Cases numbers PC 2008/0235/A
and PC 2010/0012/A

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

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 19 July 2013

Before:

SIR RAYMOND JACK
Mr NICHOLAS PAUL
Dr MANJU BHAVNANI

Between:

TARIQ REHMAN	**Appellant**
-and-	
BAR STANDARDS BOARD	**Respondent**

Mr Marc Beaumont for the **Appellant**
Mr Nikki Singla and Mr Tom Cross for the **Respondent**

Hearing date: 20 June 2013

JUDGMENT

Sir Raymond Jack:

1. This is our unanimous judgment.

2. On 1 February 2010 the appellant, Tariq Rehman, a practising barrister, appeared before a Disciplinary Tribunal of the Inns of Court to face three charges of professional misconduct. The first charge relating to continuing professional development, and the second relating to an unpaid penalty of £100, were found proved. The third relating to alleged failure to respond to letters from the Bar Standards Board was dismissed. The tribunal ordered that he pay a fine of £600 on each of the two charges found proved, and that he pay the outstanding penalty and costs of £335. On 29 June 2011 Mr Rehman appeared before a second Disciplinary Tribunal to face a single charge of professional misconduct in relation to his failure to pay a judgment obtained against him. The charge was found proved. The tribunal ordered that he be suspended for one month and pay costs of £335.

3. Mr Rehman appealed against the findings of both tribunals. He raised a number of points relating to the appointment of the members of the two tribunals, which it is submitted require that the findings against him be set aside. They relate either to their independence from the prosecutor, the BSB, or to the eligibility of particular members to be appointed. Those points apart, he now only appeals against the substance of the finding of the second tribunal, that concerned with the judgment debt. We will take this part of his appeals first.

<u>The finding on 29 June 2011 that the charge of professional misconduct relating to the non-payment of the judgment debt was proved</u>

4. The charge was as follows:

   Statement of Offence

   Professional misconduct, contrary to paragraph 301(a)(i) and/or 301(a)(ii) and pursuant to paragraph 901.7 of the Code of Conduct of the Bar of England and Wales (8th Edition).

   Particulars of Offence

   Tariq Rehman engaged in conduct which was discreditable to a barrister and/or was likely to diminish public confidence in the legal profession or in the administration of justice or otherwise bring the legal profession into disrepute, contrary to paragraphs 301(a)(i) and/or 301(a)(ii), in that he failed to comply with a court order, namely a judgment made against him on 10 July 2009 by the Clerkenwell & Shoreditch County Court, Claim Number 9EC04391, whereby he was ordered to pay the sum of £2751.67 to Brian Edward Buck in instalments of £200 per month, payable from 10 August 2009. Mr Rehman's failure to comply with the court's order has continued, despite the Bar Standard Board drawing the order to Mr Rehman's attention by a letter and enclosures sent to him on 4 February 2010.

5. The facts giving rise to the charge were as follows. Mr Rehman was called to the Bar on 9 March 2000. In September 2001 he was offered an interest-free

loan of £4,000 by the Bar Council Scholarship Trust. He agreed to repay one third, £1,333.33, by 1 October 2004, and two thirds, £2,666.67, by 1 October 2005. The purpose was to assist with pupillage. The first third was repaid but no more. After telephone calls and letters the trustees decided to take court proceedings. Mr Rehman admitted the claim. On 10 July 2009 an order was made that he pay £2,751.67 by instalments of £200 per month starting on 10 August 2009. On 28 October 2009 the judgment creditor, Mr Brian Buck, Trustee and Secretary of the Bar Council Scholarship Trust and also Chief Accountant of the General Council of the Bar, wrote to Mr Rehman's chambers. He said that nothing had been paid under the judgment, and that Mr Rehman had first been uncontactable but had later said that he had sent a cheque for £2,000. The cheque had not been received, and Mr Rehman had said he would investigate, but Mr Buck had heard nothing. He wished to make a complaint to the chambers. The chambers replied on 10 November 2009 saying Mr Rehman had been sent a number of questions in relation to the complaint. Mr Buck wrote again on 11 December saying that the Trustees had not heard from Mr Rehman, had considered the matter and had decided to make a formal complaint to the Bar Standards Board, 'the BSB'. The complaint was received by the BSB on 5 January 2010. On 4 February 2010 the BSB wrote to Mr Rehman asking him to comment on the complaint. No response was received and the BSB wrote again on 10 March. The complaints officer spoke to Mr Rehman by telephone on 14 April. She asked for his comments on the complaint to be sent by email. None were received and she sent a further email on 21 April. Mr Rehman responded by email the next day. He said that he had sent a cheque to Mr Buck but had later found that the cheque he had in mind as having been paid was to the Inland Revenue. He said that he had then sent a further cheque to Mr Buck, which had not been cashed and must have been lost in the post. He said that he had tried to contact Mr Buck unsuccessfully. He said he was prepared to send the amount due. He said that he had contacted the BSB on many occasions. On 22 April the complaints officer repeated her request for his comments on the complaint. On 23 April she said that if she did not have a reply within 2 weeks, she would have to put the matter before the complaints commissioner. Mr Rehman replied that day. He said that he had not paid due to financial problems: he had a court order to pay a tax bill of £89,000 at £2,000 per month, and with the collapse of financial markets he had lost a lot of money in Dubai. On 28 April the officer emailed to say that no money had been received. Mr Rehman replied that day that he hoped to pay within 2 to 3 weeks. On 22 September 2010 the Complaints Committee of the BSB decided that Mr Rehman should be charged before a Disciplinary Tribunal. A hearing before a Tribunal in April 2011 had to be vacated. On 10 May 2011 Mr Buck received a cheque from Mr Rehman for the amount due under the judgment. On 20 May 2011 the President of the Council of the Inn's of Court made a further convening order nominating a Tribunal and appointing 29 June 2011 as the date for hearing. The hearing took place on that date with the outcome we have stated.

6. Mr Beaumont began his submissions to us on behalf of Mr Rehman by addressing the meaning of 'discreditable conduct'. The relevant part of paragraph 301 of the Code of Conduct in which the word 'discreditable' appears, is as follows:

301. A barrister must …. not:

(a) engage in conduct whether in pursuit of his profession or otherwise which is:

(i) dishonest or otherwise discreditable to a barrister;

(ii) prejudicial to the administration of justice; or

(iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;

(b) …….

7. The Tribunal approached the charge in terms of the allegation of discreditable conduct. It did so on the basis that the alternatives of diminishing public confidence in the legal profession or the administration of justice, or bringing the legal profession into disrepute, did not add anything in the circumstances. We will take the same approach. We think that, if charges were framed to make one allegation, the allegation which best fitted the circumstances, this would be fairer to defendants and would simplify hearings.

8. Mr Beaumont referred us to the definition of discreditable conduct proposed by Mr John Hendy QC in the Disciplinary Tribunal Case of *Sivanandan*, written judgment dated 6 September 2012:
"We conclude that the test in relation to a charge of discreditable conduct is whether there is a reasonable prospect of showing, beyond reasonable doubt, conduct which would be regarded by a reasonable barrister as conduct serious enough to bring into question whether or not the person charged was fit to remain a barrister (whether practicing or not)."

9. Mr Beaumont suggested that the passage had been approved by Collins J in the Visitors' case of *O'Connor v the Bar Standards Board*, 17 August 2012. In *O'Connor* Collins J did cite a passage from *Sivanandan*, but it was not this passage and the judgment in which this passage was contained followed the judgment of Collins J. In *O'Connor* Collins J agreed with the approach suggested in what was probably the oral judgment in *Sivanandan* that 'discreditable' in the context meant discreditable enough to warrant a charge and public hearing. We see a major problem with Mr Hendy's test cited by Mr Beaumont. For there are many charges of discreditable conduct where the charge is properly brought but the conduct is not so serious as to raise a risk of the barrister being disbarred because a lesser penalty would be appropriate and sufficient.

10. 'Discreditable' as defined in the Shorter Oxford Dictionary means 'bringing discredit to, shameful, disgraceful.' Paragraph 301 is not concerned with trivial matters, but otherwise we do not think that any further definition is necessary. It is for the tribunal to decide whether the conduct in question is discreditable to a barrister and sufficiently discreditable to warrant a finding against the barrister. The Tribunal should, of course, approach that objectively, and we do not think that references to the reasonable man, or the man on the Clapham omnibus - as occurred during the hearing in the present case, really assist.

11. Mr Beaumont submitted to us that it could not be discreditable conduct for a barrister simply to fail to pay a debt, whether a judgment debt or otherwise, because he lacked the means to pay. We accept that, and it was also accepted by the Tribunal. There must be something in the circumstances relating to the debt and its non-payment which makes the non-payment discreditable.

12. In its written judgment the Tribunal stated in paragraph 8:
"Mere non-compliance with an order to pay a sum of money was not, by itself, necessarily discreditable. The failure to comply needed to be seen in the context of facts before and after judgment was entered against the Defendant. We considered five factors:-
    (1) The nature of the debt. It was an interest-free loan made by a professional body to provide financial assistance to new entrants to the profession. Those who would suffer from the delay in repayment would be future recipients of funding;
    (2) The failure to pay was over very many years, the total sum being due by October 2005;
    (3) The order of the court. We did not know whether the Defendant had input into the order but we assumed that he had either requested to pay the judgment by instalments or that he could and should have done so;
    (4) No attempt was made to contact the court or the creditor to vary the order;
    (5) The Defendant alleged that he had sent a cheque for £2,000. ….. In the circumstances we rejected his evidence that he sent the creditor a cheque for £2,000 as untrue."
It was on the basis of these matters that the Tribunal found the charge proved.

13. Mr Beaumont submitted that the Tribunal was wrong to rely on these matters. We are satisfied that the Tribunal was entitled to rely on the nature of the original debt as adding to the seriousness of the non-payment of the judgment. It was inevitable that if money was not repaid, the fund available for others was reduced. The fact that the loan had been outstanding for so long before the judgment added to the importance of paying the judgment. The order to pay £200 a month was made as a result of an offer by Mr Rehman as shown by Mr Buck's complaint. That was in evidence. This added to the gravity of Mr Rehman's failure to make any payment. The Tribunal did not hold that he made the offer in bad faith. Mr Rehman did not offer any evidence explaining why he both agreed to pay and failed to pay. The Tribunal was entitled to take account of the fact that Mr Rehman had done nothing about the non-payment but had remained silent after the order was made. We consider that all of these matters are straightforward.

14. The Tribunal found that Mr Rehman had lied about sending a cheque. We have read the evidence and consider the Tribunal were well justified in making that finding. We also record that even now Mr Rehman has not sought to introduce evidence from his cheque book. The order for payment at £200 per month was made on 10 August 2009. Mr Rehman told Mr Buck in October 2009 that he had sent a cheque for £2,000. When Mr Buck said that it had not been received, Mr Rehman said he would investigate. On 29 April Mr Rehman

stated in an email to the BSB that having thought he had sent a cheque to Mr Buck he had later appreciated that the cheque he had had in mind was payable to, and was paid to, the Inland Revenue. He said that he then sent a cheque to Mr Buck, which was never cashed and must have been lost in the post. Those were the lies. Mr Rehman also lied to the Tribunal to the same effect.

15. It is apparent from our reading of the transcript that the lie issue, as we may call it, played a large part at the hearing, and we think also in the Tribunal's conclusion that Mr Rehman's conduct was discreditable. Mr Beaumont submitted that if the BSB were to rely on dishonesty it must be charged. In support of that submission he much later supplied the decision of the Divisional Court in *Singleton v The Law Society* [2005] EWHC 2915. He said that the Tribunal was wrong to take Mr Rehman's lies into account in assessing whether Mr Rehman's conduct in relation to the non-payment of the debt was discreditable. Mr Singla submitted for the BSB that the Tribunal was entitled to take account of Mr Rehman's lies to Mr Buck and the BSB and also of his lies to the Tribunal. He submitted that *Singleton* was distinguishable on its facts.

16. We have no hesitation in rejecting the submission that the Tribunal was entitled to take account of Mr Rehman's lies to the Tribunal in deciding whether the failure to comply with the court order was discreditable. What he said to the Tribunal was not part of the circumstances relating to the non-payment. If a defendant lies to a Disciplinary Tribunal, that may be a serious matter which can be met with a subsequent charge of dishonest conduct, but it cannot be part of the original offence. We do not consider that the Tribunal here fell into this error. The emphasis was on the lies to Mr Buck and in his email to the BSB.

17. Before the Tribunal heard evidence the Chairman raised the question whether dishonesty was involved and, if it was, whether it needed to be a separate charge. Mr Singla answered that it was part of the discreditable conduct. The Chairman also raised the matter with Mr Rehman's counsel asking whether dishonesty in the course of an explanation for non-payment could be discreditable without having to be charged separately as dishonesty. Counsel accepted that dishonesty could be included in a charge of discreditable conduct because dishonesty was discreditable. In his closing address he dealt with the alleged dishonesty on the basis that, if proved, it was an aggravating feature. We will return to the circumstances of this.

18. The words in paragraph 301 of the Code are 'dishonest or otherwise discreditable to a barrister'. We consider that where an allegation of dishonesty forms part of a disciplinary case dishonesty should ordinarily appear in the charge. The barrister is entitled to know that dishonesty is alleged and to have the charge set out. *Singleton* is clear authority to that effect in relation to solicitors, and there can be no distinction.

19. It is, however, important to look at the particular circumstances to see whether there was procedural unfairness, as did the court in *Singleton.* Here directions had provided that Mr Rehman should serve any witness statement to be relied

on by him by 19 January 2011. His witness statement was not served until 28 June 2011, the day before the hearing. The BSB did not know until then whether he would be resisting the charge or what his defence would be. However, it did know, and had known for some time, that, on its case Mr Rehman had lied about having sent a cheque. It appears, however, that the BSB decided to rely on that and to cross-examine Mr Rehman about it only when it was learnt that Mr Rehman would give evidence in accordance with his witness statement. A difficult and perhaps unusual situation thus arose. Unlike the situation in *Singleton* Mr Rehman knew precisely what the case as to dishonesty was, and, unlike Mr Singleton, he was represented by counsel. The Chairman of the Tribunal was concerned whether dishonesty should be separately charged or could be treated as part of the discreditable conduct, and he raised this with Mr Rehman's counsel – page 17 of the transcript. In response counsel accepted that the alleged dishonesty might, if proven, be taken into account in deciding whether his conduct was discreditable rather than requiring a separate charge. That was the better course for him because there was a very real possibility that, if he had not so agreed, the Chairman would have required that a charge of dishonesty be added. That would have been to Mr Rehman's disadvantage. We consider that in these circumstances Mr Rehman cannot now complain that his lies while the judgment was still unpaid were taken into account by the Tribunal in considering whether his conduct in connection with the non-payment of the judgment was discreditable. There was no procedural unfairness in what occurred.

20. Appeals to the Visitors are by way of rehearing. We conclude that given the way matters developed before the Tribunal Mr Rehman cannot now say that his lies to Mr Buck and the BSB about having sent a cheque should not be taken into account in deciding whether his conduct was discreditable. We consider that taken together the five factors considered by Tribunal made Mr Rehman's conduct relating to his failure to pay discreditable, and discreditable in a serious way such as to merit the charge. We therefore conclude that the charge of discreditable conduct was established on the evidence before the Tribunal.

21. Mr Beaumont also raised what we may call a subsidiary point. The papers before the Tribunal included a BSB attendance note dated 24 March 2011. It was mainly about Mr Rehman's need to request an adjournment of the hearing fixed for 5 April 2011. It also recorded that Mr Rehman had asked whether there was a date for the hearing of his appeal to the Visitors from the findings of Tribunal which sat on 1 February 2010. This should not have been included in the papers for the Tribunal sitting on 29 June 2011. No objection was made to it and it is likely that it was not noticed. It was not referred to at the hearing. We do not consider that there is any real risk that the Tribunal took into account the fact that Mr Rehman had previously had an adverse finding against him in deciding whether the charge of discreditable conduct in relation to the judgment was made out.

<u>Submissions relating to the membership of the Tribunals</u>

22. We heard oral argument relating to the membership of the two tribunals. It was limited by the time available, one day having been set aside for the

hearing. In broad terms the submission for the BSB was that the points raised had all been determined adversely to Mr Rehman in three previous decisions of the Visitors, namely *Russell 1*, 12 July 2012, *Russell 2*, 23 May 2013, and *Panesar*, 1 December 2012, and that we should follow those decisions. It was submitted on behalf of Mr Rehman that these three decisions were wrong in law, in particular because they did not take account of decisions of the European Court of Human Rights, and should not be followed. We were informed that the principles applied in the three cases were to be considered by way of judicial review by a Divisional Court sitting on 16 to 18 July 2013 in the case of *Mehey v Bar Standards Board* and other cases including *Russell 1* and *Russell 2*. We have concluded that the right course is undoubtedly for us to await the delivery of judgment by the Divisional Court, and to reach our conclusions on the facts before us in the light of that judgment. The alternative would be to reach our own judgment on the basis of the limited argument we heard, which judgment might well itself be the subject of judicial review.

23. We will, however, record the five submissions which Mr Beaumont made to us on behalf of Mr Rehman:

(1) The prosecuting authority, the BSB, was involved in appointments of Tribunal members because Miss Desiree Artesi was a member of the Tribunals Appointments Body and of the Professional Conduct and Complaints Committee of the BSB, and so all the appointments were to be treated as of no effect. Miss Artesi had also 'sponsored' the proceeding against Mr Rehman relating to the judgment in that she was the person who had produced the report for the PCCC relating to the case.

(2) Members of the two Tribunals did not have sufficient security of tenure to comply with Article 6 of the European Convention on Human Rights.

(3) Members of the two Tribunals were not eligible for appointment because they were 'time-expired'.

(4) One member of the first Tribunal was not qualified to sit because she was not of sufficient standing.

24. The facts relating to the membership of the first Tribunal are as follows:

(1) The Tribunal was convened by order of Etherton LJ, the President of COIC, dated 13 January 2010.

(2) Chairman: Andrew Lennon Q.C. He was appointed to the list or panel of persons eligible to be appointed, 'the panel', for an initial period of 3 years by letter of 30 July 2009. The letter did not contain any power of termination.

(3) Bar representative: Ms Bushra Ahmed. She was appointed to the panel by letter of 30 July 2009 for an initial term of 3 years. The letter stated that if circumstances arose whereby her suitability for membership of the panel was in question, the President of COIC might withdraw her authorisation. Ms Ahmed did not have 7 years standing as required by paragraph 2(3)(b) of the Disciplinary Regulations 2009 as she did not hold a practising certificate until 5 September 2003.

(4) Lay member: Mrs Veronica Thompson – Ms Hows when appointed to the panel. She was appointed to the panel first by letter of 11 November 2005. The letter stated that her term of office was for 3 years, renewable for 3 years. It also stated that if circumstances arose whereby her suitability for membership of the panel was in question, the president of COIC might withdraw her from

the panel. She was appointed for a further 3 year term by letter of 11 December 2008. That letter stated that the President and her successor 'retain the right to discontinue your panel membership'.

25. It was submitted on behalf of Mr Rehman that all the appointments were to be treated as of no effect by reason of the first of the five submissions we have set out above. It was submitted in addition that Ms Ahmed's appointment was to be treated as of no effect because (1) the power of termination meant that she did not have sufficient security of tenure to comply with Article 6, and (2) she was not eligible because she was not of 7 years standing. It was submitted in respect of Mrs Thompson that the power of termination meant that she did not have sufficient security of tenure.

26. The facts relating to the membership of the second Tribunal are:

(1) The Tribunal was convened by order of Etherton LJ, the President of COIC, dated 20 May 2011.

(2) Chairman: David Halpern Q.C. A letter from COIC dated 2 August 2012 states that Mr Halpern 'began sitting on disciplinary panels prior to the adoption by COIC of the Terms of Reference for the Tribunals Appointments Body on 10 May 2006. COIC believes that prior to the adoption of these terms no rules governed the recruitment of individuals to COIC's lists, the terms of office were indefinite and appointment letters were not regularly, if ever, sent. The adoption of the Terms of Reference subjected existing appointments to a further three-year maximum term.'

(3) Bar representative: Arthur Moore. Mr Moore's position was the same as that of Mr Halpern.

(4) Lay representative: Pradeep Khuti. Mr Khuti was first appointed to the panel by letter dated 11 November 2005, for an initial term of 3 years renewable for a further 3. The letter stated that if circumstances arose whereby his suitability for membership of the panel was in question the President of COIC might withdraw him from the panel. Mr Khuti was appointed for a further 3 year term by letter of 11 December 2008. The letter stated that the President and her successor 'retain the right to discontinue your panel membership.'

27. It was submitted on behalf of Mr Rehman that all the appointments were to be treated as of no effect by reason of the first and fourth of the five submissions set out above. It was submitted in addition that Mr Halpern was not eligible because the further 3 year term had expired. It was submitted that in respect of Mr Khuti that the power of termination meant that he did not have sufficient security of tenure to satisfy Article 6.

28. It was submitted on behalf of the BSB the 'de facto' principle as considered in *Russell 1* and *Panesar* should be applied as necessary in the cases of Ms Ahmed and Mr Halpern.

29. Lastly, we record that at the hearing Mr Beaumont informed us that he was instructed by Mr Rehman not to pursue his further supplemental petition dated 5 April 3013. This sought to raise matters relating to the BSB's 'sponsor system' and the Race Relations Act 1976.

Outcome

30. The appeal by Mr Rehman against the merits of his conviction on 29 June 2011 is dismissed. We will hear further submissions as to the issues relating to the membership of the Tribunals on a date to be fixed once the judgment in *Mehey v Bar Standards Board* and associated cases is available.