Case No: PC 2011/0219

THE VISITORS TO THE INNS OF COURT ON APPEAL FROM THE DISCIPLINARY TRIBUNAL OF THE COUNCIL OF THE INNS OF COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 19th September 2013

Before:

SIR ANTHONY MAY
JEFFREY JUPP ESQ.
MRS. PAULINE BURDON

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Between:

ALLISTER WALKER	**Appellant**
- and -	
BAR STANDARDS BOARD	**Respondent**

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MS. ALISON FOSTER QC for the **Appellant**
MR. WARWICK TATFORD for the **Respondent**

- -

Approved Judgment

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SIR ANTHONY MAY:

1. Allister Walker is senior junior practising barrister of 23 years' call with long experience in criminal law in the conduct of criminal cases. He is a Grade IV Prosecutor on the Attorney General's "A" Panel of Criminal Counsel, the highest grade short of Silk. He had, until the 4th February 2013, an unblemished professional record.

2. On the 4th February 2013 at a Bar Standards Board Disciplinary Tribunal, chaired by Julia Dias QC, he was found guilty after a hearing on the 18th January 2013 of professional misconduct. The Tribunal imposed no separate sanction for this other than an order against him as to costs. They considered that the finding of professional misconduct itself was a serious punishment in itself. They found that the conduct alleged against Mr. Walker did amount to professional misconduct but they said that it was very close to the line.

3. The conduct alleged arose in the course of a criminal prosecution at Canterbury Crown Court on 11th June 2010. Mr. Walker was counsel for the prosecution. He was cross-examining a defence DNA expert witness whose name was Mr. James Cleary, a forensic scientist specialising in DNA analysis. Mr. Cleary had been employed, but was no longer employed, by a firm called LGC Forensics. Mr. Walker had general conversational instructions from those instructing him, including the prosecution DNA expert, that Mr. Cleary may have left LGC Forensics under something of a cloud. His questions in cross-examination established that Mr. Cleary was only at this laboratory for a year and a couple of months. Mr. Walker asked why he had left so soon to which the answer was,

> "I was actually dismissed from LGC because I was hired or I was approached by a company over in the United States to do some work for them and this was discovered by LGC and they dismissed me for competitive reasons."
>
> To this Mr. Walker said,
>
> "Right, well, you were stealing information from LGC?"
>
> The answer to that was, "No, that is not correct, no."
>
> The next question was, "Is that true?"

4. At this point defending counsel intervened and there was a brief discussion with the Judge in the absence of the jury in which defending counsel asked what, unknown to him, justified a question alleging theft of intellectual property and said that the question amounted to unjustified character assassination, whereupon Mr. Walker immediately accepted that he had overstepped the mark with which the Judge agreed saying that Mr. Walker should withdraw the question which Mr. Walker said he was happy to do. After a short further exchange the jury returned and Mr. Walker addressed Mr. Cleary to say that he wanted to make it clear that he had absolutely no basis for suggesting that he had been stealing information and that the question overstepped the mark. Mr. Cleary said, "Thank you" and repeated the competitive reason for which he was dismissed. The Judge them emphasised that the question

and any suggestion had been withdrawn to which Mr. Walker said, "Entirely, your Honour, yes." We understand that the trial then continued with no adverse outcome from these exchanges. At some point later out of court Mr. Walker apologised personally to Mr. Cleary.

5. It was not until May 2011, some eleven months later, that Mr. Cleary made a formal written complaint to the Bar Standards Board against Mr. Walker arising out of this cross-examination. He had been in some correspondence with his former employers meanwhile. These disciplinary proceedings arose out of that complaint.

6. Mr. Walker's questioning had been at fault in two respects: first, he had asked a question imputing dishonesty in the witness without having a proper basis in his instructions or arising out of other evidence for doing so; and, second, he should have sought the court's leave for such questioning impugning the witness's character under section 100 of the Criminal Justice Act 2003. As an experienced prosecuting counsel he should have been and, no doubt in a thoughtful moment, was well aware of each of these. It is unnecessary to determine which of these was the more significant; they are, in any event, closely related.

7. Mr. Walker was charged with professional misconduct contrary to paragraph 708(j) and pursuant to paragraph 901.7 of the Code of Conduct of the Bar of England and Wales. The particulars were that Mr. Walker had, without reasonable grounds, suggested to Mr. Cleary that he was guilty of a criminal offence, namely, that he had stolen information belonging to LGC Forensics and that this had resulted in Mr. Cleary's dismissal. There has never been any suggestion that the particulars of the alleged offence were not established; they plainly were. The issue was, and is, whether such conduct amounted to professional misconduct.

8. Paragraph 708 of the Code of Conduct provides that:

> "A barrister while conducting proceedings in Court:
>
> …
>
> (j) must not suggest that a …witness … is guilty of crime, fraud or misconduct … unless such allegations go to a matter which is in issue (including the credibility of the witness) … and appear to him to be supported by reasonable grounds."

It is accepted that Mr. Walker did not have reasonable grounds for imputing dishonest crime to Mr. Cleary in the way that he did.

9. Paragraph 901.7 of the Code of Conduct provides:

> "Any failure by a barrister to comply with any provision of this Code other than those referred to in paragraph 901.1 above shall constitute professional misconduct."

10. Breach of paragraph 708(j) is not one of those referred in paragraph 901.1. It will be necessary to revert to paragraph 901.1 later in this judgment and so on a literal interpretation and application of paragraph 901.7 any other breach of the Code,

however trivial, would constitute professional misconduct. That cannot, in all conscience, be correct. The parties are agreed and so was the Tribunal, that some modulation of the literal interpretation and effect of these provisions is required.

11. The underlying reason why this is, as we accept, required is because consistent authorities (including, it appears, other decisions of Bar Standard Board Tribunals) have made clear that the stigma and sanctions attached to the concept of professional misconduct across the professions generally are not to be applied for trivial lapses and, on the contrary, only arise if the misconduct is properly regarded as serious.

12. Ms. Foster has helpfully assembled the authorities and direct reference to her skeleton argument for this appeal is appropriate and duly acknowledged. What follows comes, in the main, directly from paragraphs 18 to 28 of her skeleton argument. She submits as follows:

> "18. The case law shows the courts have been astute to differentiate the isolated, albeit negligent, lapse from acceptable conduct from the serious kind of culpability which attracts the opprobrium of a finding of professional misconduct.
>
> 19. This consistent thread may be discerned throughout reported disciplinary law from the early cases. Thus in ***Felix v. The General Dental Council*** [1960] 2 AC 707 Lord Jenkins, speaking for the Board of Privy Council, said this of three examples of mistaken, over-charging by a dentist:
>
> > "To make good a charge of 'infamous or disgraceful conduct in a professional respect' in relation to such a matter as the keeping of the prescribed dental records it is not in their Lordships' view enough to show that some mistake has been made through carelessness or inadvertence in two or even three cases out of … 424 patients treated during the period in which the mistakes occurred whether the carelessness or inadvertence consisted in some act or omission by the dentist himself or in his ill-advised delegation of the making of the relevant entries to a nurse or receptionist and omitting to check the forms to see that she had done as she was told."
>
> "20. In that case the prosecution submitted:
>
> > 'It is not contended that an isolated, careless mistake should come within the range of professional misconduct at all. Equally, it is not necessary to go so far as to prove fraud before an element of infamous or disgraceful conduct is important. An element of recklessness or complete irresponsibility in regard to these matters would equally amount to infamous or disgraceful conduct ...'

21. Likewise, 40 years later in ***Preiss v. The General Dental Council*** [2001] 1 WLR 1926 Lord Cooke of Thorndon said at paragraph 28 on page 1936C:

> 'It is settled that serious professional misconduct does not require moral turpitude. Gross professional negligence can fall within it. Something more is required than a degree of negligence enough to give rise to civil liability but not calling for the opprobrium that inevitably attaches to the disciplinary offence.'
>
> And at paragraph 29:
>
> 'That for every professional man whose career spans, as this appellant's has, many years and many clients, there is likely to be at least one case in which for reasons good and bad everything goes wrong – and that this was his, with no suggestion that it was in any way representative of his otherwise unblemished record.'"

Ms. Foster goes on:

"22. This passage was adopted and the reasoning applied in the case of a doctor who had failed, when answering an emergency call, to recognise the serious clinical signs of cyanosis in a severely depressed patient treated with Diazepam and Dihydrocodeine required an immediate visit or a 999 call. In that case the patient in fact died from a drug overdose; the Privy Council declined to say this was inevitably misconduct. The Board said in ***Rao v. The General Medical Council (GMC)*** [2002] UKPC 65 at paragraph 17:

> 'For the purposes of the outcome of this appeal, their Lordships proceed on the basis that this was a borderline case of serious professional misconduct. It was based on a single incident. There was undoubted negligence but something more was required to constitute serious professional misconduct and to attach the stigma of such a finding to a doctor of some 25 years standing with a hitherto unblemished career.'

22. In the case of ***Silver v. The General Medical Council*** [2003] UKPC 33 the same reasoning was applied and the Privy Council replaced the finding of professional misconduct with a finding of none in a case where they recognised the importance of the fact that the events occurred in an isolated incident relating to one patient (albeit over a number of days) as compared with a number of patients over a longer period of time. They also reflected that it was relevant to take account of the professional's long period (some 40 years) of unblemished professional conduct".

24. More recently in ***Nandi v. The GMC*** [2004] EWHC 2317 (Admin) the same principles have been applied and the clear distinction between negligently falling below standards and misconduct upheld. It has been re-emphasised in that case by the High Court per Collins J that the court must:

> '51. … bear in mind and look at the whole picture. I have to look at the doctor's record as a whole, practising for 30 years. These were two instances some three years or more apart in a 30 year period. It may well be, and indeed it no doubt is the case on the findings of the Committee, which, as I have said, I regard as appropriate, that there was a falling below the standards, which no doubt Dr Nandi sets himself as well as being the standards that one would expect from a general practitioner, but I do not think that it can properly be regarded as serious within the appropriate test. It seems to me that the Committee has taken altogether too harsh a view of what happened here and, as their reasons show, have given more weight than they should to the matters which they refer to and have regarded a falling below the standards of practice set out in the guidance as itself sufficient to amount to serious professional misconduct.'

25. The cases", says Ms. Foster, "are not confined to the medical sphere. A finding of professional misconduct is a very serious matter for a legal professional. In recent consideration of the phrase in ***Council of the Law Society of Scotland v. Scottish Legal Complaints Commission*** [2010] CSIH 79 is [she suggests] a compelling authority. It emphasises the well-established meaning:

> '… although professional misconduct is not defined, these words have long been understood to have the broad meaning attributed to them by Lord President (Emslie) in ***Sharp v. The Law Society of Scotland*** [1984] SC 129, where he said, delivering the opinion of the court, at pages 134 and 135:
>
> 'There are certain standards of conduct to be expected of competent and respectable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct.'"

13. Ms. Foster submits that:

> "26. 'Professional Misconduct' is clearly not, it is suggested, a phrase that is apt within legal practice to cover a mere slip, a single isolated error of judgment, or an act that does not infringe the spirit of the rule.

14. Ms. Foster then goes on to refer to two BSB Tribunal cases, one called ***Sivanandan*** and the other called ***In Re Miller*** where she abstracts quotations on the subject of discreditable conduct which she suggests not only support the submissions she is making but also, I think she would say, are inconsistent to an extent with the findings of the Tribunal in the present appeal. I do not set those out in detail.

15. We note that Mr. Tatford has drawn to our attention to a recent decision of The Visitors called ***Rehman v. The Bar Standards Board*** where Sir Raymond Jack, sitting with a Visitors Panel, has referred to the case of ***Sivanandan*** and questioned whether it can be taken quite as far as is suggested.

16. That does not, however, detract from the quite plain theme that comes from the other authorities to which Ms. Foster and now we have referred which are consistent and compelling and, in our judgment, require us to modify the literal effect of paragraph 907.1 at least when it applies to paragraph 708(j) but in reality and logic the modification needs to apply throughout. The reason for this is the concept of professional misconduct carries resounding overtones of seriousness, reprehensible conduct which cannot extend to the trivial.

17. As we have said, the parties agree in general that this must be done but do not propose the same mechanism. The Tribunal, accepting the general approach, concluded that it was right to read some qualification into paragraph 708(j) by construing the word "must" in the paragraph as meaning "should" thereby giving the Tribunal a margin of appreciation as to whether the conduct was so serious as to amount to professional misconduct. In particular, they noted that while mere negligence would not usually amount to professional misconduct, a single act was capable of being professional misconduct if it is particularly grave.

18. Mr. Tatford, on behalf of the Bar Standards Board, supported this approach and urged us in his written material to accept the Tribunal's analysis. It was not, I believe – interestingly – the approach which he had adopted to solve the problem before the Tribunal itself, but that is by the way.

19. Ms. Foster's solution before us and the Tribunal is to submit that professional misconduct requires an element of *mens rea* and that a parallel should be seen between those provisions of the Code and the clear line taken in law with criminal statutes where an element of *mens rea* is required unless a clear intention is otherwise shown.

20. We are not persuaded by either of these solutions. Reading the word "must" as "should" in paragraph 708(j) muddies the waters of what a barrister must not do. There are, we suggest, no circumstances in which a barrister may properly impute dishonesty to a victim or witness unless there is a proper basis for doing so and the full force of the prohibition deriving from the word "must" must be maintained. We are not therefore in support of the Tribunal's solution to this problem.

21. Further, the problem lies not in paragraph 708(j) but in paragraph 901.7 whose literal application could require a finding of professional misconduct for trivial transgression. Nor do we consider that importing the requirement of *mens rea* at least alone is the right approach since we may readily conceive of serious conduct amounting to professional misconduct which was not intentional. The authorities

address the seriousness of the conduct not the mind of the professional. The requirement is to import the concept of seriousness into paragraph 901.7. If you take that paragraph alone the necessary meaning would be achieved by notionally inserting the word "serious" between "any" and "failure" so that it notionally read,

> "Any serious failure … to comply with any provision of this Code other than those referred to in paragraph 901.1 … shall constitute professional misconduct."

22. There are, however, significant objections to this when you look at other parts of paragraph 901 which we must now do. Paragraph 901.1 provides that:

> "Any failure by a barrister to comply with [a variety of paragraphs listed by number] of this Code … shall render him liable to a written warning from the Bar Standards Board and/or the imposition of a fixed financial penalty of £300 … Liability under this paragraph is strict."

23. These last words are of some significance suggesting that liability elsewhere may not be strict.

24. Paragraph 901.2 provides that:

> "Any failure by a barrister to pay a financial penalty within the time prescribed by the Regulations or stipulated by the Bar Standards Board … shall constitute professional misconduct."

25. This is expressed in absolute terms and we can see the force of this for a failure to comply with sanctions imposed by the professional Regulator.

26. The same essentially appears to paragraph 901.4 which applies to failure to comply with paragraph 202 which we need not set out in full. Paragraph 901.5 provides that:

> "(1) Any serious failure to comply with the provisions of the Code referred to in paragraph 901.1 above shall constitute professional misconduct."

27. There are then provisions as to what may amount to a "serious failure". At first blush the use of the word "serious" in paragraph 901.5 suggests that its absence in paragraph 901.7 should be taken unvarnished for what it is. We shall return to that in a moment.

28. Paragraph 901.6 is in effect that an accumulation of three written warnings or three financial penalties under paragraph 901.1 within a total of five years is to constituted professional misconduct. This, in effect, prescribes that the accumulation shall be regarded as serious so as to amount to professional misconduct.

29. In our judgment the use of the word "serious" in paragraph 901.5 and its absence from paragraph 901.7 does not prevent the notional reading of paragraph 901.7 with an added element of seriousness. There are three reasons for this. First, "serious" appears in paragraph 901.5 not in contrast with its absence from paragraph 901.7 but in contrast with paragraph 901.1. In paragraph 901.1 where liability is strict,

transgression of certain paragraphs may result in sanctions short of a finding of professional misconduct. Paragraph 901.5 is providing that serious transgressions of those same paragraphs may, by contrast, amount to professional misconduct. The conduct in paragraphs 901.2, 901.4 and 901.6, which also may amount to professional misconduct, are also by definition serious in themselves. Second, since on the authorities professional misconduct must, by definition, be serious, seriousness must find its way into paragraph 901.7. Third, the scheme of paragraph 901 taken as a whole is that a finding of professional misconduct is to be reserved for serious matters. It would be illogical if a trivial breach of paragraph 708(j) had to result in a finding of professional misconduct, but a first time non-serious transgression of one of the paragraphs referred to in paragraph 901.1 did not and vice versa. This point is strengthened when you look at the other subparagraphs of 708 all or many of which admitted the possibility of breaches ranging from the trivial to the very serious. They would, however, all of them, come within paragraph 901.7.

30. For these reasons we would import the notion of seriousness into paragraph 901.7. In a sense, this is lawyer's logic chopping since the Tribunal's approach in the present case produced much the same framework for their decision. But we consider that our approach is technically preferable. It may also, perhaps, being a less particular solution, be of assistance in future cases.

31. Ms. Foster submitted, whilst accepting, we think, that the analysis to which we have just referred was a suitable one, that nevertheless her submission as to *mens rea* should retain a degree of persuasion. We can certainly see that questions of intention are relevant to questions of seriousness under paragraph 901.7 as we have interpreted it. We do not, however, consider that *mens rea* is an exclusive test of whether professional misconduct is or is not appropriate.

32. The issue, therefore, is whether Mr. Walker's single and momentary error was sufficiently serious to be characterised as professional misconduct. Was it, to use a phrase in the authorities, "particularly grave"? This was essentially the question which the Tribunal addressed. They stated that it caused them some difficulty. They addressed the facts on the evidence they had. They accepted Mr. Cleary's evidence that he did not leave LGC Forensics because he had stolen confidential information. They accepted that Mr. Walker was given certain information by his expert which suggested that Mr. Cleary had left under a cloud. They accepted that he must have been given the impression that Mr. Cleary's departure involved a misuse and possibly theft of confidential information. They accepted that Mr. Walker, rightly, considered that he had no proper basis to make a bad character application. They accepted that the cross-examination was entirely proper up to the suggestion that Mr. Cleary had stolen confidential information. They considered, as is obvious, that he should then have been more cautious. The Tribunal bore in mind Mr. Walker's unblemished record and considerable experience and seniority. They reckoned that seniority told against him as he was sufficiently senior to have been able to stay within the rules. They accepted that the suggestion was a mistake, a slip, which was blurted out and to that extent that it was not intentional. In conclusion they considered that the case was very close to the line but they found that what happened should not have occurred to someone of Mr. Walker's seniority and experience and that professional misconduct was made out even on the criminal standard of proof.

33. In the sentencing part of their decision the Tribunal accepted that it was an isolated incident and in an otherwise unblemished career of some length. Mr. Walker immediately accepted that he had gone too far, made an immediate retraction and apology in open court and volunteered a further apology to Mr. Cleary in private which the Tribunal were satisfied was genuine.

34. Ms. Foster submits that this unfortunate lapse was not so serious as to be properly characterised as professional misconduct. It was not, she submits, seriously reprehensible. Her succinct submissions are, in essence, as follows: that it was a single, isolated lapse of judgment which occurred in the long and blemish-free career in which there was no suggestion other than that the highest standards of integrity had been demonstrated. The lapse took place in the heat of a Crown Court cross-examination after counsel had received a surprising answer from the witness volunteering the fact of his dismissal from his erstwhile employers. Mr. Walker wholeheartedly accepted at the time that he had jumped the gun and made an error. He withdrew the relevant question in open court. The judge, although further pressed by the defence, accepted Mr. Walker's apology and withdrawal of the question in open court without further criticism, comment or complaint. There was no adverse effect upon the trial, no time was lost, no further questions arose nor was there, or could there have been, any alleged injustice done. He apologised and explained at length in open court at the time. He apologised personally to the witness after court. This was, submits Ms. Foster, not seriously reprehensible and it was not professional misconduct.

35. Mr. Tatford submits in support of the Tribunal's conclusion that there is a wide possible variation in seriousness and that this particular falling short may properly be characterised as reckless. Mr. Walker was a very experienced practitioner who was failing to follow the rules and had carefully considered that he could not, on what was known to him, make a bad character application under section 100 of the 2003 Act. Mr. Tatford accepts that this is a borderline case but he submits that Mr. Walker being very experienced, not a pupil, acted in the heat of battle but he had a duty to be particularly careful. He urges us, as is correct, to recognise the serious effect that this lapse had upon Mr. Cleary.

36. We think it is important for us to recognise that this case arose because Mr. Cleary complained. He was, we are sure, entitled to do so and entitled to feel aggrieved. He had, after all, suffered in public from precisely the unfounded imputation which paragraph 708(j) of the Code is intended to prevent. That said, there is some balance in the fact, so far as we are aware, that the Judge did not feel obliged himself to refer the matter to the Bar Standards Board.

37. After very careful consideration we are unanimously of the view that Mr. Walker's lapse – though a clear breach of paragraph 708(j) was not so serious as to require the characterisation of "professional misconduct" under paragraph 901.7 as we have interpreted it. We do not consider that the lapse was trivial; far from it, not least because of its affect on Mr. Cleary. But we do consider that it was a momentary and uncharacteristic lapse which did not cross the line of seriousness which, in the end, is a matter of judgment. The Tribunal thought that it was a borderline case but we are in fact, each of us, of the view that in the end it really is not. Re-reading the transcript of the offending cross-examination it is, in our view, clear that there was no forethought in this essentially inadvertent question which looks as if it came out of a general but,

as it turned out, erroneous idea in Mr. Walker that the abrupt evidence of dismissal chimed with whatever he made of his general instructions.

38. We, accordingly, allow the appeal and quash the finding of professional misconduct. We shall, if invited to do so, also reverse the costs order made below.

MS. FOSTER: I am grateful. We do so invite you.

SIR ANTHONY MAY: We will do that.

Thank you very much. We are very grateful to both of you and to everyone who has contributed to the preparation of the case. Thank you.

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