The Bar Tribunals & Adjudication Service

The Council of the Inns of Court

Report of Finding and Sanction

Case Reference: 2023/0184/D3

John Stenhouse

The Director-General of the Bar Standards Board

The Chair of the Bar Standards Board

The Treasurer of the Honourable Society of: Lincoln's Inn [1986]

Disciplinary Tribunal

John STENHOUSE

1. In accordance with an appointment made by the President of the Council of the Inns of Court contained in a Convening Order dated 8 March 2024, I sat as Chairman of a Disciplinary Tribunal on 25 and 26 March 2024 and 26 June 2024 to hear and determine 4 charges of professional misconduct contrary to the Code of Conduct of the Bar of England and Wales against John Stenhouse, barrister of the Honourable Society of Lincoln's Inn.

Panel Members

2. The other members of the Tribunal were:

   Tom Cosgrove KC [Panel Chair]

   Yusuf Solley [Barrister Member]

   Stephanie McIntosh [Lay Member]

Charges

3. Mr Stenhouse ('S') faced 4 charges of professional misconduct ("the Charges") as follows:

Charge 1

Statement of Offence

Professional misconduct, contrary to Core Duty 5 of the Bar Standards Board Handbook (version 3.3-4.6)

Particulars of Offence

John Stenhouse, a practising barrister, behaved in a way which is likely to diminish the trust and confidence which the public places in him or in the profession, in that, from 9 August 2018 to date he has refused to delete personal data held by him in relation to DK, despite:

(a) Mr DK's request dates 9 August 2018 pursuant to article 17 of the General Data Protection Regulation ("GDPR") that Mr Stenhouse delete his data;

(b) a letter from the Information Commissioner's Office dated 29 March 2022 which stated that in his view Mr Stenhouse had retained Mr DK's data for longer than was necessary in breach of article 5(1)(c) of UK GDPR, and requested Mr Stenhouse to review Mr DK's request that he erase his personal data and demonstrate to Mr DK that he had complied with the requirements of UK GDPR; and

(c) a letter from the Bar Standards Board dated 10 January 2023 which asked Mr Stenhouse to provide it with confirmation that he had complied with the requirements of the Information Commissioner's Office's letter dated 29 March 2022.

Charge 2

Statement of Offence

Professional misconduct, contrary to Core Duty 10 of the Bar Standards Board Handbook (version 3.3-4.6)

Particulars of Offence

John Stenhouse, a practising barrister, failed to take reasonable steps to manage his practice, or carry out his role within his practice, competently and in such a way as to achieve

compliance with his legal and regulatory obligations, in that, from 9 August 2018 to date he has refused to delete personal data held by him in relation to DK, despite:

(a) Mr DK's request dates 9 August 2018 pursuant to article 17 of the General Data Protection Regulation ("GDPR") that Mr Stenhouse delete his data;

(b) a letter from the Information Commissioner's Office dated 29 March 2022 which stated that in his view Mr Stenhouse had retained Mr DK's data for longer than was necessary in breach of article 5(1)(c) of UK GDPR, and requested Mr Stenhouse to review Mr DK's request that he erase his personal data and demonstrate to Mr DK that he had complied with the requirements of UK GDPR; and

(d) a letter from the Bar Standards Board dated 10 January 2023 which asked Mr Stenhouse to provide it with confirmation that he had complied with the requirements of the Information Commissioner's Office's letter dated 29 March 2022.

Charge 3

Statement of Offence

Professional misconduct, contrary to rC87 of the Bar Standards Board Handbook (version 3.3-4.6)

Particulars of Offence

John Stenhouse, a practising barrister, failed to ensure that his practice is efficiently and properly administered and ensure that proper records of his practice are kept, in that, from 9 August 2018 to date he has refused to delete personal data held by him in relation to DK, despite:

(a) Mr DK's request dates 9 August 2018 pursuant to article 17 of the General Data Protection Regulation ("GDPR") that Mr Stenhouse delete his data;

(b) a letter from the Information Commissioner's Office dated 29 March 2022 which stated that in his view Mr Stenhouse had retained Mr DK's data for longer than was necessary in breach of article 5(1)(c) of UK GDPR, and requested Mr Stenhouse to

review Mr DK's request that he erase his personal data and demonstrate to Mr DK that he had complied with the requirements of UK GDPR; and

(c) a letter from the Bar Standards Board dated 10 January 2023 which asked Mr Stenhouse to provide it with confirmation that he had complied with the requirements of the Information Commissioner's Office's letter dated 29 March 2022.

Charge 4

Statement of Offence

Professional misconduct, contrary to Core Duty 9 of the Bar Standards Board Handbook (version 4.6)

Particulars of Offence

John Stenhouse, a practicing barrister, failed to be open and co-operative with a regulator, namely the Information Commissioner's Office, in that he failed to provide it with information requested of him by its emails dated 15 December 2021, 12 January 2022 and 26 January 2022, which information was requested to enable it to investigate a complaint made to it about Mr Stenhouse.

4. We considered these charges over the course of three sitting days on the 25th and 26th March 2024 and the 26th June 2024. During the course of the hearings and in advance we received numerous documents (including numerous skeleton arguments) and legal submissions from the parties. We have considered them all carefully. After the close of proceedings on the 26th June 2024 S wrote to BTAS on the 1st July 2024 asking for further matters to be considered by the panel. The BSB object to us considering these further matters at this stage. The proceedings had closed with a short oral ruling given on charge 4 on the 26th June 2024. S had been given every possible opportunity to furnish us with documents and submissions throughout the process. We have not taken into account these further matters raised by S in our consideration of the issues before us as we do not think it would be fair or appropriate to do so at this stage - which is well after the stage for receiving evidence and submissions.

5. The Burden of proving these charges fell on the BSB throughout. As a general rule, the Disciplinary Tribunal must apply the civil standard of proof when deciding charges of professional misconduct: rE164. However, rE261A.1 provides that the criminal standard of proof will apply where conduct forming the basis of one charge occurred prior to 01.04.2019 and continued beyond 31.03.2019. Accordingly, when deciding Charges 1 to 3, our approach has been to apply the criminal standard of proof: rE261A.1. When deciding Charge 4, we have applied the civil standard of proof: rE164 and in that regard we cannot find the charge made out unless we are satisfied the BSB has established that their case is more probable than not.

6. Charges 1 to 3 arose from his alleged refusal to delete personal data held by him in relation to a prospective public access client, DK, which he had held since 2018. Each of these charges alleged professional misconduct taking place in the period from 9th August 2018 '*to date'* – which we understood to mean until the date of the charges in mid-2023. Each charge referred to three matters as part of a chronology of requests for S to do various things which are listed at (a)-(c). Accordingly, it is important to understand – and evident on the face of each charge - that each of the charges alleged professional misconduct over a period of some 5 years.

7. Charge 4 arises from his alleged refusal to provide information requested by the Information Commissioner's Office ("ICO") in emails in December 2021/January 2022.

8. The BSB relied solely on documentary evidence allied to submissions from Mr Jacob (Counsel for the BSB). We heard extensive submissions from him and S on the 25th and 26th March 2024 and considered the documents put before us carefully. The hearing was held virtually.

9. Having considered such matters it became clear from consideration of the documentation that there were a number of instances in the chronology where the BSB and/or ICO had decided to dismiss/not take forward issues relating to the refusal by S to delete relevant personal data relating to DK. We do not set all such instances out which have been covered

in detail in the various skeletons and submissions presented to us. By way of examples on the 12th July 2019 the BSB had dismissed a complaint that had been made against S by DK relating to his refusal to delete material and informed S as much. On the 24th July 2019 the BSB had indicated in a letter from a Mr Bonsu that they would '*not investigate this further'*. In light of a further complaint by DK (relating to essentially the same issue) to the ICO in April 2020 the ICO indicated that after investigation '*the case will now be closed'*. In December 2020 the BSB informed S that a further complaint from DK had been considered and the matter was not considered to warrant further action. DK sought to pursue essentially the same issue again in 2021 which led to further action by the ICO and the eventual charges we are now considering.

10. We note that the Independent Decision-Making Panel (IDMP) when considering the matter (the allegations before it covered the refusal to delete issue) in May and June 2023 had not – at least on the face of the documents we have seen - been made aware of the various dismissals/decisions not to investigate similar subject matter earlier in the chronology of events. We consider it very unlikely - had it been aware – that matters would have been taken further. In any event and whether such matters were explained to the IDMP fully or not - in light of our consideration of the documents and following questioning of and submissions by the BSB through Counsel it was conceded by Counsel that the BSB were not in a position to prove professional misconduct during the period August 2018-January 2023. In that sense it was readily accepted by the BSB that without amendment the case could not be proved.

Application to amend Charges 1-3

11. As a result of this position the BSB applied to amend Charges 1-3 so that the period of the alleged misconduct would be stated to be '*from 10th January 2023 to date'* rather than being from the '*9th August 2018'*.

12. The application relied on and was made pursuant to rE161 which provides:

rE161

A Disciplinary Tribunal may at any time before or during the hearing grant permission to the Bar Standards Board to amend the charge(s) and/or application(s) against any respondent, or grant permission for new charge(s) and/or application(s) be added, provided that:

.1 the Disciplinary Tribunal is satisfied that no respondent will by reason of such an amendment or addition suffer any substantial prejudice in the conduct of their defence; and

.2 the Disciplinary Tribunal will, if so requested by a respondent, adjourn for such time as the Disciplinary Tribunal considers reasonably necessary to enable that respondent to meet the amended charge(s) or application(s).

13. In relation to the application we heard submissions from the BSB and S. We considered these carefully.

Decision on Application to Amend Charges 1-3: Reasons

14. We find that the case in charges 1-3 had always sought to allege professional misconduct over a 5-year period. This was evident from a simple reading of the charges and was the way that the BSB skeleton argument had put matters in relation to those charges. It was also the nature of the case which S had spent considerable time and effort in preparing to defend.

15. What the BSB now proposed by way of amendment was only a minor textual change to each charge in terms of replacement text but the impact on the natures of the charges would in our view be substantial. It would at a stroke reduce the period of alleged misconduct from some 5 years to a much shorter period. In making such an application the BSB had in effect accepted that the alleged conduct from August 2018 to January 2023 was not capable of being properly pursued. It was right to take that view given the evidence we have seen.

16. However, in our view the case that would be left would be a materially different one and understood in context a very different one for S to have to defend at this stage. The BSB did not seek to amend parts (a) and (b) of the charges which we found strange. It was said that they should remain by *'way of context'*. Having accepted that such matters could not

constitute professional misconduct it seemed at best strange that the BSB should seek to retain them. In any event we find that the case, were we to allow the amendment would be in reality a new allegation of professional misconduct from January 2023 that would inevitably have to be considered in a different context.

17. We also consider this proposed amendment has come at a very late stage indeed. There does not appear to us to have been any reason why such an amendment could not have been pursued much earlier. In our view it should have been. We have a discretion as to allow such an amendment even at this stage. Unamended the BSB accept that the case on these three charges is hopeless. If amended at this late stage we consider S would face a very different case. He would inevitably have to run his defence very differently than he has up until now and we consider he would be substantially prejudiced were we to allow the proposed amendments at this stage. To that extent we find that the application would not accord with rE161 (1). We find that it would be unfair on S to expect him to deal with this at a very late stage of proceedings. We have not come to this decision lightly and have considered the nature of the subject matter and the public interest as well as the issue of fairness to S. For the reasons we have set out however we are clear that the application to amend should be refused and are unanimous in that conclusion.

Subsequent stance of the BSB and findings on charges 1-3

18. In light of our refusal of the application for amendment (initially delivered orally in March 2024) the BSB offered no evidence in relation to charges 1-3.

19. In light of that and for the avoidance of doubt we went on to find that charges 1-3 were not proved.

Adjournment

20. The case was then adjourned for Charge 4 to be considered.

Charge 4

21. We heard further submissions on the written evidence from the BSB when we reconvened (online) on the 26th June 2024. S had provided amended skeleton arguments and some further documentation in the period of adjournment. The BSB had accordingly provided a further short skeleton to address such matters. We considered these together with all the other material that had been put before us. We also heard from S who gave evidence and was asked questions in cross examination by the BSB. S then made legal submissions which were responded to by the BSB. As well as considering matters in light of the relevant burden and standard of proof we also had in mind the principle that for a breach of the handbook to constitute professional misconduct it had to be serious rather then merely trivial or inconsequential: Khan v BSB [2018] EWHC 2184 (Admin) at paragraphs 31-36.

22. Charge 4 relied on professional misconduct which was said to be contrary to CD 9. CD 9 provides: "*You must be open and co-operative with your regulators*". The particulars of the charge alleges that S had failed to be open and co-operative with the ICO in that he had failed to provide information requested of him in three emails dated the 15.12.21, 12.1.22 and 26.1.22.

23. We considered that the context was important. As referred to above Charges 1-3 were not pursued by the BSB. In light of that there was no evidence before us which had shown that the refusal to delete personal data held by S in relation to DK was conduct which would conflict with Core Duties 5, 10 or to rC87 of the Handbook. Indeed, in relation to all those earlier charges the particulars had relied upon a letter dated 29.3.22 from the ICO which had requested S review his data handling practices in light of a conclusion by the ICO that it was likely S had retained DK's data longer than necessary. This letter was written by the ICO further to the email it had sent S on the 26.1.22. We note that the letter of 29.3.22 - which fell after the date of the emails referred to in Charge 4 – was not within a period of time (ie pre January 2023) which the BSB felt it had evidence to prove misconduct in relation to matters raised in Charges 1-3 (see our earlier discussion about the application to amend).

That of course was not determinative as to charge 4 which we considered as an individual stand-alone charge in light of the evidence.

24. However, the correspondence referred to in Charge 4 was in essence asking S to justify or explain why he considered he could retain the data in issue in late 2021 and early 2022. It formed part of an extensive chronology within which we find that S had at various stages sought to explain both to the BSB and the ICO why he was retaining data. Indeed, as we have already noted on a number of occasions in the earlier chronology S was told the issue would not be pursued further.

25. In this context his failure to provide information to the ICO at the time particularised in charge 4 so that it could investigate a further complaint covering in essence similar issues that had already been traversed was perhaps more understandable. Indeed, S did respond to the ICO on the 29.3.22 by email indicating that he had '*previously explained and set out that right in considerable detail and reference should be made to that previous explanation. I have also explained and set out the reasons for my retention of such information and again reference should be made to that previous explanation*.'

26. We note that S at that stage indicated he had reviewed his policies as requested by the ICO in the 29.3.22 letter. Indeed when the ICO again wrote to him in April 2022 and asked him to further review his data practices he did so again and indicated as much in a reply dated 13.4.22.

27. When further requests from the ICO followed S replied – with increasing frustration - and referred to his earlier responses. In our view, whilst the responses and various explanations from S might (we emphasise 'might' as for present purposes we form no particular view on this) not have been legally correct in an area of some complexity they did at least constitute responses in good faith offering an explanation for his position. We do note that in some instances the tone of the messages sent from S was not as measured as it should have been for a barrister in such a context.

28. However we are not of the view that the BSB have established on the balance, that S failed to be open and cooperative with the ICO as alleged in Charge 4. For that reason, we find that Charge 4 is not proved.

29. Although S raised a particular argument before us that the ICO was not in fact a 'regulator' which the BSB opposed- we do no need to decide that point. We should also add that even had we found there was a failure to provide information requested in the specified emails we would not have considered - specifically in light of what had been earlier explained by S and his willingness to review – that this particular conduct could be said to be sufficiently serious so as to constitute professional misconduct – applying the principle in Khan. That is not in any way to undermine the importance of barristers responding fully and openly with bodies such as the ICO. But on the particular facts of this case and having considered the detailed chronology and evidence put before us we do not find this particular charge proved.

30. We have not felt it necessary in light of our approach to charge 4 to address all the other various arguments raised in the alternative in the skeletons before us.

Costs

31. S applied for his costs pursuant to rE244-48. He had produced a schedule of costs as required by rE245 in advance of the resumed hearing date in June. We received copies of various authorities in relation to the issue of costs and heard submissions from S and the BSB in relation to the principle and amount (if any) of costs to be awarded.

32. It was not in dispute that there exists a power for us make a costs order. We have a discretion whether to make such an order and if we make one as to the amount of such costs[1].

[1] We could in that event also decide to direct BTAS to appoint someone to decide the amount.

33. We accept that despite acting for himself S can seek costs in light of what is often referred to as the 'Chorley principle[2]' whereby a person acting as a defendant in person is entitled to reasonable professional renumeration for work which, if he had not performed it himself, would have had to be done by another lawyer and paid for by an unsuccessful opponent. Nor was any particular issue taken by the BSB as to the claimed for hourly rate of £150 per hour. We considered that in light of a number of authorities discussed before us – including *Competition and Markets Authority v Flynn Pharma Ltd & Anor* [2022] UKSC14 – that while there is no generally applicable principle that all public bodies should enjoy a protected status as parties to litigation where they lose a case it is nevertheless important when considering costs against such a body to take into account the risk that there will be a chilling effect on the conduct of the public body if costs are routinely made against it even where it may have acted reasonably in bringing the case. This will to some extent inevitably be case and fact specific. We do not consider there is necessarily any presumption that the BSB should pay costs per se merely because it did not succeed.

34. In relation to the issue of whether there should be any order for costs at all the BSB distinguished to some extent the position in charges 1-3 (where it had in the end offered no evidence) as from charge 4. It submitted that in relation to charge 4 there was reasonable evidence to support the position it took. Whilst the BSB did not concede any costs order should be made, we are of the view that S is entitled to some costs at least in relation to charges 1-3. In the case of charges 1-3 we are of the view that the charges as drafted and covering such an extensive period stood minimal chance of ever succeeding in light of the evidence we have considered. We are less persuaded in relation to charge 4 where there was at least a reasonable argument.

35. Such matters inevitably involve broad judgments as to principle and amounts. We have decided – as a starting point – to reduce the overall amount sought by around 20% (this charge as less complex than charges 1-3 and so a 20% reduction is appropriate rather than

[2] LSBS v Chorley (1884) 12 QBD 452 at 455

25%) to reflect our view that there should be no costs being awarded in relation to charge 4. This would reduce the amount in broad terms to just over £15,000.00.

36. The BSB made some detailed submissions about the amount of time claimed for various parts of the work itemised on the schedule produced by S. We agree in broad terms that some amounts appear excessive. We also consider that the 'hearing fee' of £8000.00 for the 2 day hearing in March is excessive. We consider that there is some duplication with some of the preparatory work claimed for which might often be included in a 'brief fee'. We have decided to reduce the 'hearing fee' element to £3,000.00 which equates to 20 hours on £150 per hour. Taking a broad view about some of the hours claimed for individual work done on other parts – we agree some are excessive. We make further minor deductions of £500 to reflect this so that an overall figure of £9,500 is arrived at. We appreciate that this is a judgment that is inevitably broad brush. However we consider that the award of £9,500 in costs to S appropriately reflects the nature of the proceedings and the fact specific matters before us in evidence whilst at the same time reflecting the approach in *Flynn Pharma Ltd & Anor* applied to this case.

37. We accordingly order that the BSB pay S the sum of £9,500 within 21 days of the date of this decision.

38. The decisions and findings set out above were all unanimous.

Tom Cosgrove KC

Panel Chair

24th July 2024