Case No: NO D2007/098

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 4 July 2014

Before :

MRS JUSTICE ASPLIN
JENNIFER JONES
LUCINDA BARNETT

- -

Between :

BENJAMIN CONLON	**Appellant**
and	
BAR STANDARDS BOARD	**Respondent**
DONALD GORDON	**Appellant**
and	
BAR STANDARDS BOARD	**Respondent**
PAUL WILLIAMS	**Appellant**
- and -	
BAR STANDARDS BOARD	**Respondent**

- -
- -

David Woolley QC (instructed by **Bar Mutual**) for **Mr Donald Gordon**
Kenneth Homer (instructed by **Weightmans LLP**) for **Mr Paul Williams**
Mark Mullens (instructed by **Bar Standards Board on its own behalf**
Mr Benjamin Conlon unrepresented and did not attend the hearing

Hearing dates: 9 May 2014

- -

Approved Judgment

1. These are three appeals by Mr Paul Williams, Mr Donald Gordon and Mr Benjamin Conlon respectively, from the decision of the Disciplinary Tribunal of the Council of the Inns of Court (the "Disciplinary Tribunal") of 30 January 2009. Mr Williams and Mr Gordon were each found guilty of one charge of professional misconduct contrary to paragraph 404.2(c) and 901.5 of the Code of Conduct for the Bar of England and Wales 8th edition. The particulars of the offence in relation to each of them was that as joint heads of chambers they had failed to take all reasonable steps to ensure that proper arrangements were made in 3 Temple Gardens, Temple, London EC4Y 9AU ("Chambers") for dealing with pupils and pupillage matters to commence October 2006, and that the failure was so serious as to be likely to bring the Bar into disrepute and amounted to professional misconduct. The charge against Mr Conlon was in the same form but in his capacity as head of the Pupillage Committee.

2. Mr Williams and Mr Gordon were reprimanded and Mr Conlon was fined £1,000. Each Appellant was ordered to pay £2,390 by way of costs.

3. At the end of the oral hearing of the appeals on 9th May 2014 we stated that we would reserve our decision. This is our decision in relation to the three appeals and the reasons for it.

The Appeals

(i) Mr Gordon

4. Mr Gordon appeals against the finding that he was guilty of professional misconduct and the costs order made against him but not against the sentence that he should be reprimanded. In summary it is said that:

    i) Mr Gordon gave unchallenged evidence that he had taken steps to ensure that Chambers carried out its pupillage functions efficiently and that his former chambers had not taken any pupils following the Bar Council's requirement that those chambers form a pupillage committee;

    ii) The Tribunal made no findings of fact as to steps taken by Mr Gordon but only in respect of Mr Williams. Nevertheless, it concluded that Mr Gordon did nothing in the circumstances;

    iii) The Tribunal gave no reasons for ignoring Mr Gordon's unchallenged evidence that he had taken steps to ensure that Chambers dealt with pupillage matters efficiently;

    iv) As a result the Tribunal's decision was against the weight of the evidence and was unreasonable and the reasons given for its decision were inadequate.

    v) Lastly, the Tribunal failed to consider whether the steps taken by Mr Gordon to ensure that the Chambers pupillage functions were efficiently discharged were reasonable.

(ii) Mr Williams

5. Mr Williams appeals against conviction and sentence. It is submitted that the conviction should be set aside and that the Visitors should substitute the sanction of reprimand with an order that no further action be taken. In summary, it is said that:

   i) The Tribunal failed to ask itself whether contrary to paragraph 404.2(c) of the Code of Conduct, as joint Head of Chambers, Mr Williams had failed to take all reasonable steps to ensure that proper arrangements were made for dealing with pupillage matters and whether any failure by him was so serious as to be likely to bring the Bar into disrepute contrary to paragraph 901.5 of the Code;

   ii) The Tribunal erred in finding that:

      a) from the time of the chambers management meeting held on 16 March 2006 there was disquiet as to the management of pupillage arrangements which had been entrusted to Mr Conlon;

      and that

      b) Mr Williams should have made and/or did not make proper enquiries of Mr Conlon before he went on holiday at the end of July 2006 as to what was happening with the OLPAS applications and whether chambers was complying with the OLPAS procedures as they had done in the previous two years.

   iii) The Tribunal ought to have found that Mr Williams as joint head of chambers had complied with his obligations by making proper arrangements to deal with pupillage matters: by appointing Mr Conlon as head of pupillage in early March 2006, the handover being a matter to be worked out between the former and new incumbents; the introduction of written procedures and guidelines in Chambers to deal with pupillage matters in March 2006 and the summer of 2006; the proper consideration of pupillage issues at the management committee meetings chaired by Mr Williams on 16 March and 23 August 2006; and holding regular meetings during 2006 with Mr Conlon to discuss pupillage issues including the need to comply with OLPAS requirements and Mr Conlon's assurance of OLPAS compliance.

   iv) The Tribunal failed to give any or any sufficient weight to the evidence of Ms Andrea Clerk that it was commonplace for heads of pupillage to be charged with such matters, the fact that the Chambers pupillage policy documents stated that it was the responsibility of the head of pupillage to organise such matters, the evidence of the joint senior clerks of their responsibility to download and print off the OLPAS applications to which only they had access, Mr Conlon's assurance in October 2006 that all matters were being dealt with properly and his assurance in the letter of 31 October 2006 to the Bar Council that two pupils had subsequently submitted OLPAS applications.

   v) The Tribunal failed to deal adequately with paragraph 901.5 or to say why any failure under paragraph 404 was so serious as to be likely to bring the Bar into disrepute;

vi) In so far as it addressed paragraph 901.5 it failed to give any or any sufficient weight: to the appointment of a senior practitioner to be responsible for pupillage matters, which was common practice at the Bar; the fact that the allegation of the bogus use of OLPAS was withdrawn on the morning of the hearing; Mr Williams was as the Tribunal found, concerned to ensure compliance with the Equality and Diversity Code; that he had made clear that OLPAS was the cornerstone of the chambers' recruitment policy; and that any failure was limited to not making sufficient enquiry as to the progress of pupillage applications.

(iii) Mr Conlon

6. Mr Conlon appeals against the Tribunal's finding and against sentence. He says that the Tribunal erred in concluding that the Bar Standards Board had discharged the burden of proof (which is to the criminal standard), the evidence of Ms Andrea Clerk was unreliable, the Tribunal Chairman's report contained "irreversible errors likely to harm [Mr Conlon's] professional integrity" and that it contained many inaccuracies undermining the judgment.

7. In relation to the sentence, it is said that no credit was given for Mr Conlon having accepted responsibility, that he liaised with Ms Clerk throughout, that the PFAC (the Bar Council's Pupillage Funding and Advising Committee) had recorded that the pupillage committee had complained that guidance sought from the Bar Council/Bar Standards Board was not comprehensive, clear or helpful and the PFAC had recommended that Mr Conlon might be assisted by undertaking Equality and Diversity training. It is said therefore, that the fine was excessive and should be substituted by a reprimand.

Jurisdiction

8. Mr Williams and Mr Conlon also take issue as to the composition of the Disciplinary Tribunal which heard this matter. It is said that the appointment of certain members of the Disciplinary Tribunal from time to time had lapsed and accordingly, that decisions of such Tribunals were void.

9. The Rt Hon Sir Anthony May in his capacity as the Directions Judge in this case, decided on 30 January 2014 that the Appellants may reserve any appointments issue which may become arguable following the decision, if any, on appeal in *R (On the application of Leathley & Ors) v The Visitors to the Inns of Court and the Bar Standards Board [2013] EWHC 3097 (Admin)*. This is the position which has been adopted.

10. However, very shortly before the hearing of this appeal, a second but related issue was taken by Mr Conlon only. He argues that there is no jurisdiction for lay or barrister members to sit as Visitors to the Inns of Court on an appeal from the Disciplinary Tribunal. Accordingly, he challenges the constitution and jurisdiction of the panel that has heard this appeal. It seems to us that the underlying issue as to the jurisdiction of the Visitors is set out in the *Leathley* decision in the Administrative Court. So far as we are aware, however, it is not the basis for the application for permission to appeal in that case. Accordingly, for the sake of completeness, we set out our decision in this regard below.

Representation and Applications

11. Although Mr Gordon, Mr Williams and the Bar Standards Board were represented before us at the Appeal hearing, Mr Conlon did not attend nor was he represented. However, he had served a written Consolidated Argument and two individuals did attend in order to take notes on his behalf. At the end of the hearing Mr Kornhauser, one of those attending on Mr Conlon's behalf, addressed the Visitors briefly and stated that he had spoken to Mr Conlon that day and that Mr Conlon did not recognise the jurisdiction of the panel of Visitors as constituted and that as a result, any decision reached would be ultra vires. Mr Kornhauser also stated that Mr Conlon refuted any express allegation or inference which might be drawn that he had lied in relation to the pupillage arrangements at 3 Temple Gardens.

12. Despite the absence of Mr Conlon, we went on to hear the appeal and did so pursuant to Rule 14(4) of the Hearing before the Visitors Rules 2010, ("the 2010 Rules"). In deciding to proceed in Mr Conlon's absence we took into consideration, in particular, the delay since the matters with which this appeal is concerned took place and since the decision of the Disciplinary Tribunal made its decision. More than eight years have already elapsed since the events in question and five since the Disciplinary Tribunal's decision. It seems to us that further delay is not in the interests of justice.

13. We should add that in the light of the fact that Mr Conlon was neither present nor represented, we did not hear argument in relation to the nine applications which were contained in his written Consolidated Argument but inevitably not pursued before us. They were an application for permission to call four witnesses for cross examination before the Visitors and a variety of applications for disclosure of documents and the provision of further information.

14. Had the applications been pursued we would not have granted them. In relation to the application for permission to call and cross examine Andrea Clerk, Paul Williams and Donald Gordon limited to matters raised in their respective statements, we would have refused the application on the basis that each of the individuals was cross examined extensively at the hearing before the Disciplinary Tribunal and the Visitors have access to lengthy transcripts of the hearing which took place over many days.

15. In relation to the application to call and cross examine Ms Telfer, the position is even stronger. Despite the lengthy hearing, her evidence was not before the Disciplinary Tribunal. In such circumstances, evidence will only be admitted in exceptional circumstances and with the consent of the Visitors: Rule 14(6) 2010 Rules. At paragraph 38 of his Consolidated Argument Mr Conlon states that Ms Telfer, whom he describes as a Senior Investigating Officer must have known that "a non-OLPAS offer had also been made to Pupil B." Had it been pursued, we would have refused Mr Conlon's application in this regard. He does not set out any "exceptional circumstances" which would have justified the admission of such evidence and in addition, in the light of the lapse of time since both since the events in question and the hearing before the Disciplinary Tribunal we consider it inappropriate that further evidence be admitted.

16. In addition, in relation to the applications in relation to all four witnesses, we add that the applications should have been made to the Directions Judge at the appropriate time rather than in the Consolidated Argument.

17. Mr Conlon also sought un-redacted and unedited reports by the Bar Standards Board made concerning the recommendation for prosecution, the applications for pupillage relating to the applicants "named in the Petition", a copy of the alleged advert for pupillage for October 2006, copies of all records and documentation relating to Pupils A and B "in the context of the matters set out in [the] Petition", a copy of the publication which advised that the amalgamated chambers were no longer registered to take pupils, an un-redacted copy of any internal inquiry and/or investigation of Andrea Clerk with regard to matters "alluded to in this Petition", and an order that the Bar Standards Board identify Pupil B and provide further and better particulars as to what conduct was originally considered to be "the bogus use of OLPAS".

18. Once again, each of these amounts to fresh evidence and had the applications been pursued, we would have decided that there are no exceptional grounds to justify their admission, particular in the light of the length of the delay in this matter and the fact that the application was made on the eve of the hearing of the appeal. Furthermore, any further and better particulars in relation to the "bogus use of OLPAS" is entirely irrelevant given that the charge was withdrawn and is not considered on this appeal.

Nature of an Appeal to the Visitors

19. Before turning to the background to this matter, we set out the nature of an appeal to the Visitors. This was considered in some detail in *R v Visitors to the Inns of Court, Ex parte Calder, Ex parte Persaud, [1994] QB 1*, per Sir Donald Nicholls V-C at 4D-G:

> "There remains Miss Calder's fourth ground of appeal: that the visitors misunderstood their role. She contends that the visitors were sitting as an appellate tribunal, not (as they seem to have thought) as a reviewing tribunal, and hence they failed fully and properly to carry out their duties as visitors. As to this, first, I can see no reason to doubt that an appeal to the judges as visitors is precisely that: an appeal. It is so described in the authorities. In Lincoln v Daniels [1962] 1 Q.B. 237, 256, Devlin L.J. referred to it as "a rehearing on appeal". Thus the visitors will look afresh at the matters in dispute and form their own views. The procedure followed in the conduct of such an appeal is a matter for the visitors. The current visitors' rules provide that fresh evidence will be admissible only in exceptional circumstances. In the absence of fresh evidence the appeal will be comparable to an appeal in the Civil Division of the Court of Appeal. Regarding sentence, it will be for the visitors to exercise their own discretion and judgment.
>
> Second, I am in no doubt that if visitors conduct, not an appeal of this nature, but a review of the disciplinary tribunal's findings and decision comparable to that undertaken by the court by way of judicial review of decisions of inferior courts or tribunals, then the visitors' decision is amenable to judicial review. In that event the visitors' decision falls within the limited judicial review jurisdiction retained by the court over decisions of visitors. In that event the visitors have seriously misapprehended their function. The appellant has not had the benefit, to which he is entitled, of the visitors considering whether the charge,

> to the requisite standard of proof, has been made out to their satisfaction." (original emphasis)

More recently, the issue was addressed by Eady J in *Rahman v Bar Standards Board [2013] EWHC 4202 (QB)*. He decided at paragraph 5 that after the decision in *Regina v Visitors to the Inns of Court, Ex parte Calder*, it is clear that the jurisdiction is by way of a re-hearing rather than merely a review and, therefore, that the appellate tribunal must form its own view of the matter in the light of all the circumstances. We agree.

Composition of the Panel of Visitors

(i) Submissions

20. It was not until 4 May 2014, some five days before the hearing of this appeal, that Mr Conlon intimated that he did not recognise the jurisdiction of the panel of Visitors as constituted in this appeal. In his "Consolidated Argument for the Visitors" he set out his submissions and the materials upon which he relies in relation to this point, at some length. In summary, he submits that only High Court Judges and those more senior to them, can sit as Visitors to the Inns of Court. He says that the Lord Chief Justice's power to appoint a Panel of Visitors is limited to the selection "... solely of Judges of the Court of Appeal, or the High Court. It is these Judges or a single Judge dealing with preliminary directions, which are termed a panel for the purposes of Appeal. There is no authority, even by the BSB's rules, for the inclusion of Non-Judge wingmen."

21. In support of his case Mr Conlon relies on Mann LJ's judgment (prepared by Brooke J) in the Divisional Court in *R v Visitors to the Inns of Court ex parte Calder* [1994] QB 1 in which he sets out the evolution of the jurisdiction of the Visitors in some detail. At page 18D-E, Mann LJ summarised the role of the Visitors before the Supreme Court of Judicature Act 1873 ("the Judicature Act") in the following way:

> "[The above] analysis of the history of the visitor's jurisdiction before 1873 makes it quite clear, in our judgment, that when the judges were sitting as visitors to the Inns of Court to hear appeals by barristers who had been ordered to be suspended or disbarred they were acting as judges and performing judicial duties which were an essential part of the administration of justice in their courts. "

22. Mr Conlon also relied on a passage in Mann LJ's judgment at 18H – 19A:

> ". . the disciplinary jurisdiction of the visitors was transferred to the High Court pursuant to section 16 [of the Judicature Act].
>
> Accordingly, the jurisdiction of the visitors in these matters was a jurisdiction which was transferred to the High Court in 1873 and retained there by section 18(3) of the Act of 1925 and section 19(2)(b) of the Act of 1981."

23. In his Consolidated Argument, Mr Conlon submitted that a special jurisdiction was granted to the High Court Judges by the Crown to sit as Visitors at the Inns of Court,

and recognised by section 44 of the Senior Courts Act 1981. As such, this authority can only be altered by an Act of Parliament. He says that there has been no such Act which purports to vary this jurisdiction, other than section 24 of the Crime and Courts Act 2013 which he describes as having moved the jurisdiction from the Visitors to the High Court.

24. Mr Conlon contends that the Bar Standards Board ("BSB"), acting in its capacity as the regulatory arm of the Bar Council, has no authority to make rules and regulations as to who should sit as Visitors to the Inns of Court. According to Mr Conlon, this authority has been granted to the High Court Judges in common law, and any purported attempt to make such rules is *ultra vires* and void.

25. Mr Mullins for the BSB submits that the 2010 Rules were made by the judges of the High Court in the exercise of their extraordinary jurisdiction as conferred or recognised by section 44 of the Senior Courts Act 1981. In support of his case, Mr Mullins refers to the preamble to the 2010 Rules:

> "We, the judges of her Majesty's High Court of Justice, in the exercise of our powers as Visitors to the Inns of Court, hereby make the following rules for the purpose of appeals to the Visitors from Disciplinary Tribunals of the Council of the Inns of Court and certain other appeals to the Visitors".

26. Mr Mullins contends that the 2010 Rules give responsibility to the Lord Chief Justice (or a High Court Judge with delegated powers) for a number of functions under those 2010 Rules, in particular the appointment of the Panel of Visitors. Furthermore, the Lord Chief Justice (or, by Rule 2(6), a Court of Appeal or High Court Judge exercising delegated powers) has the power under Rule 12(1) to nominate the persons to hear an appeal to the Visitors, such persons to be nominated in accordance with Rule 12(3).

27. Mr Mullins also draws our attention to the decision of the Administrative Court in *R. (on the application of Leathley) v Visitors to the Inns of Court* [2014] A.C.D. 39 in which the court held that the preamble to the Hearings before the Visitors Rules 2005 (the "2005 Rules") was of significance. The preamble to the 2005 Rules is identical to that in the 2010 Rules. At paragraph 15, the Court held that:

> "Similarly, the sole power, under the 2005 Rules, to nominate persons to sit as Visitors rests with the Lord Chief Justice."

The Court also held, at paragraph 33, that the Lord Chief Justice is under no requirement to appoint members of a panel from a pool of approved candidates. Mr Mullins submits that this decision is relevant to the 2010 Rules, which are, in relation to the provisions at issue in this case, substantively the same. He submits therefore, that there is no conflict between the requirement in the 2010 Rules that a Visitors' panel include lay and barrister members and the jurisdiction of the judges of the High Court over Bar disciplinary matters. Neither, he says, do the 2010 Rules amount to a trespass by the BSB on the powers of the High Court. On the contrary, he describes the 2010 Rules as an expression of the jurisdiction of the judges of the High Court.

28. I should also mention that on the morning of the hearing of the appeal, the Visitors received an email from Mr Kornhauser in which he brought the case of *Posokhov v Russia [2004] 39 EHRR 21* to the attention of the panel. That is a case in which the applicant was convicted of being an accessory to the avoidance of customs duties and abuse of power. The tribunal which heard his case was composed of a professional judge and two lay judges. Before the European Court of Human Rights, the applicant contended that the tribunal had been improperly established since:

    i) Neither the president of the court nor the presiding professional judge had drawn lots for the lay judges as required by the domestic legislation (The Federal Law on the Lay Judges of the Federal Courts of General Jurisdiction in the Russian Federation 2000, the "Lay Judges Act");

    ii) The lay judges had been acting in this capacity before the applicant's trial for at least 88 days, instead of the maximum 14 days permitted by domestic law; and

    iii) There was no evidence that any judicial authority had been conferred on them before the trial, since the list of lay judges for that period (dated February 2000) was only confirmed by the regional legislature after the trial (in June 2000), and there was no evidence of any lists before February 2000.

    The court found that the combination of factors raised by the applicant led to a breach of Article 6(1) ECHR:

    > "In the determination of … any criminal charge against him, everyone is entitled to a fair … hearing … by an independent and impartial tribunal established by law."

29. The ECHR held that the phrase "established by law" covers not only the legal basis for the very existence of a tribunal but also the composition of the bench in each case. Furthermore, the Court was "particularly struck" by the fact that there was no confirmed list of lay judges appointed before February 2000. The Court found that the regional authority had failed to present any legal grounds for the participation of the lay judges in the administration of justice on the day of the applicant's trial since the February 2000 list was not confirmed until June 2000. The ECHR therefore requires that a tribunal be established, and the bench be formed, on the basis of "legal grounds".

(ii) Decision

30. First, we are in no doubt but that Mr Conlon's analysis of the root of the jurisdiction of judges as Visitors to the Inns of Court in recent times, is wrong. He relies upon the judgment in the Divisional Court in the *Calder* case and in particular, on the passages which we have set out. However, it is quite clear from the decision of the Court of Appeal that the Divisional Court was wrong and that in 1873, the jurisdiction of judges over the Inns of Court in their capacity as Visitors so far as it related to question as to the fitness of person to become or remain barristers, devolved upon the judges of the new High Court of Justice by virtue of section 12 Supreme Court of Judicature Act 1873 and not section 16 as the Divisional Court had found: (per Sir

Donald Nicholls VC at 33A-D and 333G – 34E, Stuart-Smith LJ at 46G – 47F and Staughton LJ at 65G – 66D.)

31. The Act of 1873 has been repealed but the effect of section 12, as Sir Donald Nicholls VC explained and with whom Stuart Smith and Staughton LJJs agreed, survived via section 18(3) of the Supreme Court of Judicature (Consolidation) Act 1925 in section 44 of the Supreme Court Act 1981 (now section 44 Senior Courts Act 1981.) The jurisdiction devolved in this way because when exercising the jurisdiction as visitors the judges were not acting as judges. As the Vice Chancellor described it at 33 B-C:

> "When exercising that jurisdiction the judges were not acting as judges. They were not sitting as a court of law. . . .They were sitting in a domestic forum , as visitor to the Inns of Court. . . But what matters more for present purposes is that when exercising their jurisdiction over the Inns the judges were exercising a jurisdiction different from that exercised when sitting as judges of their respective courts."

32. The Vice Chancellor, Sir Donald Nicholls went on to explain at 35D that from time to time, the judges have taken steps to regulate the procedure on such appeals. At 35F he set out the preamble to the Hearings before the Visitors Rules 1991, a forerunner of the 2010 Rules, which is the following form:

> "We, the judges of Her Majesty's High Court of Justice, in the exercise of our powers as visitors to the Inns of Court, hereby make the following rules for the purposes of appeals to the visitors from disciplinary tribunals of the Council of the Inns of Court . . ."

33. The composition of the Panel of Visitors for the purposes of this appeal is governed by the Hearings before the Visitors Rules 2010 (the "2010 Rules"), at rule 12:

> "12. (1) When a petition is served upon the Clerk to the Visitors (whether or not served in time), and after the period for service of any answer in accordance with rule 11(1) above has elapsed, the Lord Chief Justice shall nominate the persons who are to hear the appeal.
>
> (2) An appeal against a decision of a Disciplinary Tribunal presided over by a Judge of the High Court shall be heard by a panel comprised of-
>
> (a) a Judge of the Court of Appeal.
>
> (b) a Queen's Counsel; and
>
> (c) a lay representative.
>
> (3) Subject to paragraph (c) below, an appeal that is not of a type mentioned in paragraph (2) and is an appeal against a decision of a Disciplinary Tribunal shall be heard by a panel comprised of-
>
> (a) a Judge of the High Court or the Court of Appeal;

> (b) a barrister (who, where the defendant is a Queen's Counsel, shall himself be a Queen's Counsel); and
>
> (c) a lay representative.
>
> (4) An appeal that is not of a type mentioned in paragraph (2) and that is an appeal against a decision of a Disciplinary Tribunal may be heard by a Judge of the High Court or of the Court of Appeal sitting alone, if the Lord Chief Justice or the Directions Judge directs that the appeal relates solely to a point of law and is appropriate to be heard by a judge sitting alone.
>
> (5) Any other appeal shall be heard by a Judge of the High Court or the Court of Appeal.
>
> (6) No person shall be nominated to serve on a panel if they
>
> (a) are a member of the Bar Council or of any of its committees; or
>
> (b) are a member of the BSB or of any of its committees; or
>
> (c) were a member of any committee of the BSB at any time when the matter was being considered by that committee."

Despite the fact that the decision of the Disciplinary Tribunal was dated 30th January 2009, by virtue of rule 18 of the 2010 Rules, it is the 2010 Rules which apply in this case. Rule 18 provides that in the case of an appeal which is commenced before 1st September 2010 but which has not been completed by that date, the 2010 Rules apply from that date and any steps taken prior to that date, pursuant to the Hearings before the Visitors Rules 2005, "shall be regarded as having been taken pursuant to the equivalent provisions of theses Rules."

34. Furthermore, as Mr Mullins points out the 2010 Rules have the identical preamble to that contained in the 1991 version which Sir Donald Nicholls VC was considering in the *Calder* case. It is also the same as the preamble to the 2005 Rules which was considered to be significant by the Administrative Court in the *Leathley* case.

35. As Mr Mullins points out, the effect of section 24 Crime and Courts Act 2013 is that the jurisdiction conferred upon the judges in their capacity as Visitors to the Inns of Court has ceased. Nevertheless, the 2010 Rules continue to apply to the appeals with which we are concerned as a result of article 3 Crime and Courts Act 2013 (Commencement No 7 and Saving and Consequential Provisions) Order 2013/3176 which provides that section 24 is to have no effect in relation to an appeal in which the date of the decision was before 7th January 2014 and the appellant served notice of intention to appeal before 18th April 2014. Both criteria are satisfied in this case.

36. It seems clear to us therefore, and it is expressly stated in each of the respective preambles that the 2010 Rules and their predecessors were made by the judges in their capacity as Visitors and is an exercise of their jurisdiction in that capacity. As Sir Donald Nicholls VC described it in the *Calder* case at 33B-C, "*When exercising that*

jurisdiction the judges were not acting as judges. They were not sitting as a court of law. . . ."

37. As described in the preambles to the various versions of the Rules, including the 2010 Rules, in the exercise of that jurisdiction, the Judges make the rules for the purposes of appeals to the Visitors from what is now the Disciplinary Tribunal through the Lord Chief Justice, the President of the Queens' Bench Division, the President of the Family Division and the Chancellor of the High Court who act on their behalf. By those Rules and in the exercise of their jurisdiction to do so, the Judges determine all matters including the procedure and manner in which appeals should be dealt with. As a result of the exercise of that jurisdiction, the Lord Chief Justice is clothed with power to nominate those who are to hear an appeal: see rule 12(1) of the 2010 Rules. Further, in exercise of that jurisdiction, the composition of such a panel in the various circumstances is set out at rule 12(2), (3) and (4). In our judgment, there is nothing to suggest that the judges in the exercise of their jurisdiction were not empowered to make the 2010 Rules as a whole or rule 12 in particular. Accordingly, in circumstances such as those of the three appeals with which we are concerned, rule 12(3) applies.

38. As Mr Mullins mentioned, the preamble to the 2005 Rules and, in fact, the provisions in relation to the constitution of panels and the power of the Lord Chief Justice to nominate those who are to hear appeals are in the same form. In the *Leathley* case Moses LJ sitting in the Administrative Court having considered the preamble to the 2005 Rules held at paragraph 15 that *"the sole power, under the 2005 Rules, to nominate persons to sit as Visitors rests with the Lord Chief Justice."* He also held at paragraph 24 that:

> "The rules set out an elaborate procedure for vetting those suitable to sit on a disciplinary panel but nowhere do they require the President to appoint from the COIC pool. The absence of any such provision is even more blatant when it comes to a Visitors' Hearing. The Lord Chief Justice is not acting on behalf of COIC when making an appointment nor is he bound by its rules."

39. Further, at paragraph 33 he held:

> " . . the sole requirements for appointment to any particular Disciplinary Tribunal are those contained in the Disciplinary Tribunals Regulations 2009 themselves and in the Hearing before the Visitors Rules 2005. The legal authority to sit is derived from those regulations and rules . . "

40. It seems to us that this is entirely correct and that accordingly, in just the same way as under the 2005 Rules, as a result of the 2010 Rules, made as an exercise of the jurisdiction of the judges in their capacity as Visitors, those nominated by the Lord Chief Justice in accordance with the 2010 Rules have the jurisdiction to hear appeals of the kind with which we are concerned in this case. Accordingly, there is no trespass on the powers of the High Court and Mr Conlon's argument that there is no jurisdiction for lay members to sit on a panel of Visitors is without any merit. The 2010 Rules and their predecessors, including rule 12 which sets out the composition

of the panel on appeal are an expression of the jurisdiction of the judges of the High Court as Visitors.

41. We should add that we do not consider the *Posokhov* case is of any relevance in this case. The Panel as constituted derives its jurisdiction from the 2010 Rules which as we have already explained, are an expression of the jurisdiction of the Judges of the High Court as Visitors. There is no question but that the Panel was formed "on legal grounds" and that the Panel as constituted under the 2010 Rules is "an independent and impartial tribunal established by law" for the purposes of Article 6 European Convention on Human Rights.

42. For the sake of completeness, we should add that we were informed by Mr Mullins on behalf of the BSB that Mr Conlon has raised the same or very similar arguments before in judicial review challenges to other disciplinary proceedings against him. An earlier application for judicial review was refused permission and permission to appeal refused by the Divisional Court on 11th November 2011 and by Richards LJ on 11th October 2012. Mr Conlon has also brought a further application seeking to challenge an alleged decision of Baroness Deech, Chair of the BSB said to concern the composition of the Visitors' panel in this case. It appears that there is no such decision and we are informed by Mr Mullins that the BSB has responded robustly and a decision on permission is awaited.

43. Before turning to the factual background in this matter, we should add that we have come to our decision unanimously and that our decision is made jointly and severally, save in the case of Mr Conlon's substantive appeal (namely paragraphs 80-96 and 109-126 below), where the decision was reached by a majority.

Factual Background

44. In 2006 the Chambers was a mixed criminal and common law set in the Temple with 38 members. The composition of Chambers at that time resulted from a merger in March 2005 between the set of the Second Defendant, Mr Gordon, at 3 Temple Gardens Northside (the "Northside Set"), and the set of the Third Defendant, Mr Williams, at 3 Temple Gardens Southside (the "Southside Set"). The Third Defendant, Mr Conlon, joined the Southside Set in November 2004 and remained with Chambers following the merger.

45. Mr Gordon had been involved in organising pupillage at the Northside Set prior to the merger. The pupillage arrangements at the Northside Set had been reviewed by the BSB previously, resulting in the redrafting and monitoring of the pupillage procedures in 1999. Further failures in pupillage procedures were identified in the Northside Set in 2002, and as a result the set decided not to take on any more pupils from that time. The Southside Set had used the OLPAS system (the Bar Council's On Line Pupillage Application System) to recruit pupils since its introduction in 2003.

46. In March 2005, following the merger of the two sets and the formation of Chambers, Jean-Marie Labelle took charge of pupillage. For the year 2005, two pupils had been recruited by the Southside Set using the OLPAS scheme; Dale Brook, who started pupillage in March 2005, and Marcus Joyce, who began in October 2005. Both pupils joined Chambers post merger. Ayoub Khan was taken on as a pupil in November

2005 via the OLPAS "newsflash" system which catered for vacancies that arise at short notice. His pupillage was registered in March 2006.

47. In March 2006, Mr Conlon replaced Mr Labelle as Head of the Pupillage Committee. Mr Conlon was a former head of chambers in a set in Gray's Inn and a registered pupil supervisor. During the same month, Chambers promulgated a pupillage policy document, "*Chambers Pupillage Policy*" (the "March Policy") which provides, at paragraph 3:

> "Chambers is a Member of OLPAS (the On Line Pupillage Application System) on the standard application form. We aim to recruit one twelve month pupil each year via OLPAS. In exceptional circumstances more than one pupil may be recruited."

Paragraph 4 of the March Policy states:

> "Applications via OLPAS will be made using the standard OLPAS on-line application form. Each application form will be independently reviewed by 2 members of the pupillage committee using the standardised scoring procedure. No application is rejected unless at least 2 members of the panel have read the OLPAS form and reached the same conclusion."

After setting out the criteria for selection of pupils, paragraph 4 goes on to state:

> "It is the responsibility of the Head of Pupillage to organise members of Chambers to be part of the panel and process applications and interview candidates. In consultation with these members of Chambers and with pupil masters, it is his and only his responsibility to offer pupillages and ensure pupils leave Chambers at the end of their tenure".

48. A second version of the pupillage policy document was promulgated at some point during the summer of 2006, although the exact date is unclear (the "Second Policy"). The relevant amendment for the purposes of this appeal is the addition in paragraph 3 of the words:

> "In addition Chambers reserves the right to recruit Non-OLPAS pupils; where either insufficient applications are submitted to Chambers on the OLPAS system or suitable candidates cannot be selected from those available".

49. On 16 March 2006 Chambers held a meeting of the Management Committee (the "March Committee Meeting"). Both Mr Williams and Mr Gordon were present at this meeting, although Mr Conlon was not.

50. The parties accept, and the minutes record, that concerns were raised at this meeting in relation to Mr Conlon's running of the pupillage procedures. The minutes of the meeting record:

> "Matthew Hardyman & Alex Wright wish concerns about the way in which Ben Conlon is running pupillage to be enquired into. Principally BC has decided to take on an extra pupil. Matthew and Alex are concerned as to how we are going to fund an extra pupil and how the extra pupillage position is being advertised.
>
> Paul Williams to speak to Ben in order to discuss the pupillage policy."

51. There is a note from Mr Hardyman (the then Chambers Treasurer) dated 11 September 2008. He comments on this extract stating:

> "As Chambers Treasurer from 2002 to date, I confirm that my concerns were about funding any further pupillage awards. I was in March 2006 and still am aware of the requirement to fund pupils and recall being concerned at the time about the extra demand on resources."

52. At some point before 23 August 2006, it had come to Mr William's attention that there were no pupils scheduled to begin pupillage in October 2006. This issue was raised at the Management Committee Meeting of 23 August 2006 (the "August Committee Meeting"), at which both Mr Gordon and Mr Williams were present. Mr Conlon was not present, being at that time on holiday in Italy. The minutes of the August Committee Meeting state:

> "Pupillage - Ben Conlon to report back as a matter of priority as to OLPAS and progress of applications. Clerks room to take responsibility for printing up estimated 130 applications for BC on his return from holiday. Dale and Wing to be asked to assist BC with application process".

53. Three things were therefore decided at the August Committee Meeting that are of relevance to this appeal:

    i) Mr Conlon was to report back as a matter of priority as to the progress of the OLPAS applications;

    ii) The clerks room would download and print the applications for Mr Conlon to review upon his return from holiday; and

    iii) Dale and Wing would be asked to assist Mr Conlon with the application process. (Dale and Wing were two junior tenants of Chambers.)

54. Mr Williams had become aware that there were a number of applications for pupillage on the OLPAS system that had been neither downloaded nor considered. There were in fact 98 such applications. It is clear that at least 96 of these were never considered by Chambers (two of the applications appear to have been submitted by Ms Ahmad and Ms Mitchell, to whom we will return below).

55. The minutes record that William McKimm and Paul Harding, both senior clerks at Chambers at the time, were present at the August Committee meeting. Both Mr McKimm and Mr Harding accept that the applications were not downloaded in

accordance with the instructions given in the August Committee Meeting, although they cannot recall exactly why these instructions were not carried out.

56. In fact, in the months following the August Committee Meeting, Chambers made three non-OLPAS offers of pupillage for the year 2006, as set out below.

(i) Patricia Reidy

57. In January 2006 Mr Conlon had had discussions with a representative of the Serious Fraud Office ("SFO") regarding the possibility of the SFO funding a pupil in Chambers. As a result, Ms Reidy was offered a pupillage to start on 29 August 2006. An application to register this pupillage was signed by Ms Reidy on 15 July 2006 and by a representative of Chambers on 8 August 2006 (and presumably was submitted to the BSB thereafter).

58. Following a letter from Ms Andrea Clerk of the BSB dated 15 September 2006 advising that a waiver of the BSB funding requirements was required before Ms Reidy's pupillage could be registered, Mr Conlon submitted such an application on the same date. On 20 September 2006 Mr Conlon submitted to the BSB, by fax, a copy of a letter from the SFO of 21 June 2006 confirming that the SFO would sponsor the first six months of Ms Reidy's pupillage, in support of the application for a waiver. By a letter dated 4 October 2006 the BSB requested further information in relation to the application for a waiver.

(ii) Nahid Ahmad

59. Ms Ahmad believed that she had been selected by Mr Gordon, before the merger, to complete a pupillage at Chambers post-merger, and Ms Ahmad was invited to submit an OLPAS application. However, a non-OLPAS offer was made to Ms Ahmad for a pupillage to commence on 3 October 2006. An application to register this pupillage was signed by Ms Ahmad on 4 September 2006 and by a representative of Chambers on 11 September 2006 (and presumably was submitted to the BSB thereafter).

(iii) Victoria Mitchell

60. Ms Mitchell also believed she had been offered a pupillage by Mr Gordon, before the merger, to be completed in Chambers once the sets had merged, and Ms Mitchell was invited to submit an OLPAS application. However, a non-OLPAS offer was made to Ms Mitchell for a pupillage to commence on the first Monday in October 2006. An application to register this pupillage was signed by Ms Mitchell and Mr Conlon on 4 September 2006 (and presumably was submitted to the BSB thereafter).

61. In respect of all three pupils, Mr Conlon submitted applications for a waiver of the BSB Pupillage advertising requirements. By a letter dated 25 October 2006 the BSB requested more information in relation to these applications. Mr Conlon replied to this with a letter dated 31 October 2006.

62. On 11 November 2006, Ms Mitchell emailed Andrea Clerk at the BSB requesting that her pupillage be registered.

63. On 18 January 2007, the BSB visited Chambers in order to investigate the offers made to Ms Reidy, Ms Ahmad and Ms Mitchell. The BSB compiled a report of this visit and their investigation, which was sent to Chambers under cover of a letter from the BSB addressed to Messrs Gordon and Williams dated 13 March 2007. The letter explained that the applications to register the three pupillages had been refused:

> "Based on the report prepared after the visit to your chambers and discussions that followed the Bar Standards Board concluded that pupillages should not, in this case, be registered.
>
> The Pupillage Funding and Advertising Panel's conclusion was that no waiver should be granted in respect of the individuals whom your chambers has made offers of pupillage, namely to Victoria Mitchell, Nahid Ahmad and Patricia Reidy. The Panel had great concerns about how chambers made those offers and, in particular, that 98 individuals who applied through OLPAS did not have their applications considered at all."

64. As a result of their investigations, the BSB issued the formal charges of professional misconduct contrary to paragraphs 404.2(c) and 901.5 of the Code of Conduct for the Bar of England and Wales (8th edition) against Messrs Conlon, Gordon and Williams with which this appeal is concerned.

65. The particulars of offence of professional misconduct against Mr Conlon is in the following terms:

> "Mr Ben Conlon, as Chairman of the Pupillage Committee at 3 Temple Gardens, Temple, London, failed to take all reasonable steps to ensure that proper arrangements were made in those Chambers for dealing with pupils and pupillage and, in particular:
>
> (a) that all pupillage vacancies were advertised in the manner prescribed by the Bar Council; and
>
> (b) that, in making arrangements for pupillage, regard was had to the pupillage guidelines issued from time to time by the Bar Council and to the Equality and Diversity Code for the Bar.
>
> Those Chambers advertised pupillages through OLPAS to commence in October 2006 but then did not download or consider any of the 98 applications submitted to them. Instead, 3 pupillages were granted by private arrangement and without any proper selection procedure being undertaken.
>
> The above matters constitute breaches of Paragraph 404.2(c) of the Code of Conduct of the Bar of England and Wales (8th edition). Those breaches are particularly serious having regard to:
>
> (i) the prejudice to 96 of the pupillage applicants (2 of the 98 who submitted applications through OLPAS having been offered pupillage by private arrangement);

(ii) the prejudice to the 3 individuals who were offered pupillage by private arrangement but who were refused pupillage registration or waiver;

(iii) the consequent prejudice or potential prejudice to the reputation of the Bar as a whole for openness and fairness.

The above breaches of Paragraph 404.2(c) of the Code of Conduct are so serious as to be likely to bring the Bar into disrepute and therefore amount to professional misconduct pursuant to Paragraph 901.5 of the Code of Conduct."

66. The particulars of offence of professional misconduct against Mr Gordon is stated in the following terms:

"Mr Donald Gordon, as Joint Head of Chambers at 3 Temple Gardens, Temple, London, failed to take all reasonable steps to ensure that proper arrangements were made in those Chambers for dealing with pupils and pupillage and, in particular:

(a) that all pupillage vacancies were advertised in the manner prescribed by the Bar Council; and

(b) that, in making arrangements for pupillage, regard was had to the pupillage guidelines issued from time to time by the Bar Council and to the Equality and Diversity Code for the Bar.

Those Chambers advertised pupillages through OLPAS to commence in October 2006 but then did not download or consider any of the 98 applications submitted to them. Instead, 3 pupillages were granted by private arrangement and without any proper selection procedure being undertaken.

The above matters constitute breaches of Paragraph 404.2(c) of the Code of Conduct of the Bar of England and Wales (8th edition). Those breaches are particularly serious having regard to:

(i) the prejudice to 96 of the pupillage applicants (2 of the 98 who submitted applications through OLPAS having been offered pupillage by private arrangement);

(ii) the prejudice to the 3 individuals who were offered pupillage by private arrangement but who were refused pupillage registration or waiver;

(iii) the consequent prejudice or potential prejudice to the reputation of the Bar as a whole for openness and fairness;

(iv) the fact that Mr Gordon had previously been warned by the Bar Council of the need to comply with its requirements in relation to pupillage.

> The above breaches of Paragraph 404.2(c) of the Code of Conduct are so serious as to be likely to bring the Bar into disrepute and therefore amount to professional misconduct pursuant to Paragraph 901.5 of the Code of Conduct."

67. The particulars of offence of professional misconduct against Mr Williams is stated in the following terms:

> "Mr Paul Williams, as Joint Head of Chambers at 3 Temple Gardens, Temple, London, failed to take all reasonable steps to ensure that proper arrangements were made in those Chambers for dealing with pupils and pupillage and, in particular:
>
> (a) that all pupillage vacancies were advertised in the manner prescribed by the Bar Council; and
>
> (b) that, in making arrangements for pupillage, regard was had to the pupillage guidelines issued from time to time by the Bar Council and to the Equality and Diversity Code for the Bar.
>
> Those Chambers advertised pupillages through OLPAS to commence in October 2006 but then did not download or consider any of the 98 applications submitted to them. Instead, 3 pupillages were granted by private arrangement and without any proper selection procedure being undertaken.
>
> The above matters constitute breaches of Paragraph 404.2(c) of the Code of Conduct of the Bar of England and Wales (8th edition). Those breaches are particularly serious having regard to:
>
> (i) the prejudice to 96 of the pupillage applicants (2 of the 98 who submitted applications through OLPAS having been offered pupillage by private arrangement);
>
> (ii) the prejudice to the 3 individuals who were offered pupillage by private arrangement but who were refused pupillage registration or waiver;
>
> (iii) the consequent prejudice or potential prejudice to the reputation of the Bar as a whole for openness and fairness.
>
> The above breaches of Paragraph 404.2(c) of the Code of Conduct are so serious as to be likely to bring the Bar into disrepute and therefore amount to professional misconduct pursuant to Paragraph 901.5 of the Code of Conduct."

68. The charges as originally issued included an allegation of the "bogus use of OLPAS". This was withdrawn by Mr Mullins, counsel for the Bar Standards Board, on the first morning of the hearing before the Disciplinary Tribunal and as a result, it is not considered in this appeal.

69. We observe that although all three charges refer to the advertisement of pupillages to start in October 2006, the understanding of the majority of the Visitors of the OLPAS timetable, is that pupillages advertised in spring 2006 would in fact start in autumn 2007, not autumn 2006. Save for passing references from Mr Gordon and Mr Conlon before the Disciplinary Tribunal to this timing point, the hearings both here and below proceeded on the basis that the correct date was October 2006 without the issue being raised. We have considered the impact of this point and formed the view that it does not impinge on the substantive issues aired before the Disciplinary Tribunal or before us. Therefore had it been raised on the appeal, we would have decided that nothing turned on it and that it did not make the decision below unsafe.

The decision of the Disciplinary Tribunal

70. The charges against the Defendants were considered by the Disciplinary Tribunal in 6 days of oral hearings held between 6 October 2008 and 30 January 2009. The Disciplinary Tribunal gave its decision by way of a report dated 26 February 2009. The findings of the Disciplinary Tribunal are set out at paragraphs 15 to 18 of the report:

> "15. The Tribunal, having reviewed the evidence, reached the conclusion that Mr Williams did from time to time enquire of Mr Conlon the nature of the pupillage arrangements and that Mr Conlon had given him reassurances. However, given the disquiet noted in the April Management Committee meeting, the OLPAS timetable and the fact that Mr Conlon was on holiday at a crucial time for Chambers to carry out its obligations to applicants under the scheme commencing before Mr Conlon departed for his holiday, His Honour [Dennis Levy QC] highlighted that if enquiries had been made, it would have become apparent that 98 applications had been received for which the appropriate arrangements should have been made.
>
> 16. Heads of Chambers were under duty to administer competently and ensure that Chambers was complying with OLPAS, as had occurred in the two previous years. The Tribunal was also satisfied that three pupils had been made offers without proper application of the Code.
>
> 17. The Tribunal considered Mr Conlon's evidence and written and oral closing submissions. They concluded that as head of the pupillage committee, he had been invited and accepted responsibility for the recruitment of pupils. As joint head of Chambers, Mr Williams had to face up to these responsibilities and he had failed to do so. They accepted that Mr Gordon was not well during the months in 2006 that there had been the failure properly to operate the OLPAS scheme to which the Chambers were committed and pupillages had been improperly offered. However they concluded that the infirmities about which they heard evidence did not excuse him from his duties as Joint Head of Chambers as identified under the code and his failure to take any steps to perform those duties. Despite his infirmity they concluded that his failure as joint head of Chambers it was not enough for him to have done nothing as this did not comply with his responsibilities.

18. The Tribunal found the three Defendants guilty as charged."

It is generally accepted that the reference in paragraph 15 of the report to the "April Management Committee meeting" is actually a reference to the March Committee Meeting.

The Provisions of the Code of Conduct

71. The relevant provisions of the Bar Code of Conduct are as follows:

"Heads of chambers

404.1 The obligations in this paragraph apply to the following members of chambers:

(a) any barrister who is head of chambers;

(b) any barrister who is responsible in whole or in part for the administration of chambers;

(c) if there is no one within (a) and (b) above, all the members of the chambers.

404.2 Any person referred to in paragraph 404.1 must take all reasonable steps to ensure that:

(a) his chambers are administered competently and efficiently and are properly staffed;

(b) the affairs of his chambers are conducted in a manner which is fair and equitable for all barristers and pupils;

(c) proper arrangements are made in his chambers for dealing with pupils and pupillage and, in particular,

(i) that all pupillage vacancies are advertised in the manner prescribed by the Bar Council;

(ii) that such arrangements are made for the funding of pupils by chambers as the Bar Standards Board may by resolution from time to time require;

(d) all barristers practising from his chambers whether they are members of the chambers or not are entered as members with BMIF and have effected insurance in accordance with paragraph 402 (other than any pupil who is covered under his pupil-master's insurance);

(e) all registered European lawyers and all foreign lawyers in his chambers comply with this Code to the extent required by the Registered European Lawyers Rules (reproduced in

Annex B) and the Foreign Lawyers (Chambers) Rules (reproduced in Annex H);

(f) fee notes in respect of all work undertaken by all members of chambers and pupils and (unless expressly agreed with the individual) former members and pupils of chambers are sent expeditiously to clients and in the event of non-payment within a reasonable time, pursued efficiently.

(g) every barrister practising from his chambers has a practising certificate issued by the Bar Council (acting by the Bar Standards Board) pursuant to the Practising Certificate Rules (reproduced in Annex D).

404.3 In carrying out the obligations referred to in paragraph 404.2 any person referred to in paragraph 404.1 must have regard to any relevant guidance issued by the Bar Council and Bar Standards Board including guidance as to:

(a) the administration of chambers;

(b) pupillage and further training; and

(c) good equal opportunities practice in chambers.

. . .

Part IX - COMPLIANCE

901.1 Any failure by a barrister to comply with the provisions of paragraph 202 (a) to (d), 203(1)(a), 204(b), 402, 403.5(b)(c) and (d), 404, 405, 406, 408, 701, 801(a), 804 or 905(a)(i), (d) or (e) of this Code (to the extent that the rule or rules in question apply to him, as to which see paragraphs 105A and 105C above or with the training requirements imposed by the Bar Training Regulations in force at the date of his Call to the Bar or with the Continuing Professional Development Regulations or the Practising Certificate Regulations (other than paragraph 8 thereof) shall render him liable to a written warning from the Bar Standards Board and/or the imposition of a fixed financial penalty of £300 (or such other sum as may be prescribed by the Bar Standards Board from time to time) or any financial penalty prescribed by the said Regulations for non-compliance therewith. Liability under this paragraph is strict.

. . .

901.3 In the event that a barrister is given a written warning by the Bar Standards Board, or a financial penalty is imposed upon him for an infringement of the aforementioned provisions of the Code, the barrister shall have a right of appeal to a panel under the provisions of paragraph 23 (3) and (4) of the Disciplinary Rules. The time for

bringing such an appeal shall be 28 days from the date upon which the written warning or notice seeking payment of the penalty is deemed to have been received by the Barrister. However, unless the Bar Standards Board agrees or the appeal panel otherwise rules, an appeal shall not operate as a suspension of the requirement to pay the financial penalty or an extension of the time for so doing.

. . .

901.5

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

(2) A failure to comply with those provisions may be a serious failure:

a. due to the nature of the failure; or

b. due to the extent of the failure; or

c. because the failure in question is combined with a failure to comply with any other provision of the Code (whether or not that provision is mentioned in paragraph 901.1); or if the barrister has previously failed to comply with the same or any other provision of the Code (whether or not that provision is mentioned in paragraph 901.1).

. . ."

Summary of Submissions and evidence

(i) Mr Gordon

72. On behalf of Mr Gordon, Mr Woolley QC made the following submissions:

i) The Disciplinary Tribunal asked itself the wrong questions: it ought not to have considered whether Mr Gordon failed to discharge his obligations as Joint Head of Chambers with Mr Williams. Rather, it should have considered whether what Mr Gordon did or failed to do was unreasonable and, even if it was, whether his failures were so serious (within the meaning of article 901.5 of the Code of Conduct) as to amount to professional misconduct.

ii) Mr Gordon played a "moderately active" part in the affairs of the Pupillage Committee and of the pupils. The Disciplinary Tribunal was almost dismissive of his contribution.

iii) In light of: Mr Gordon's ill-health in 2006; the fact that he had been told (by e.g. Paul Harding, the senior clerk) not to get involved in pupillage matters and not to assist in relation to Victoria Mitchell as he knew her; Mr Gordon's

reasonable reliance on Mr Williams to deal with pupillage matters as his Joint Head of Chambers; and Mr Conlon's assurances that he was dealing with pupillage on which Mr Gordon relied, it was reasonable for Mr Gordon's involvement to have been limited.

iv) The BSB concede that it was legitimate to appoint a pupillage committee and a Head of that committee who would have prime responsibility for managing pupillage matters. Once this responsibility was transferred, it would take something cataclysmic for Mr Gordon to be required to take back that responsibility. No such event occurred.

v) As to the 23 August 2006 management committee meeting, which the BSB submitted was the point at which matters "came to a head", Mr Gordon should be judged against all the circumstances and in particular the fact that there were three or four levels of responsibility before him: Mr Conlon; Mr Williams; the clerks who had been asked to download the OLPAS applications; and the two other junior members of Chambers who were appointed to assist Mr Conlon at the August meeting.

73. For the BSB, Mr Mullins argued:

i) That although Mr Gordon did have a withdrawn role in pupillage matters, this did not exempt him from responsibility. He had had previous contact with the BSB when he received a warning, so he knew how serious an issue pupillage is.

ii) That Mr Gordon agreed to be Joint Head of Chambers without any formal division of responsibility and so remained responsible.

iii) That Mr Gordon was present at the 23 August 2006 meeting but did nothing in response to the problems.

iv) That it was not justifiable for Mr Gordon to have directed that correspondence relating to pupillage be redirected to the Head of the Pupillage Committee, particularly following the August meeting.

v) That the Disciplinary Tribunal had already taken into account Mr Gordon's ill health. It did not relieve him of responsibility.

74. Mr Gordon gave evidence as to what involvement he had in the pupillage process at various dates. There is no dispute that he was unwell by reason of various foot operations in 2005 and 2006. In summary, the further evidence was as follows:

i) There was no formal division of labour between Mr Williams and Mr Gordon. Mr Gordon explained that Mr Williams took the lead on pupillage matters insofar as required and Mr Williams agrees. As to discussions with Mr Conlon specifically, it was Mr Gordon's view that these would more naturally be carried out by Mr Williams, who had been in Chambers with Mr Conlon before the merger.

ii) In reality both Mr Gordon and Mr Williams left pupillage matters to Mr Conlon. Thus, for example, there was no formal system in place for the members of the Chambers Management Committee and the Heads of Chambers to find out who prospective pupils were and when they were joining. These issues were all left to Mr Conlon.

iii) In March 2006, Mr Gordon knew that there were concerns about the funding of and interview process for pupillage. He did not know that there was any issue with advertisements. He thought that the pupillages were properly advertised. He explained that funding and interview issue was left to Mr Williams to deal with and was asked by Ms Clark of the Disciplinary Tribunal:

> "Q: Can I just ask you, what steps did you take to follow up concerns that were expressed at this meeting in March 2006?
>
> A: I did not deal with it. Paul Williams spoke to Ben about it.
>
> Q: Did you take any steps yourself to satisfy yourself that those concerns were being addressed.
>
> A: I do not think I would have policed Paul.
>
> Q: I am not suggesting that to you, but, for example, did you speak to Paul Williams to find out what whether that conversation had occurred and, if so, was Mr. Conlon going to address the concerns that were expressed at the meeting?
>
> A: No, I do not recall doing that."

iv) In August 2006, Mr Gordon knew that Chambers was anxious about Mr Conlon's pupillage procedure and that something was going to be done about it. He was not himself going to speak to Mr Conlon.

v) He did have some recollection of speaking to Mr Conlon at some point, however. The transcript does not disclose a date, but it appears the conversations took place informally in a corridor. Mr Gordon's evidence was:

> "I should say, if I could just stop you for a moment, that I do remember on two occasions I did ask Mr Conlon, "Are you sure you are observing the new procedures", because I knew they were new procedures, the advertising, funding and so on, and he assured me that he was familiar with the new procedures. It was not as a result of a meeting though, but I thought I ought to remind him."
>
> Further:
>
> "Mr Woolley: Did you at any stage have any contact with Ms Clerk?
>
> Mr Gordon: No, I did not myself, but I heard about her role because Mr Conlon was telling us that he was speaking to Ms Clerk about it [the problems with Ms Mitchell and Ms Ahmad's pupillages] and that it would be all right. We left it to him to deal with the matter."

vi) Mr Gordon was asked whether any changes were made to the system in August 2006, for example by arranging for correspondence regarding pupillage to come to one of the two heads of chambers. He stated that he did not think that there was any need to interfere:

> "We are talking about a senior man who himself had been head of chambers and we had no reason to suppose that things were not being done and properly downloaded and so on. I think we probably thought that some help was needed to process the applications and that is why Dale and Wing were going to be asked to help. But we did not at that stage have any idea that the OLPAS system was not going to be operated properly."

In fact, we conclude that this explanation must be incomplete because as at the meeting on 23 August 2006, it had come to light that the downloading exercise had not been done. It is, however, clear from the transcript that Mr Gordon did not recollect the detail of that meeting and we accept, given the passage of time, that this is not entirely surprising.

vii) Mr Gordon did recollect what happened in October 2006. He explained that his and Mr Williams' primary concern was to regulate the position regarding the three women who had been offered pupillage:

> "Mr Gordon: What we did about it was, there was a Management Committee meeting and it was decided that letters should be written to the three ladies offering them the opportunity to continue their pupillages in the hope or expectation that when the difficulties were resolved, their pupillages would be registered.
>
> Mr Mullins: That is what the letter said to them, is that what you are saying or is that what you hoped for?
>
> A: No, the letters were given to them. In fact, I said I would draft the letters and did so. Each pupil was given the opportunity. We were being told at that time by Ben Conlon that it would be resolved because he had spoken to Andrea Clerk and everything would be resolved. In the meantime, however, these pupils could not get themselves registered."

viii) Similarly, he recalls a conversation at around that time about the best way to respond to a letter from the BSB dated 25 October 2006 asking for details of why the OLPAS applications had not been downloaded when Mr Conlon: "assured us that it was all right, it was a misunderstanding and he would attend to it. We accepted his explanation at the time."

ix) Later, Mr Gordon recalls that he offered to attend the BSB's inspection meeting in January 2007, but that Mr Conlon turned the offer down.

75. Ms Clerk of the BSB gave evidence about the involvement of a Head of Chambers in recruitment, which reflects the structure adopted by Chambers:

> "Mr Woolley: In your experience is it commonplace throughout the Bar for the Head of the Pupillage Committee to be charged with these [application and interviews for pupillage] responsibilities?
>
> Ms Clerk: Yes, it is. The head of chambers may allocate those responsibilities to whoever he would wish and if that is the arrangement that a particular set of Chambers would have, we would accept that.
>
> Q: In practice, you do accept, do you not?
>
> A: Yes.
>
> Q: Obviously, the Head of the Pupillage Committee is the obvious candidate if you have a Pupillage Committee, is it not?
>
> A: It is up to the Chambers, but I would say that in the majority of cases, that is indeed the case."

(ii) Mr Williams

76. On behalf of Mr Williams, Mr Hamer submitted:

i) The Disciplinary Tribunal set the test too high in stating that Heads of Chambers were under a duty to ensure compliance with the OLPAS system.

ii) The Disciplinary Tribunal failed to sift, weigh and analyse the steps taken by Mr Williams and so failed properly to balance his actions with the requirements for a charge of professional misconduct to be made out.

iii) The Disciplinary Tribunal failed to consider the effect of the two pupillage policy documents created by Chambers in March and Summer 2006.

iv) The Disciplinary Tribunal failed to give reasons for its finding that Mr Williams had failed to face up to his responsibility for the recruitment of pupils.

v) Mr Williams had no reason to suspect that Chambers was not acting in accordance with BSB requirements or that pupils had been recruited outside the OLPAS scheme. Even in October 2006, Mr Conlon was telling Ms Clerk of the BSB that Victoria Mitchell and Nahid Ahmad had submitted OLPAS applications, therefore it is a reasonable inference that he was telling Mr Williams the same thing.

vi) Mr Williams took the following steps before the August 2006 management meeting:

a) The introduction of two pupillage policy documents;

b) The appointment of Mr Conlon as Head of the Pupillage Committee;

c) Discussion of pupillage matters in the March 2006 management committee meeting, albeit that at this meeting concerns focussed on the funding for an extra pupil;

d) Discussions with Mr Conlon where: Mr Williams explained that the OLPAS scheme should be used; and Mr Conlon stated that everything was being done properly.

vii) He also took steps during and after the August management committee meeting by:

a) Asking the clerks to download the OLPAS applications;

b) Appointing two more tenants to help with the pupillage process;

c) Speaking to Mr Conlon on Mr Conlon's return from his summer holiday in Italy.

viii) Taken in the round these steps were sufficient to discharge Mr Williams' obligation, which was to take "all reasonable steps" to ensure that proper arrangements were made for dealing with pupils.

ix) The Disciplinary Tribunal did not address the issue of what would constitute a "serious" failure for the purposes of article 901.5 of the Code of Conduct. This is a high test to meet.

77. As to the appeal on sentence, Mr Hamer submitted that there has been a long delay in the hearing of this appeal, to which the Visitors must have regard under Article 6 of the ECHR. He also relied on the facts that Mr Williams is no longer Head of Chambers and that the offence is unlikely to be repeated.

78. The BSB's case was that:

i) In relation to the March management committee meeting, the Disciplinary Tribunal found that the disquiet should have alerted Messrs Gordon and Williams more generally from March, but that is not to say that the professional misconduct threshold was crossed at that point.

ii) Mr Williams' problem is that there is no record of what passed in the conversation between Mr Williams and Mr Conlon when Mr Conlon returned from Italy in late summer 2006.

iii) It was not sufficient for Mr Williams simply to accept Mr Conlon's assurances: there is a possibility that, had Mr Williams followed up with Mr Conlon, the OLPAS process could have been followed since two of the three pupillages appear only to have been offered in early September.

iv) The Appellants cannot rely on the wrongly offered pupillages as a defence to a breach of the Code of Conduct.

79. As to Mr Williams' involvement in the pupillage process, he gave the following evidence:

i) He had no concerns about appointing Mr Conlon as Head of the Pupillage Committee. He came with high credentials. He was a former head of chambers in Gray's Inn. He was a senior practitioner. He was, in Mr Williams' view, a very experienced and a very impressive man.

ii) He had regular discussions with Mr Conlon throughout his time as head of pupillage. These took place over tea or in a corridor but were regular. Mr Williams thought it was plain that Chambers expected pupillage to take place initially solely through OLPAS. As a result of discussions with Mr Conlon the pupillage policy was amended to allow for recruitment outside of OLPAS in exceptional circumstances, but not otherwise. He was clear that Chambers as a whole wished to remain in OLPAS.

iii) As at the meeting in March 2006, Mr Conlon had only been in post a few weeks. There was an issue about funding of pupillages and in addition the potential amendment to the pupillage policy was being discussed. It is Mr Williams' recollection that following that meeting, but he does not recall precisely when: "I just emphasised to Ben that recruitment would be fair and proper within OLPAS." In his cross-examination of Mr Williams, Mr Conlon made clear that there were no extant applications for pupillage at this time.

iv) As at the meeting in August 2006, Mr Williams knew that downloading of application forms had not taken place, although he did not recall precisely how this had come to light. He did not know anything about the three pupils lined up to join Chambers in October. He was asked whether or not, with hindsight, he thought that he had taken reasonable steps in relation to pupillage matters and said:

> "I have to be very careful here. Clearly with hindsight I have not done enough. There is no doubt about it. The steps which I have taken since involve intensive man management, something which I do not mind doing because of what has happened. The question is: At the time? And at the time I thought we did have sufficient. I thought I had done enough.
>
> One of the problems I have is that on the detail, I am struggling. I have the minutes that help me on two separate occasions and so in one way I understand why I am being held responsible and why I face the charge. On the other hand, I am hampered in trying to assist the tribunal because I did delegate it. I thought I had delegated it properly and responsibly. I thought where follow up was needed, I followed it up."

v) When asked about the period subsequent to the August management meeting, the following exchange took place:

> "Mr Williams: You told me that everything was properly done with pupillage. This involved you liaising with Andrea Clerk of the Bar Standards Board, which I took to be reassurance. However, there was an issue. I did not understand there to be major issues, but there was an issue, but what was right or wrong, I understood you to be liaising with Andrea Clerk of the Bar Standards Board.

> Mr Conlon: In fairness to you, it is right that there were situations whereby I said to you, "Let me deal with it Paul. Do not worry about it. You have got enough on your plate." Those were the sort of expressions I would use.
>
> A: First of all, I did not understand there to be any sort of issue that I ought to get involved with. It is right to say that I know you were being pro-active. You had ideas about pupillage, the SFO was an example of you being pro-active and that was a good thing potentially, if done properly, and I did have a lot on my plate. Delegating it to you was the proper running of the pupillage."

vi) Mr Williams was pressed on what happened after the August meeting in cross-examination by Mr Mullins and also in re-examination by Mr Hamer. He stated that he would have spoken to Mr Conlon but could not recall precisely what he would have said. In re-examination he stated twice that he was "absolutely" sure that the conversation would have happened and further explained:

> "Mr Hamer: When he comes back from Italy. Doing the best you can, and trying to picture the situation between 23rd August and these three ladies beginning to come through the door on 1st October, did you have any concerns as a result of your discussions with Ben, when he came back from Italy, that the proper procedures may not have been followed?
>
> Mr Williams: No, my concerns arise when someone is sitting in front of me, an individual, not yet a pupil, asking me to fund her when her pupil registration has not yet been passed by the BSB. That is my clue really that there is a serious problem here. That was after a delay. Initially, I thought it was just a temporary hitch. That was my first clue there was a problem here."

Ms Clark of the Disciplinary Tribunal questioned Mr Williams further about precisely what he could have said. She concentrated in particular on the fact that had he specifically asked if the application forms had been downloaded after the August meeting, he would have been told that they had not. Mr Williams said that he had thought the clerks and two junior members of Chambers were dealing with it. He reiterated that he had spoken to Mr Conlon, but that he could not remember what he said.

(iii) Mr Conlon

80. Mr Conlon's submissions derive from his written Consolidated Argument. They are largely based around his case that the problems in 2006 arose from confusion within the BSB, particularly on the part of Ms Andrea Clerk, with whom he dealt. His Arguments in Support of the Petition state in summary:

i) That in 2005 Ms Clerk failed to understand the effect of the merger of the Northside and Southside sets and failed to understand that the Southside set was authorised by the BSB to take pupils.

ii) She subsequently accepted her error but by this stage, the BSB had published the information that Chambers was not entitled to take pupils and this information could not be corrected or retracted for two years i.e. until 2007.

iii) In response to questions from Mr Conlon about how to deal with this problem, she stated that all applications should be sent to her directly for processing. These matters were discussed with Mr Williams, who also contacted Ms Clerk directly.

iv) Mr Conlon sent the applications of two pupils (known as A and B) to Ms Clerk. Their pupillages were registered by the BSB and the pupils completed their pupillages. Mr Conlon understood that BSB requirements had been complied with.

v) Subsequently, when Ms Mitchell and Ms Ahmad's applications came to light, Mr Conlon sought advice from Ms Clerk. Following Mr Gordon's confirmation that both pupils had been selected by a proper selection process at the Northside set, Ms Clerk said that the same process would apply as that used for Pupils A and B.

vi) Mr Conlon did not cause any advertisement to be placed for pupillage in Chambers. He acted in accordance with advice received from Ms Clerk. Given that he did not know of any advertisement, he did not know to download the applications that had been received.

vii) Before leaving to go on holiday with his family in July 2006, Mr Conlon checked the progress of Ms Mitchell and Ms Ahmad's applications with Ms Clerk and was told that they were on track.

viii) As to Ms Reidy's application, Ms Clerk advised that this would be treated separately because different rules applied to the SFO.

ix) Mr Conlon knew nothing of the OLPAS procedures but cannot be criticised for that in all the circumstances.

81. For the BSB Mr Mullins argued:

i) That the Disciplinary Tribunal's findings were inevitable on the state of the evidence before it:

a) Mr Conlon never disputed that he was the Head of the Pupillage Committee.

b) There was no dispute that that meant that he was operationally responsible and the main point of contact.

c) Mr Conlon played a crucial role in that certain decisions were reserved to him, for example decisions about to whom to grant pupillage.

ii) Mr Conlon's written Consolidated Argument contests facts that were not contested below, such as whether or not there was an advertisement of pupillages through OLPAS.

iii) Mr Conlon had not taken adequate steps before his holiday to Italy to process the 98 OLPAS applications and nor was there any evidence that he had instructed anyone else to do so. In addition, he did not download the applications when he got back from Italy.

iv) As to seriousness:

a) The applicable rules are not difficult to access or understand;

b) There was a flagrant disregard of these requirements by Mr Conlon, who did nothing to familiarise himself with them.

c) The prejudice caused to those applicants whose forms were not considered was very serious.

d) The public expect those at the Bar to respect the rules and procedures.

e) There was also prejudice by reason of the "mess" caused for the three pupils who were taken on but whose pupillages were not registered by the BSB.

v) As to Mr Conlon's account of his dealings with Ms Clerk, these should be taken as an attempt to find someone else to blame.

82. It is clear to us that Mr Conlon's written Consolidated Argument and Petition of Appeal seeks to raise some points that were not argued below. As explained above, had Mr Conlon attended the appeal we would have refused his applications to adduce new evidence. We have therefore, as a function of considering the matter afresh, considered solely the evidence that was available to the Disciplinary Tribunal.

83. The starting point to assess recruitment processes at any Chambers is their pupillage policy. So far as Mr Conlon is concerned, the key point to be derived from those documents is that both the March Policy and the amended Second Policy stated that Chambers was a member of OLPAS. Although the Second Policy permits recruitment of non-OLPAS pupils where there are insufficient applications on the OLPAS system or where suitable candidates cannot be selected from those available, the default mechanism for selection is OLPAS.

84. On 31 October 2006, Mr Conlon responded to a letter from Ms Clerk dated 25 October 2006 asking how it had come to pass that he had not reviewed the applications received through OLPAS. His response stated:

> "Subsequent to the Merger of these Chambers with that of Donald Gordon's set in the March 2005 I became Chairman of the Pupillage Committee circa March 2006. These Chambers (Paul Williams) had throughout been subscribers to the OLPAS process. However, this was not the case with Donald Gordon's set. Due to the financial restraints of the merger the newly formed set we could not afford to fulfil the Pupillage commitment of both sets. A decision was taken to give priority to those who had been accepted on the OLPAS scheme and then Victoria Mitchell and Nahid Ahmad from the former Donald

> Gordon set. These two applicants were advised and subsequently submitted OLPAS applications to this set (which they did). I understood from Donald Gordon that he had complied with all the requirements of the Bar Council in offering Pupillage to both these ladies. Therefore, I honoured the commitments given to these Ladies by Donald Gordon."

85. A similar account is reflected in the BSB's report of its visit to Chambers on 18 January 2007. The BSB was represented by Ms Stevens-Hoare and Mr Stein. The report records:

i) That Pupils A and B (to adopt Mr Conlon's nomenclature) were recruited through OLPAS in 2004 and that Chambers then remained on the OLPAS scheme.

ii) The report is silent as to the first part of 2006. It then states:

> "By June/ July 2006, Ben Conlon has been asked to take over responsibility for pupillage as he was a registered pupil supervisor. He was informed of the two outstanding pupillage offers. He spoke to Andrea Clerk and was informed that if the two pupillage offers had been made in compliance with all the relevant regulations such as advertising, equal opportunities selection etc. then they would be valid. Ben Conlon made enquiries of Donald Gordon and was assured that everything had been dealt with properly in relation to Victoria Mitchell and Nahid Ahmad. He took that to mean that all regulations and requirements had been complied with. Donald Gordon talked in terms of Victoria Mitchell having been promised pupillage. He did not recall such a promise to Nahid Ahmad but N Lethbridge confirmed that such a promise had been made and that all requirements had been complied with.
>
> …
>
> The history of the promises/ offers made to Victoria Mitchell and Nahid Ahmad was investigated further in anticipation of our visit. Those present candidly accepted that having investigated the matter they had to accept that it was not clear if pupillage offers were ever actually made but that at some point both women had been given to understand and/or come to expect that they would get pupillage. It appears Donald Gordon met Victoria Mitchell and had various discussions with her about pupillage. It is understood that N Lethbridge first met Nahid Ahmad at a law centre and discussions between them resulted in the suggestion of pupillage in Donald Gordon's set.
>
> Further it was accepted that it would not be said that either woman was selected as a result of any sort of selection process following on from an advertisement for pupils. It appeared that Donald Gordon had not advertised for pupils and had not conducted any sort of selection process. It was not known if either woman had actually applied for

> pupillage at any point other than by their unprocessed OLPAS applications. It was accepted that their pupillages were not as a result of their participation in the OLPAS process. They were given pupillage on the basis of a belief that there was a pre-existing offer as a result of an earlier process that complied with the regulations and it was apparent that this was not in fact the case."

86. Mr Conlon's understanding that Mr Gordon had offered Ms Mitchell and Ms Ahmad pupillage is contested. By his witness statement dated 2 October 2008, Mr Harding (who was senior clerk to the Northside set and became joint senior clerk to Chambers) stated:

> "6. Miss Mitchell had been called to the Bar and was looking for pupillage. I can confirm the occasion that Mr Gordon remembers when we both spoke to Miss Mitchell in the hallway of chambers and told her that we could not help her because we were not taking any more pupils. I told her this on other occasions also. We certainly did not promise her a pupillage.
>
> 7. After the merger Miss Mitchell continued to bring work to chambers and knew several of the members. I knew that she was applying for pupillage in the merged set. There was already an approved pupillage scheme in the set we joined, but neither I nor Mr Gordon because involved with it after the merger. It appeared to be functioning properly."

87. Mr Harding was not cross-examined before the Disciplinary Tribunal. His evidence was uncontested. When asked why he did not call Mr Harding, Mr Conlon stated that he did not think it worth dragging the senior clerk through the procedure of the Disciplinary Tribunal. Mr Gordon did not attend the inspection meeting with the BSB (although as noted above, he offered to but Mr Conlon declined the offer) and so his account is not recorded. Nor did he see the letter of 31 October 2006 at the time. He was asked about these matters in cross-examination:

> "Mr Mullins: I understand, Mr Gordon, that you say that is just not correct?
>
> Mr Gordon: That is right. If I had seen this letter, I would have done something about it. I did not see this letter and the first I knew about this idea Mr Conlon had was when I saw that report of 18th January visit in March. It was March 2007 by that time.
>
> Q: Did Mr Conlon say anything about how, in his mind, these two pupils had been taken on?
>
> Ms Jackson [tribunal]: I am sorry, but I cannot hear you.
>
> Q: We are returning now to the chambers meeting in October/ November. Mr Conlon is there, you have explained the general assurances that were given, what I want to know specifically is, did he

> make this point, the point he is making in this letter, which is that he understood these applicants had pre-existing offers of pupillage?
>
> A: No, because I would have said straight away, "No, that is not the truth." It was not true. On the contrary we had in VM's case made it clear to her that we could not give her a pupillage."

88. In his cross examination, Mr Conlon ultimately stated about this point: "I think it was a misunderstanding on both our parts".

89. Ms Clerk, who appeared as a witness for the BSB before the Disciplinary Tribunal was cross-examined about her understanding of the recruitment process operated by Mr Conlon and, in particular, about whether or not she knew that Chambers was not using the OLPAS system to recruit, whether by reason of the merger or otherwise.

90. Whilst being cross-examined by Mr Conlon about her state of knowledge about the conduct of pupillage in April 2006, it is recorded that Ms Clerk said the following:

> "Mr Conlon: I am saying prior to 11th April, there had been the merger of two sets of chambers. Do you recall that?
>
> Ms Clerk: I do not recall on what date I had been told that. But what I can firmly state is that sets merging is nothing unusual and we do not visit every set that has merged.
>
> Q: Bear with me.
>
> The Chairman: The question is that prior to the meeting on 11th April, you had heard that there had been a merger from Mr Conlon?
>
> A: Possibly, I cannot remember.
>
> Mr Conlon: Let me help you with that conversation because the problem was not only did I not appear to be registered, but also you indicated that my chambers should not be taking pupils. Do you remember that conversation?
>
> A: No, what I remember is a number of conversations that I did have with you. I was thoroughly confused as to what was going on.
>
> Q: I accept that.
>
> A: I was trying to understand and to ask you what was happening and how this was happening. I really could not work it out. It was as a result of this that a visit was arranged because I reported to the Committee that I did have those conversations and I could not work out how this happened, what had happened and how pupils were recruited because a lot of statements I did have were non-circuitous. I was told that you did advertise. I then checked the system and the applications had not been looked at. I was asked if it was possible for these pupils to apply subsequently.

Q: I am going to interrupt you, Ms. Clerk, because it is going a bit further forward and I will deal with that in a moment. Just dealing----

The Chairman: If you ask her a question, she is entitled to answer it. She said that she was confused.

A: I was thoroughly confused and the more conversations I had on this subject, the more confused I became because things did not stack up. The more I was told, the more questions I would have. I was then asked by the Pupillage Sub-Committee and by the Advertising Panel how did it happen and I could not explain because I did not understand. I find it difficult to answer this concisely because I most genuinely did not understand what was happening.

Q: And I accept that Ms Clerk. I am just trying to get to what facts were happening around this time. It is accepted, it is, by you that to your knowledge the chambers of Donald Gordon were not and should not have been taking pupils; correct?

A: Yes.

Q: You were also informed by me that the chambers of Paul Williams that merged was in the form of the chambers of Dermot Wright and had been taking OLPAS pupils from its inception. Do you remember that?

A: Yes.

Q: Your concern was, you told me, we were dealing with a new set of chambers. Do you remember that?

A: Yes, I would have said that.

…

Q: You had expressed concern to you [sic] about the fact that Donald Gordon was as set that should not be taking pupils and had undertaken not to. Paul Williams' set was a set that you accepted might have been or was on the OLPAS system after you had done some research. However, because these were a new set of chambers, it had to be inspected by the Bar Standards Board Committee before we could take any pupils. Do you remember that conversation?

A: No, I would never say that.

Q: Why?

A: All these sets are dissolving and re-merging and we do not inspect every new set of chambers.

Q. Maybe not every set, but on this occasion you deemed it necessary that before we could go any further to have an inspection, hence you

> contacted with my consent, after discussing it with me, chambers to arrange a meeting with myself and perhaps several others to discuss the position [sic]. Do you remember that?
>
> A: No, because it would not take me from April to January to arrange a visit. I only arranged one visit to your chambers.
>
> Q: I am asking you about the 11th April. There was an arrangement. My chambers were contacted for a visit from the Pupillage Committee and you made that contact. Do you see that, 10:30?
>
> A: I am sorry, I cannot remember that.
>
> Q: You cannot remember what?
>
> A: I just know the visit I did organise and took place in January 2007, would not take from April, or even before April, to start organising that visit. It is too long a period. I would not have organised the two visits. I would not have been so inefficient to have left it from April until the following January to organise a visit.
>
> Q: But Ms Clerk, as far as that is concerned, the January visits came about as a result of the rejection of the registration forms. Is that not correct?
>
> A: That is correct, yes.
>
> Q: The registration forms were not rejected until about October. Then these two visits had absolutely nothing to do with the rejection of the registration forms. It must have been something other than that. Do you accept that?
>
> A: I do not recall arranging those visits, I am sorry."

And further on a similar point:

> "Q: My suggestion to you is that on the matter which has been dealt with earlier on, I was given to understand by you that until we were re-authorised to take pupils, we had to wait until we have been inspected and by 23rd August, we had not been inspected?
>
> A: I am sorry if I have made myself unclear, but that is not what I would say. As I say, chambers merge all the time and we do not inspect each merger or visit every chambers that has merged or re-organised themselves. This is not a protocol that we follow and I would not have said so."

91. There are additional extracts demonstrating both a difference of opinion between Mr Conlon and Ms Clerk but also a lack of complete recollection on the part of Ms Clerk. Thus:

"Mr Mullins: Do you recall dealing with a Mr. Jean-Marie Labelle as head of pupillage at 3 Temple Gardens?

Ms Clerk: No, I do not. This is not to say that person would not have called me. I do not recall having any conversations with that person.

Q: Did you tell Mr Labelle that 3 Temple Gardens were not registered with OLPAS and not on record as offering pupillages?

A: If 3 Temple Gardens had telephoned me about any matters relating to pupillages, I would have said the chambers of Donald Gordon is no longer registered as taking pupils because that is what I had been told.

Q: I need to ask whether you had any independent information that the two chambers at 3 Temple Gardens, one previously headed by Mr. Williams and one headed by Mr. Gordon had merged?

A: Not before. I did not deal with mergers or anything related to mergers of chambers. I only became involved if pupillages were an issue. I was notified at that point that there was this merger which confused me. But, no, I did not know before the Chambers merged. I did not have the merged set of chambers on my records as taking pupils and I did not have their pupillage policy document, which is a document that every set of chambers that takes pupils must have.

Q: So far as the set formally [sic] headed by Mr Williams alone is concerned, did you have records and documents relating to that pre-existing chambers?

A: I would have. If they had taken pupils, we would have records and documents, yes.

Q: Did you tell Mr. Labelle that before chambers would be allowed to take any pupils, it had to be inspected by a sub-committee of the Bar Standards Board?

A: No, I would not say that.

…

Q: Is Mr Conlon right that there were two projected visits [in January 2007] and they had to be cancelled twice?

A: No, I do not recall any cancellations. It may have been that they did not happen on Tuesday, but happened on Thursday, but I do not have a record of any cancellation of a visit to those chambers.

Q: Do you recall telling or did you tell Mr Conlon that the chambers' registration of OLPAS could not be reinstated until an inspection had been completed as they were considered a new set?

> A: No, because I would not say that. If any set would wish [to] recruit through OLPAS, then the procedure would be to contact the firm that runs OLPAS and register with them.
>
> Q: Did Mr Conlon seek your help and advice with regard to three pending applications from three female applicants?
>
> A: Yes, I do remember having long discussions with Mr Conlon with regard to the three applications that we had had. They were all slightly different, but what they all had in common was that we could not understand how these individuals had been recruited.
>
> …
>
> Q: I want to ask you about something different which is, as it were, a stage before. So did Mr. Conlon ever seek advice from you about applicants who had not yet been offered pupillage and how to deal with them?
>
> A: No. He may have, but I do not remember.
>
> Q: In late July do you remember Mr Conlon speaking to you on the telephone and asking you about when the chambers would be inspected?
>
> A: This may have happened. I do not have notes on the telephone calls, so I cannot deny or confirm that. I do know that I have spoken to him and I do not remember what the precise timings of those conversations were."

92. Ms Clerk was also asked how it came to pass that Ms Mitchell and Ms Ahmad submitted their OLPAS applications. She stated:

> "Whether I had advised through Rachel Reeves or directly that those individuals should submit their registration forms because at that point we were having those conversations over the telephone. I was not able to work out where or by whom those pupillages were advertised. I was told that the chambers of Paul Williams were members of the OLPAS system. I checked with the firm that run this system, GTI, whether they had advertised and what they had done with the applications. The firm told me that 98 applications were received, but they had remained untouched, so that is not what we call a good recruitment process not to consider those applications. Then they recruited those people and I could not understand how and where. I did suggest that they submit the forms so that we then had some process through which we could deal with this application."

93. Mr Williams was cross examined by Mr Conlon about his knowledge of Mr Conlon's dealings with Ms Clerk:

"Mr Conlon: Then round about this particular time, I am talking about March 2006, there was some communication with Jean-Marie Labelle and the Bar Standards Board with regard to our ability to take pupils. Do you recall that being brought to your attention by me?

Mr Williams: No, I do not. You did say to me, if I may say this at this point, that you were liaising with Andrea Clerk.

Q: I am going to come to that in a moment. There came a time, obviously, when Jean-Marie Labelle had decided to resign. Do you remember that?

A: That is correct.

Q: It was his explanation, was it not, that he could no longer continue because it had been indicated to him that since he was not a pupil master, he could not appropriately continue to be chairman of the Pupillage Selection Committee?

A: I think he had been given to understand that by, I thought you told me, Andrea Clerk.

Q: I have a timetable here. I believe another reason why he resigned was that there was going to be an inspection on April 11th and he felt, in the circumstances, someone else should take over that position. Do you remember that?

A: No, I do not. If I am allowed to refer to the minutes of 16th March [under the Pupillage section], it was known to the Management Committee that there was going to be a pending inspection. At page 22: "The Bar Council are due to inspect chambers on Tuesday, 11th April. Sam Frazer to liaise with BC", that is you. We were expecting an inspection, but I did not know there was an issue about Jean-Marie.

…

A: I do not have a note to help me. I was not in contact with Andrea Clerk. I now know that there was a lot of contact between you and Andrea Clerk. I did not know, as far as I recollect, that there was an issue as to whether or not we could continue to take pupils.

Q: I am going to suggest to you, Paul, that I made clear to you at that particular time that there were three principal issues as to who our chambers were, whether we were able to take pupils and that a policy had to be put into place. A proper policy document had to be put in place. Do you recall me telling you this?

A: I agree, we had to have a pupil policy document. I am certain one was amended to reflect the small change in our position to give flexibility to go outside of OLPAS. We had been through that. I cannot go any further than that.

> Q: I have to put to you also that I told you that, first of all, it was most important that we resolve the issue as to who are chambers were and whether or not we could take pupils. That was the first thing that had to be resolved.
>
> A: I did not understand there to be any problem at all with the identity of our chambers. We were 3 Temple Gardens."

94. When asked what he thought the purpose of the inspection of 11 April was, Mr Williams stated that he just thought that it must be something in the ordinary course of business. He did not know that it was to do with the status of Chambers to take pupils.

95. Mr Conlon also asked Mr Williams if he recalled Mr Conlon telling him about ongoing discussions with Ms Clerk in March – June 2006 concerning the status of Chambers and how to arrange the pupillages of Ms Mitchell and Ms Ahmad. Mr Williams was clear that he had no recollection of these discussions.

96. In Mr Conlon's evidence, the following points were made:

    i) He did not know that an OLPAS advertisement had been placed.

    ii) He did know that pupils A and B had been recruited through OLPAS and it was for this reason that he did not understand why the BSB were saying that Chambers could no longer recruit through OLPAS.

    iii) He first realised that there were outstanding OLPAS applications in late May or early June 2006. He learned this from Ms Clerk, who wanted to know what process was being following for Ms Mitchell and Ms Ahmad. It was Mr Conlon's evidence that he raised this issue with Mr Williams and Mr Gordon at that time and that he understood Mr Gordon had promised pupillage to Ms Mitchell. He did not think he could do anything about the applications because Chambers was not authorised to accept pupils.

    iv) He understood that the Chambers pupillage policy would be ineffective unless or until approved by the BSB.

Discussion and Decision

(i) Mr Gordon

97. In relation to Mr Gordon, the questions we need to ask ourselves in the light of the evidence are whether we are satisfied beyond reasonable doubt that:

    i) He failed to take all reasonable steps to ensure that proper arrangements were made in Chambers for dealing with pupils and pupillage (Code of Conduct paragraph 404.2(c)); and

    ii) That any failure was serious by reason of its nature or extent (Code of Conduct paragraph 901.5).

98. We have assessed reasonableness objectively in light of all the circumstances and have applied the criminal standard of proof to the facts.

99. There are three over-arching points concerning the proper conduct of Heads of Chambers that have governed our deliberations:

    i) A Head of Chambers remains personally responsible for discharging his obligations under the Code of Conduct. We do not accept (and nor was the case put in this way) that the mere fact of being a Joint Head of Chambers rather than a sole Head of Chambers liberates that person from his obligations. If responsibilities have been clearly and transparently divided between Head of Chambers then this will impact on the reasonableness of the particular actions of a Joint Head of Chambers, but the nature of his or her obligations remain the same.

    ii) We accept (as did the BSB) that a Head of Chambers is entitled to delegate responsibility. This is common practice both in relation to pupillage (as noted by Ms Clerk) and also in relation to other parts of the administration of Chambers.

    iii) Where responsibility has been clearly delegated, a Head of Chambers is entitled to rely on the appointed member of Chambers to carry out his role with reasonable care and diligence and so as to comply with that member's professional obligations. This does not, however, mean that the Head of Chambers no longer retains any responsibility at all for the delegated function. Taking reasonable steps to ensure that proper arrangements are made for ensuring that an administrative function is carried out includes taking reasonable steps to obtain an appropriate level of reporting back from the person to whom responsibility has been delegated. It may also include an obligation to step in and take a more active role if it becomes apparent that the person to whom responsibility has been delegated is not carrying out his or her role properly and/or to remove such a person.

100. In light of the foregoing, we find as follows:

    i) There is no real dispute that the fundamental facts on which the charge is based are made out. It must be the case that pupillage was advertised through OLPAS in spring 2006, because applications were received. There is no doubt that 98 applications were received but that these were not downloaded by Chambers. Nor is there any doubt that the three pupillages that were awarded were awarded by private arrangement and not in accordance with either Chambers own selection process as set out in its pupillage policy, or any other proper selection process.

    ii) We agree that in principle, these failings were serious by reason in particular: of the prejudice caused to the three applicants who were awarded pupillage by private arrangement but whose pupillages the BSB subsequently refused to register; of the prejudice caused to the 96 applicants who had submitted applications which were not processed and by reason of the potential prejudice caused to the reputation of the Bar as a whole by reason of these matters.

iii) We do not accept that Mr Gordon's reliance on his illness is relevant. Although we accept that a Head of Chambers may be temporarily incapacitated such that he places more reliance on his entitlement to delegate responsibility and does so by putting in place a temporary structure, we do not accept that illness frees him or her from all responsibility. If a Head of Chambers is too unwell properly to discharge his obligations, then we would expect him to resign and permit someone else who is able to act to take over.

iv) However, we do consider the following matters to be relevant:

a) Although there was no formal division of responsibility, it is clear from the tenor of both Mr Williams' and Mr Gordon's evidence that Mr Williams had taken primary responsibility for liaising with Mr Conlon about pupillage. In those circumstances we accept that it was reasonable for Mr Gordon to rely on Mr Williams to take a more active role.

b) We also accept Mr Gordon's evidence that he did have some conversations with Mr Conlon about pupillage. It is unclear precisely at what point these discussions took place, but Mr Gordon recollects speaking to Mr Conlon about pupillage on at least two occasions to confirm that Mr Conlon was following the new procedures. He also recalled Mr Conlon reassuring him that everything would be alright when the problems with Ms Mitchell's and Ms Ahmad's pupillages emerged.

c) Finally, we accept Mr Gordon's evidence that he became more actively involved in October 2006 when it was clear that there were real problems with Ms Mitchell's and Ms Ahmad's pupillages. Although this is not directly relevant to the charge, we accept that his behaviour is consistent with a willingness to become involved where required.

v) We consider the assessment of Mr Gordon's conduct to be finely balanced. Although we do not think he can fairly be criticised for not becoming actively involved in pupillage to any great extent before August 2006, once it became apparent that the OLPAS applications had not been downloaded, we see some force in the BSB's argument that Mr Gordon could have done more, for example, by chasing the junior members of Chambers to make sure that the applications had been downloaded and were being processed.

101. However, on balance and applying the criminal standard of proof to the facts, we consider that in all the circumstances Mr Gordon did take reasonable steps to ensure that proper arrangements were made in Chambers for dealing with pupils and pupillage by having some conversations with Mr Conlon from which he obtained reassurance as to the steps being taken and by relying on Mr Williams who was taking a more active role in relation to pupillage.

102. Had we decided that Mr Gordon had breached paragraph 404.2(c) of the Code of Conduct, we would have found that the breach was sufficiently serious to constitute professional misconduct under paragraph 901.5(1) and (2) due to the nature of the failure. In this regard, we repeat the matters set out in paragraph 100 (ii) above. We

should make clear that we do not consider that the fact that the 96 applications which were not downloaded and processed might have related to pupillage commencing in October 2007 rather than October 2006 is of any relevance. It seems to us that, in any event, the failure to download and process them was serious as a result of the prejudice caused to those candidates in not having their applications processed with the effect that their prospects of gaining pupillage whether the year commencing October 2006 or 2007 were diminished and was serious by reason of the potential prejudice caused to the reputation of the Bar as a whole by reason of these matters.

103. Nevertheless, in the light of our findings and decision in relation to paragraph 404.2(c) of the Code of Conduct, we allow Mr Gordon's appeal.

(ii) Mr Williams

104. The same principles and for the most part, the same facts apply to Mr Williams as to Mr Gordon, although Mr Williams was more engaged in the pupillage process.

105. The following additional matters appear to us to be particularly relevant:

i) Mr Williams was involved in the promulgation and subsequent amendment of the Chambers pupillage policy. We consider it reasonable for him to have thought that the policy would be followed once it had been produced (and amended) without him being obliged to monitor the detail.

ii) We accept Mr Williams' evidence that he had regular discussions with Mr Conlon about the pupillage process. As to the chronology of those discussions:

a) We do not consider that the period immediately following the March 2006 meeting is particularly relevant. Mr Hardyman's note of 11 September 2008, to which we referred at paragraph 51, makes clear that the main concern at the March Committee meeting was one of funding and so there would have been no real need to consider the process, particularly in light of the March Policy.

b) We consider that for Mr Williams, the relevant period post-dates the August meeting at which it became apparent that the 96 applications had not been downloaded. We accept that it is relevant that two junior members of Chambers were delegated to assist with the process, although in itself we would not have considered this to be enough had no further enquiries been made. However, Mr Williams was confident that he had discussed what was happening with Mr Conlon although he could not remember the details. Indeed, Mr Conlon himself accepted that he told Mr Williams to let him deal with it because Mr Williams had enough on his plate.

106. In our judgment, having been involved in setting up a Chambers pupillage policy, it was then reasonable for Mr Williams to rely on Mr Conlon's assurances that he was implementing it both before and after August 2006.

107. For these reasons, Mr Williams' appeal is also successful. The position in relation to seriousness in relation to Mr Williams is the same as in relation to Mr Gordon and is set out at paragraph 102 above.

108. Mr Williams also appealed against his sentence of a reprimand. In light of our decision, we do not need to consider this part of the appeal. However, if we had upheld Mr Williams' conviction we would also have upheld his sentence on the basis that a reprimand would have been an appropriate sanction, even at this late date, had the charge been made out.

(iii) Mr Conlon

109. Responsibility for pupillage in Chambers had been delegated to Mr Conlon as Head of the Pupillage Committee. Accordingly, a direct obligation in relation to the proper arrangements for pupillage pursuant to paragraph 404.2 of the Code of Conduct on behalf of Chambers fell upon him..

110. Before turning to matters more generally, we should mention that in our judgment, one key submission made by Mr Conlon is not supported by the evidence and we cannot accept it. As currently put (in his Consolidated Argument) it is Mr Conlon's case that the confusion he suffered in relation to pupillage dated from the recruitment of the so-called pupils A and B in 2005, which was allegedly managed by sending the applications directly to Ms Clerk rather than through the normal OLPAS process. In fact, both Mr Conlon's evidence before the Disciplinary Tribunal and the BSB's report of its visit to Chambers on 18 January 2007 make clear that pupils A and B were recruited through OLPAS in the usual way. It seems that Mr Conlon's recollection has misled him on this point. In the circumstances, we are satisfied beyond reasonable doubt that any confusion cannot have emanated from the earlier period and must have dated from the period starting in March 2006 when Mr Conlon took over as Head of the Pupillage Committee.

111. As to the period between March and August 2006, in our judgment the following evidence is material:

i) The March Policy (and the subsequently updated Second Policy) both provided for pupillage to be conducted through OLPAS. Mr Conlon was instrumental in the alteration to the March Policy which led to the Second Policy. Mr Conlon did suggest in evidence that he did not think these policies had been adopted by Chambers, but there is no dispute that they were drafted. Mr Williams' understanding was that they would be used.

ii) Mr Conlon accepts in his Consolidated Argument that he knew nothing of OLPAS procedures (but submits that he cannot be criticised for that in the circumstances). There is no evidence as to any concrete steps that Mr Conlon took to acquaint himself with the detail of the OLPAS process beyond his discussions with Ms Clerk.

iii) As to the discussions with Ms Clerk in spring and summer 2006, there are the following conflicting strands of evidence:

a) Mr Conlon relies on ongoing discussions with Ms Clerk between March and summer 2006 about whether or not Chambers was entitled to take pupils and how the pupillages of Ms Mitchell and Ms Ahmad should be registered. He considers that the visit in April 2006 was to review Chambers' entitlement to take pupils and that there was great confusion when it was cancelled.

b) Ms Clerk does not recall the proposed inspection of April 2006. The only inspection she recalled was in January 2007 and she did not agree that this could have been the same inspection as proposed in April 2006. She said it would not have taken her from April to January to arrange an inspection. She was also clear that she would not have said that the mere fact of a merger meant that the BSB had to inspect because that is not the BSB's practice. She did not recall whether or not there had been a discussion about an inspection in July 2006.

c) It is, we think, fair to say that Ms Clerk was confused about the discussions that were taking place in summer 2006. She stated as much in evidence. Her recollection is that the discussions were about the fact that the applications had not been downloaded and about her suggestion that Ms Mitchell and Ms Ahmad should submit OLPAS applications.

d) Mr Conlon also suggested to Mr Williams that Mr Williams knew that there was an issue in relation to whether or not Chambers was entitled to take pupils. Mr Williams did not recollect any such issue and indeed thought that recruitment was taking place in accordance with the OLPAS requirements.

iv) By the end of August 2006, it had become apparent that the applications existed and had not been downloaded and that Chambers wanted them to be. It seems that Mr Conlon continued to focus on the applications from Ms Mitchell, Ms Ahmad and Ms Reidy. He neither downloaded nor considered the remaining 96 applications himself and nor did he take any steps to ensure that either the clerks or the two junior tenants of Chambers who had been deputed to assist did so.

112. We find it proven to the criminal standard that:

i) Chambers recruited through OLPAS in 2005.

ii) The two versions of the pupillage policy being the March Policy and the Second Policy stated that OLPAS was the chosen recruitment mechanism.

iii) Mr Conlon did not understand the mechanism of OLPAS and did not take any independent steps beyond his discussions with Ms Clerk to educate himself.

iv) Mr Conlon did not download the applications for pupillage either before or after August 2006 and nor did he take any other material steps to conduct the Chambers pupillage process in accordance with OLPAS or the chosen recruitment mechanism.

113. It seems to us that the evidence supports the conclusion that there was some level of confusion in the period between March – July 2006 about Chambers pupillage arrangements. Given the lapse of time and the fact that we heard no oral evidence, and notwithstanding Mr Williams' and Ms Clerk's understanding and the existence of the March Policy and the Second Policy in relation to pupillage, we accept that it is possible that during this period Mr Conlon may have been confused as to whether and if so, how he should have been operating the OLPAS process for 2006.

114. The issue for us is whether or not, in light of the circumstances outlined above, Mr Conlon failed to take all reasonable steps to ensure that proper arrangements were in place for dealing with pupils and pupillage.

115. For the following reasons, we find that he did not do so:

i) This is a case where Mr Conlon knew that Chambers was operating through OLPAS in 2005 (post-merger) and that Chambers had a pupillage policy providing for recruitment to take place through OLPAS. Even if Mr Conlon did find himself confused as to the application of the OLPAS process in 2006 as he suggests, it is difficult to see why Mr Conlon would have thought that the post-merger procedure of using OLPAS in 2005 would somehow have fallen away altogether. We consider that in those circumstances and despite his alleged confusion, he should at the very least have sufficiently acquainted himself with the OLPAS procedure so that he could check whether or not applications were coming in, (particularly given that he knew that at least two applications would be submitted by Ms Mitchell and Ms Ahmad as described in paragraph 92 above), to take note of the timetable applicable to them, to download them and to make enquiries about what to do with them in the circumstances. This he failed to do.

ii) Further, Mr Conlon was involved in the decision to amend the pupillage policy contained in the March Policy to provide for recruitment outside of OLPAS in exceptional circumstances. If Mr Conlon had thought that Chambers could not recruit through OLPAS at all and would instead recruit outside OLPAS, we consider that he should and would have made this clear in the revised policy documentation and would have drafted the Second Policy in a different way. We do not consider it reasonable or acceptable for the Head of a Pupillage Committee in chambers which has a pupillage policy such as the March Policy and the Second Policy (even if he were confused as to the application of the OLPAS procedure for 2006) not to acquaint himself with the OLPAS procedure at all and to be involved in drafting amendments to March Policy which on his evidence did not reflect the actual situation. Given the content of the March Policy and the Second Policy, and the fact that Mr Conlon was instrumental in drafting the Second Policy, we consider that despite his confusion, Mr Conlon should have appreciated that the OLPAS procedure applied and failed to abide by it and to take any appropriate steps under it.

iii) Even if this is wrong, by the end of August 2006 when Mr Conlon returned from holiday, in our judgment it must have been clear to him that something had gone awry and that 96 applicants had tried to apply to Chambers through the OLPAS system. It also either was or should have been clear to him that the BSB wanted Chambers to use the OLPAS process or at least thought that it

would: were this not the case then Ms Clerk would not have told Mr Conlon that Ms Mitchell and Ms Ahmad should submit OLPAS applications. Finally, it either was or should have been clear that Mr Williams and Mr Gordon, together with the rest of Chambers, were worried about what had been going on.

iv) In those circumstances, in our judgment, on his return from holiday Mr Conlon should have taken reasonable steps to download and consider the outstanding OLPAS applications and to regulate the position. He did not do so but instead reassured Mr Williams that all was well.

116. In order to constitute professional misconduct, Mr Conlon's failures must be serious. We have no hesitation in saying that they were. In this regard, we rely upon the matters set out at paragraphs 100(ii) above. We also repeat the matters relating to the commencement of pupillage for the OLPAS applicants set out at paragraph 102 above which also apply in relation to Mr Conlon.

117. Accordingly, Mr Conlon's appeal against conviction is dismissed.

118. Mr Conlon also appeals against sentence, arguing that a fine of £1,000 was excessive and that the appropriate sanction was a reprimand.

119. Mr Conlon's failures as the member of Chambers with the delegated authority and responsibility for managing Chambers pupillage arrangements were serious, as we have found and we take this into account in considering sentence.

120. When the Disciplinary Tribunal convicted Mr Conlon it did not have the benefit of sentencing guidelines and so sentenced him in accordance with its own discretion.

121. This is the same approach that we have taken. However, we have the advantage that the BSB now promulgates sentencing guidelines for professional misconduct. We have therefore reviewed the earliest of those guidelines (dated April 2009, some three months after the Disciplinary Tribunal's decision) for guidance only and as rough cross check before reaching a final decision.

122. The relevant section of the sentencing guidelines (E4: Breach of pupillage advertising/ funding requirements) is not precisely on point but provides as follows:

"**Common circumstances**	**Starting Point**
a. Failure to advertise but no pupillages were offered in contravention of the rules	a. Reprimand/ advice as to future conduct
b. Deliberate failure to advertise where pupils have been taken on in contravention of the rules	b. Reprimand and low level fine
c. …	…
d. Intentional failure to comply with	d. Short suspension

recruitment requirements as well as
failure to provide funding requirements"

A low level fine is up to £1000. A short suspension is up to three months.

123. Specific aggravating factors are described as including the breach resulting in the pupillage not being registered and persistent breaches involving numbers of pupils. Specific mitigating factors are said to include the breach being unintentional, a one off where previous pupillages had been properly handled and remedial action being taken at an early point.

124. There is also a list of generic aggravating and mitigating factors at Annex 1 to the sentencing guidelines. The following aggravating factors are relevant:

i) Persistent conduct or conduct over a lengthy period of time.

ii) Undermining of the profession in the eyes of the public.

iii) Position of responsibility within the profession.

125. In addition, we have in mind the following mitigating factors:

i) Co-operation with the investigation.

ii) Previous good character.

126. This is a case where there was a consistent and lengthy failure to comply with the recruitment requirements. Mr Conlon failed to identify his obligations before or while undertaking his role as Head of the Pupillage Committee and failed to take reasonable steps to rectify his failings after the August 2006 meeting when it must have been clear that something had gone badly wrong. In the circumstances, we agree that a low level fine of £1000 was the appropriate sanction and uphold the Disciplinary Tribunal's award.

127. We will accept submissions on costs in writing if they cannot be agreed.