not consider that such matters alone could be said to constitute recklessly misleading conduct. On balance we are not persuaded that the mere submission that an application notice had been drafted by RWKC

(as alleged in the particular) is sufficient to constitute recklessly misleading conduct. This particular is limited in terms to such a submission. We do not consider that conduct alone would have left the Court with an incorrect appreciation of events which it might otherwise have had. As will be seen below we take a different view as to other particulars which we consider must properly be assessed in a broader context given the nature of those particulars and charge as drafted.

**Re Particular 2**

87. As we have indicated earlier we find that the Respondent did state to the Deputy Master the matters as is set out in particular (2) to each charge. Considered in context we find that the Respondent did fail to draw the matters identified in the particular to the attention of the judge. The context was the probing questioning from the judge and we consider that the transcript quotation referred to in the particular needs to be considered in context of such questioning.

88. We consider that the submission that a statement from RWKC that indicated he drafted the document would '*have been helpful*' in the context of the hearing and what was being discussed is on the face of it recklessly misleading as it may at the very least have indicated to the judge that is what RWKC might have said in a statement. Such conduct is likely to have left the Court with the impression that RWKC would not have disputed the drafting of the document. The Respondent in our view knew or must have known that RWKC had said the opposite in a pleading supported by a statement of truth and filed in other proceedings about which the judge was unaware - but still did not disclose such matters to the judge. We find that the Respondent must have been aware of the risk that he might be misleading the Court but still went on to the take the risk.

89. In any event we also find that together with the suggestion that a statement from RWKC was not '*forthcoming*' because of the '*issue*' between Mr F and RWKC was in context recklessly misleading. It is not clear why such a dispute would prevent a statement from coming forward and we find that the Respondent was aware that RWKC had filed a Defence with a statement of truth that addressed the issue before the judge in a way that conflicted with the position on a key issue that the Respondent was now pursuing on behalf of Mr F. Had the Judge been made aware of the other litigation and the nature of

the dispute it would have been very clear why no statement was forthcoming that supported the position of Mr F. We find that the Respondent was aware of these matters.

90. We find in relation to these matters that the Respondent was recklessly misleading the court through failing to draw to the attention of the Judge the RWKC Defence and his denial in it of drafting the application notice. His conduct is likely at the very least to have left the Court with the impression on a key issue that there was no evidence available from RWKC that could be put before the court and/or that RWKC was unable to provide evidence.

91. It is also likely to have left the court under the impression that if a statement had been provided by RWKC he might well have said he drafted the application. We find that the Respondent must have been aware of the risk that the Court would be misled by his conduct but even so went on to take this risk in a way that was objectively unreasonable. We find that the contradictions evident in the Defence of RWKC should in these circumstances have been brought to the attention of the Court. In acting as he did he breached CD1 and rC3.1 as alleged in the Charge by recklessly misleading it.

**Re Particular (3)**

92. This again relates to the failure to draw to the Court's attention the Defence of RWKC. We find that the Respondent did refer the Court to evidence as set out in particular (3) said to support that an application notice had been drafted by RWKC. It was an essential part of the case being put by the Respondent on behalf of his client. We find that in doing so there was a failure to draw to the attention of the Deputy Master the Defence of RWKC. We accept that in principle a barrister can put such matters in evidence or omit such others as in his or her discretion he or she thinks will be most to the advantage of the client. We agree however with the BSB that in acting as he did there was in this case an obvious risk which the Respondent must have been aware of that the Court might be misled into accepting the evidence of others especially as the Respondent indicated to the judge that there was no evidence from RWKC and so no direct evidence to the contrary. We find that such conduct would at the very least have given an impression to the court that there was no evidence that could be brought to the attention of the court to the contrary. We find that the Respondent must have been aware of the risk that the Court would be misled by

his conduct but even so went on to take this risk in a way that was objectively unreasonable. We find it was reckless conduct and risked misleading the court or at the very least constituted recklessly attempting to mislead the court. The Respondent should have corrected such an incorrect impression which resulted from his conduct.

**Re Particular (4)**

93. This particular refers to the failure to draw to the Courts attention the contents of Mr F's Particulars of Claim which the Respondent had drafted. We find that the Respondent did make the oral submission and did write in a skeleton argument the matters alleged. We also find that in the Particulars of Claim (and the particular paragraphs therein as set out in the particular) that the Respondent drafted did contain the matters alleged. We find that the Respondent failed to draw such matter to the attention of the Court as set out in the particular in the Charge. As we have found earlier there was no reference in the skeleton to the proceedings against RWKC or the pleadings therein or to either the contention by Mr F in those proceedings that RWKC had failed to draft or serve the application notice. Indeed we note that the skeleton makes no mention of the RWKC proceedings and it in terms indicated that there was not likely to be evidence available as to whether the court received the application notice. This particular is not limited to any specific statement made by the Respondent but relies on his skeleton argument and on his submissions that Mr F had complied with the order of Henderson J. Again, viewed in context we consider these submissions constituted a breach of CD1 and rC3.1 as alleged in the Charge.

94. In acting as he did we consider there was an obvious risk which the Respondent must have been aware of that the Court might be misled into accepting the evidence of others especially as the Respondent indicated to the judge that there was no evidence from RWKC and so no direct evidence to the contrary.

95. We find that such conduct would at the very least have given an impression to the court that there was no evidence that could be brought to the attention of the court to the contrary. We find that the Respondent was aware of the content of the Particulars of Claim. We do not consider that his suggestion that he considered it might be privileged or

that it was to be amended in due course to be a sufficient answer to excuse the conduct we have found. We find that the Respondent must have been aware of the risk that the Court would be misled by his conduct but even so went on to take this risk in a way that was objectively unreasonable. We find it was reckless conduct and risked misleading the court or at the very least constituted recklessly attempting to mislead the court. It was not appropriate in the particular context before us in evidence to not have made the Deputy Master aware of Mr F's pleaded case which ran a contradictory position when submitting at the same time to another court a different position.

96. For the reasons we have set out above we find that Charge 1 particulars (2)-(4) are proved. We find that Charge 1 particular (1) is not proved.

97. We have considered whether the facts we have found proved are sufficiently serious to amount to professional misconduct and we consider that they are.

**Charge 2**

98. This charge alleges a breach of CD3 and specifically a failure to act with integrity.

99. In relation to the issue of integrity we accept the submissions of the BSB [9] that in professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards.

[9] Derived from Wingate and Evans v SRA [ 2018] EWCA Civ 366 esp at paras 95-102

100. We agree that the concept includes acting recklessly but not dishonestly in allowing a court to be misled[10]. We accept that such reckless conduct does not necessarily constitute a breach of CD3, but that it is likely to often do so.

101. For the reasons we have set out in relation to the particulars to charge 1 and in our earlier findings we consider that the Respondent failed to act with integrity as alleged in Charge 2 save that we do not find particular (1) proved. We find particulars (2)- (4) proved.

102. We have considered whether the facts we have found proved are sufficiently serious to amount to professional misconduct and we consider that they are.

**Charge 3**

103. This charge alleges a breach of CD3 and rule rC9.1 of the Conduct Rules. Again the issue relates to integrity and as to whether the Respondent recklessly misled or attempted to mislead the Defendants and their legal representatives.

104. We consider that the reasoning we have applied above in relation to the Court in particulars (1) – (4) applies equally to the Defendants and legal representatives in the relevant case. In the particular context before us we consider that the Respondent did recklessly mislead the Defendants and their legal representatives. Again we do not find particular (1) proved but we do find particulars (2) – (4) proved and the Charge overall is proved to that extent. We have considered whether the facts we have found proved are sufficiently serious to amount to professional misconduct and we consider that they are.

**Charge 4**

105. This charge relates to an alleged breach of CD 5 and rules rC8 of the conduct rules. We find that for the reasons we have given above and to the extent alleged in this charge the

[10] Wingate at 101 (ii)

conduct of the Respondent was recklessly misleading and lacked integrity. In those circumstances we find that such conduct was likely to diminish the trust and confidence which the public placed in him and in the profession and is conduct which could reasonably be seen by the public to undermine his integrity. Again however we do not find particular (1) proved but do find particulars (2) –(4) proved and the charge as a whole proved to that extent.

106. We have considered whether the facts we have found proved are sufficiently serious to amount to professional misconduct and we consider that they are.

## Conclusion

107. We find the facts and charges proved to the extent set out above. In finding the charges proved to the extent we have done we have considered in relation to each charge whether the facts we have found proved are sufficiently serious to amount to professional misconduct and in each case we consider that they are. We have been referred in particular to the case of Walker v BSB[11] and accept the proposition that something more than mere negligence is often required to justify a finding of professional misconduct. In short, a finding of professional misconduct should not extend to the trivial or to careless momentary lapses but rather should focus on matters which are serious. The case before us has not alleged any dishonest conduct or deliberate intention to mislead the Court. Nor have we found any such conduct. We accept that the Respondent faced difficult circumstances and we have taken fully into account the evidence not only from him but also from the other witness statements he relies on from senior members of the bar and which are unchallenged. However, although this was not an easy case, we were of the unanimous view that the conduct we have identified was reckless and contrary to Core Duties of importance. In context we consider the conduct was serious enough so as to constitute professional misconduct as alleged in the charges we have been asked to consider.

[11] PC 2011/0219

## Sanction

108. We considered sanction in light of the BTAS Sanction Guidance version 6 (January 2022) ('the Guidance'). We had fully in mind the purpose of sanctions and the principles of sanctioning as set out in the Guidance[12].

109. We heard submissions from counsel representing the BSB and leading counsel on behalf of the Respondent. We identified the applicable misconduct Group as being F (misleading the Court and others).

110. In light of the facts we found proved and the documentary evidence we had considered and the submissions we heard we considered issues relating to the seriousness of the proved misconduct.

111. We did so in particular by considering general culpability and harm factors[13]. In that regard we are satisfied that the nature, scope and extent of the professional misconduct was limited to the events at a single hearing. The conduct was not intentional. We do not accept that the misconduct can be characterized as taking place in just a 'split second' as suggested to us in submissions on behalf of the Respondent. The misconduct was not a trivial or careless momentary lapse and it took place in a professional context. As we made clear in our findings it would have been possible for the Respondent to ask for time to take instructions and take a different position than he did before the judge. The hearing was not a short one and we consider that there was sufficient time for the Respondent to draw relevant matters to the attention of the Judge.

112. We accept that the Respondent did not benefit financially. Nor did his conduct in fact impact on the proceedings although we consider there was a risk that harm could have been caused.

[12] Especially at section 2 thereof
[13] In Annex 2 and in Group 'F' of the Guidance

113. We have indicated that we accept that the Respondent may have felt under pressure and that we do not underestimate difficulties that can be caused by online hearings. In light of these considerations we consider that the conduct set out in the charges we have found proved falls to be considered in the lower range of indicative sanctions – which would normally attract a medium to high level fine. We note however that the guidance indicates that panels have discretion to impose sanctions outside the ranges where there are good reasons for doing so.

114. We then considered the aggravating and mitigating factors in line with the Guidance. We accept that the Respondent did not attempt to conceal the conduct. Indeed to some extent at least the Respondent apologised to the Judge in his written response of the 17th September 2021 when he accepted that some matters ought to have been raised before the court by him. We are satisfied that the misconduct is not likely to be repeated and that this is important in the context of protecting the public. The Respondent has chosen not to provide us details of his financial means. He has previous good character and the circumstances he faced were not easy. We have considered his character references carefully and give them some weight. We acknowledge that the impact of these proceedings will already have been significant on him. Even so we have in mind that it is important to maintain public confidence and trust in the profession and to maintain and promote high standards of behaviour and performance at the Bar. In light of all these matters we have felt it appropriate to impose a financial sanction, but a lower financial penalty for each charge than as indicated in the lower range for Group F.

115. The 4 charges all relate to the same incident and factual background. We have taken care to consider the totality principle to ensure the sanctions we impose are proportionate.

116. For each of charges 1-4 we order that the Respondent pay a fine of £625 to the Bar Standards Board. This results in a total fine of £2500 to be paid.

## Costs

117. In relation to costs the BSB sought costs amounting to £5,762 in a schedule provided just prior to the start of the hearing on the 27th November. The Respondent submitted that this late submission was not in accordance with rE245. We agree although we do not consider

that this has caused the Respondent any prejudice. However, we consider it important that such regulations are complied with and no good reason was provided to us by the BSB as to why the schedule was provided late. In addition we note that some £801.67 was sought for Advisory work which was incurred by the BSB prior to the hearing. This appeared to us to be '*costs incurred..preparatory to the hearing*' within the meaning of rE248 - which the regulations indicate '*must be borne by the Bar Standards Board*'. In light of these matters we decided that it was appropriate for costs to be awarded to the BSB but not in relation to the advisory work. Further we decided that a reduction of £500 should also be made to reflect the non-compliance with rE245.

118. As a result we order that the Respondent pay the BSB the sum of £4,200 (inclusive of vat) towards the BSB costs within 28 days.

**Tom Cosgrove KC - Chair**

**November 2023**