Case No: PC2008/0263/D5

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: 23/05/2013

Before:

THE HONOURABLE SIR WYN WILLIAMS
MR ROBERT SLIWINKSI
MRS ALISON FISHER

- -

Between:

CARRON-ANN RUSSELL	**Appellant**
- and -	
BAR STANDARDS BOARD	**Respondent**

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- -

Mr Marc Beaumont (instructed by **CKFT Solicitors**) for the **Appellant**
Mr Clive Lewis QC, Mr John Caudle and Mr Tom Cross (instructed by **The Bar Standards Board**) for the **Respondent**

Hearing dates: 18 and 19 April 2013
- -

JUDGMENT

Sir Wyn Williams:

This is our unanimous judgment.

Introduction

1. The Appellant is a non-practising barrister who was called to the Bar of England and Wales in July 1986. In 1998 she was a registered foreign lawyer in a firm, Russell Henry, which she founded. Between 17 and 20 May 2010 and on 21 June 2010 the Appellant appeared before a Disciplinary Tribunal of the Council of the Inns of Court (hereinafter referred to as "the Tribunal") charged with an offence of professional misconduct. The particulars of the offence were:-

> "[The Appellant] engaged in conduct which was discreditable to a barrister, contrary to paragraph 301(a)(i) of the Code of Conduct in that while she was in practice as a registered foreign lawyer, subject to professional Regulation by the Law Society and the jurisdiction of the SDT under the Solicitors Act 1974, she dishonestly misled the solicitors' regulatory body by providing misleading information about the identity of her partners, namely that at a meeting on 14 September 1998 she told the solicitors' investigator, Mr Norton, that David Brian Rippon had been in partnership with her until 1 September 1998. This was not true, and she must have known it was not true, as Mr Rippon had never been in partnership with her. In respect of such conduct on 11 August 2005 she was struck off the Roll of Solicitors pursuant to finding that she was guilty of conduct unbefitting a solicitor."

On 21 June 2010, by a majority, the Tribunal found the charge proved. A sanction was imposed upon the Appellant; she was suspended from practice for a period of 2 years.

2. The Tribunal consisted of 5 members. They were His Honour William Barnett QC (a retired circuit judge) the chairman, Ms Mary Chapman, Mrs Veronica Thompson (lay members), Mr John Elliott and Mr John Smart (barristers).

3. On 29 June 2012 the Visitors (Sir Rabinder Singh, Mr Andrew O'Connor and Dr Manju Bhavnani) considered two preliminary issues in relation to the Appellant's appeal. Those two issues were:-

> "(1) Whether there was a defect in the tribunal's constitution. By the time of the hearing before [the Visitors] it had become clear that the only complaint made in this regard concerns the participation of Mr John Smart, one of the barrister members of the tribunal.
>
> (2) If there was some defect in the constitution of the tribunal, because Mr Smart should not have been a member of it, whether he had *de facto* authority to act, with a consequence that the tribunal proceedings were valid in any event."

The Visitors concluded that the Tribunal was validly constituted and that in any event Mr Smart had *de facto* authority to sit as a member of the Tribunal. The decision of the Visitors was handed down in a reserved judgment dated 12 July 2012 (hereinafter referred to as "the first Russell judgment").

4. On 17 January 2013 the Appellant was given permission to amend her petition of appeal. The amended petition was served on or about 8 February 2013.

5. At the previous hearing before the Visitors the Appellant was represented by Mr Anthony Speaight QC and Mr Marc Beaumont; the Respondent was represented by Mr Clive Lewis QC and Mr Tom Cross. At the hearing before us Mr Beaumont represented the Appellant; in respect of some of the issues raised in the amended petition of appeal Mr Lewis QC and Mr Cross represented the Respondent with Mr Lewis QC undertaking the advocacy; the remaining issues were dealt with on behalf of the Respondent by Mr Caudle. In very broad terms, Mr Caudle dealt with those grounds of appeal which relate to decisions made by the Tribunal during the course of the proceedings before it while Mr Lewis QC and Mr Cross dealt with issues which, at least in the main, first featured in the amended petition and which can be conveniently described as "procedural issues".

6. Before turning to deal with the issues raised in this appeal, however, it is as well to set out the relevant parts of the Disciplinary Tribunals Regulations 2009 ("the Regulations"), the Hearing before the Visitors Rules 2010 ("the Rules") and to consider the approach which we should adopt on an appeal under those Rules.

<u>The Disciplinary Tribunals Regulations 2009</u>

7. We were provided with the Regulations as amended in February 2012. The parties agree that the amendments made in February 2012 have no bearing on this case.

8. Regulation 2 is concerned with the composition of Disciplinary Tribunals. Reg. 2(1) provides that a Tribunal shall consist of either three or five persons. Reg. 2(2) provides that a five-person panel shall consist of a judge, two lay members and two practising barristers of not less than seven years standing. Each of those persons is to be nominated by the President of the Council of the Inns of Court (hereinafter referred to as "COIC". Reg. 2(4) is as follows:-

> "(4) In constituting a panel, the following rules shall be respected:
>
> a) ….
>
> b) ….
>
> c) ….
>
> d) No person shall be nominated to serve on a Disciplinary Tribunal if they
>
> i) are a member of the Bar Council or of any of its committees; or

ii) are a member of the BSB or any of its committees; or

iii) were a member of the Professional Conduct Committee of the BSB ("the Professional Conduct Committee") at any time the matter was being considered by the Professional Conduct Committee.

e) The President may publish qualifications or other requirements required in those appointed to be barrister or lay members of a Disciplinary Tribunal."

Reg. 4(7) provides:-

"At any time before the commencement of the substantive hearing of the charge, the President may cancel any or all of the nominations made pursuant to the Regulations, and make such alternative nominations as in the exercise of his discretion he deems to be necessary or expedient."

9. Following receipt of a copy of the charge or charges to be made against a barrister the President issues an order referred to in the Regulations as a Convening Order. Such an order specifies, inter alia, the names and status (that is, as Chairman, as lay member or as barrister) of those persons whom it is proposed should constitute the Tribunal to hear the case. Reg. 8(3) provides that the barrister charged shall have the right upon receipt of the Convening Order to give notice to the President objecting to any one or more of the proposed members of the Tribunal. In the event that the President determines that the objection is justified he may substitute a different person or persons – see Reg. 8(4).

10. Reg. 11 is concerned with the procedure to be adopted at a hearing before the Tribunal. It provides:-

"(1) The Tribunal shall apply the criminal standard of proof when adjudicating upon charges of professional misconduct.

(2) The proceedings of a Disciplinary Tribunal shall be governed by the rules of natural justice, subject to which the Tribunal may

a) (subject to paragraph (3) below) admit any evidence, whether oral or written, whether direct or hearsay, and whether or not the same would be admissible in a court of law;

b) give such directions with regard to the conduct of and procedure at the hearing, and with regard to the admission of evidence thereat, as it considers appropriate for securing that the Defendant has a proper opportunity of answering the charge or otherwise as shall be just;

> c) exclude any hearsay evidence if it is not satisfied that reasonable steps have been taken to obtain direct evidence of the facts sought to be proved by the hearsay evidence."

11. Finally we should refer to Reg. 13. This Regulation is concerned with decisions of courts or other Tribunals which may be relevant to the charge or charges faced by a barrister. Reg. 13(1)(b) provides:-

> "(1) In proceedings before a Disciplinary Tribunal which involves the decision of a court or Tribunal, the following rules of evidence shall apply provided that it is proved in each case that the decision relates to the Defendant:
>
> ……
>
> b) The finding and sentence of any Tribunal in or outside England and Wales exercising a professional disciplinary jurisdiction may be proved by producing an official copy of the finding and sentence."

By virtue of Reg. 13(2) the findings of fact by such a Tribunal upon which the conviction, sentence or judgment is based shall be admissible as prima facie proof of those facts.

The Hearings before the Visitors' Rules 2010 and the scope of an appeal to the Visitors

12. During the course of the oral submissions before us there was a debate about whether an appeal to the Visitors is by way of re-hearing or review. The Rules do not provide a definite answer although it seems to us that the combined effect of Rules 14 and 15 point towards an appeal being by way of re-hearing.

13. Be that as it may, this issue was considered in detail in R v Visitors to the Inns of Court ex parte Calder [1994] QB 1. In that case the Court of Appeal concluded that an appeal to the Visitors was by way of a re-hearing. Sir Donald Nicholls V-C put it thus:-

> "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 seemed 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 re-hearing 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 decisions 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……"

Stuart-Smith LJ said:-

> "I come then to the final ground of appeal, namely, that the visitors misdirected themselves as to the nature of their jurisdiction in that they treated the matters as one of review rather than appeal by way of re-hearing on merits. It was not contested before us that the proper approach was that of an appellate court re-hearing the case on its merits, such as is the position of the Court of Appeal on appeal in a civil case from the decision of a judge alone. Although the point has never fallen to be decided, I agree that this is the correct approach. All the cases dealing with a judges' jurisdiction as visitors referred to it as an appeal to the visitors. There is no warrant for thinking that they limited themselves to the circumstances in which the prerogative writs of prohibition, mandamus or certiorari would lie, that being the foundation of the judicial review jurisdiction. The language of the Hearings before the Visitors Rules 1991 is appropriate for an appeal and not a review only. Thus the Appellant is referred to as such and not an Applicant: Rule 2(2). The grounds of appeal are against the finding and the petition should refer to the evidence relied upon: rules 5 and 7(2)(e). The visitors may either allow the appeal or order a re-hearing: rule 11(3). They are not limited to quashing the order. Like any other appellate court, the visitors do not as a rule hear evidence from witnesses unless they give leave under rule 10(6) & (7). Accordingly they should adopt the same approach to findings of fact made by the tribunals as the Court of Appeal do in findings of the trial judge: see *Yuill v Yuill* [1945] P.15; *Watts or Thomas v Thomas*[1947] A.C. 485 and *Powell Streatham Manor Nursing Home* [1935] A.C. 243."

14. At the time of the decision in Calder an appeal to the Court of Appeal Civil Division was governed by the Rules of the Supreme Court. There is no doubt that an appeal under that regime was by way of re-hearing.

15. The Civil Procedure Rules 1998 now govern appeals to the Court of Appeal Civil Division and, for that matter, other appeals such as from a Circuit judge to a High Court judge. CPR 52.11-(1) provides that every appeal will be limited to a review of the decision of the lower court unless a practice direction makes different provision for a particular category of appeal or the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

16. Despite the change in the rules governing civil appeals we are satisfied that appeals to the Visitors should be by way of re-hearing. As we have said the Rules point in that direction and the Visitors have, consistently since the decision in Calder, proceeded on the basis that an appeal to them is by way of re-hearing – a recent example is O'Connor v Bar Standards Board (Sir Andrew Collins, Mr Mark Mullen and Mrs Kate Warnock-Smith) 17th August 2012; see, in particular, paragraph 12 of the judgment in that case.

17. That said the appellate courts are, generally, slow to allow an appeal against a decision of a lower court which is founded upon the exercise of discretion. In G v G (Minors: Custody Appeal) [1985] 1 WLR 647 at 652 Lord Fraser said-

> "….the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."

In Phonographic Performance Ltd v AIE Rediffusion Music Ltd [1999] 1 WLR 1507 at 1523 Lord Woolf MR explained:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

18. In so far as the decisions of the Tribunal which are impugned in this case are founded upon the exercise of discretion we propose to adopt the approach which is encapsulated in G and Phonographic Performance Ltd.

The Tribunal decisions under challenge

19. There were two principal factual issues to be determined by the Tribunal. First, was the Appellant in partnership with Mr Rippon in the firm of Russell Henry from about January 1998 to 1 September 1998? Second, had she asserted that she was when questioned by an investigating officer for the Law Society, Mr Norton, on 14 September 1998? The case for the Respondent was that Mr Rippon had never been in partnership with the Appellant yet when questioned by Mr Norton the Appellant claimed that a partnership had subsisted between Mr Rippon and herself between January 1998 and 1 September 1998.

20. These factual issues had been before the Solicitors Disciplinary Tribunal (SDT) on 11 August 2005. SDT had made factual findings adverse to the Petitioner. At the hearing before SDT a statement from Mr Norton had been admitted as evidence of its truth and Mr Rippon had given oral evidence. It was always the intention of the Respondent to call both Mr Norton and Mr Rippon to give oral evidence before the Tribunal.

21. On any view Mr Rippon's evidence was crucial. Yet it was clear to the Respondent long before the hearing before the Tribunal commenced on 17 May 2010 that Mr Rippon was very reluctant to give evidence. It is necessary to set out, in some detail, what occurred between the Respondent and Mr Rippon in the months leading to the hearing before the Tribunal.

22. On 15 January 2010 a direction was made that the Respondent should serve the witness statements of any witnesses upon whose evidence it wished to rely by 4pm 5 February 2010. On 20 January 2010 Ms Fredelinda Telfer, a senior case officer employed by the Respondent, wrote to Mr Rippon enquiring

> "…if you could contact me as a matter of urgency to advise me whether you are prepared to make a statement and, if so, whether you are willing to come to the tribunal to give evidence if necessary."

On 1 February 2010 Mr Rippon telephoned the Respondent and left a message to the effect that he had "no problem in helping" but he did not wish to attend a hearing since the matters in question had occurred more than 10 years previously and he, Mr Rippon, was aged well over 70.

23. That same day Ms Telfer sent Mr Rippon a draft witness statement by e-mail. It took the form of a short statement which verified a transcript of the evidence which he had given before SDT. The transcript was sent with the statement.

24. Mr Rippon did not sign the draft statement. Accordingly, on or about 5 February 2010 Ms Telfer served the unsigned draft witness statement and transcript which had been sent to Mr Rippon.

25. Not surprisingly, the solicitors acting for the Appellant asked that a signed statement be served. On 11 February 2010 Ms Telfer wrote to Mr Rippon and asked him to consider the draft statement, amend it, if necessary, and then sign and return it. There was no response to that letter and Mr Rippon failed to reply to a follow up letter dated 18 February 2010.

26. On 1 March 2010 a further letter was sent to Mr Rippon asking that he sign a copy of the draft witness statement. Mr Rippon replied as follows by letter dated 3 March 2010.

> "Thank you for your letter dated March 1, with enclosures. I regret the delay in writing to you since I have been away from the office. I confirm that I have no objection to your relying on the extracts from evidence in the earlier proceedings but I really cannot offer any more help than that. Ten years have elapsed and my recollection of the matter has indeed faded. However, I hope that the extract will be helpful to you."

27. On 26 March 2010 Ms Telfer wrote asking that Mr Rippon sign the witness statement and enquiring whether he would attend as a witness at the hearing before the Tribunal on 17 May. There was no response and so a further letter was dispatched to Mr Rippon dated 23 April 2010. On 5 May 2010 Mr Rippon replied to that letter to the

effect that he did not have a precise recollection of events but nonetheless he would sign the statement with some amendments. He said in terms that he was not willing to attend the hearing.

28. On 6 May Ms Telfer asked him to reconsider. She wrote:-

> "I note your comment that you really are not willing to attend the Hearing, but I ask that you re-consider this. Ms Russell, in her defence statements served today, states that in fairness she believes that you should be required to come to the tribunal. The Bar Standards Board is the independent regulatory body of the Bar Council which is responsible for regulating barristers called to the Bar in England and Wales. We take decisions to bring disciplinary tribunal proceedings in the public interest and we ask you, as a legal professional, to consider the public interest and also Ms Russell's view that it would be fairer to her for you to attend the Tribunal."

Despite the Respondent's plea Mr Rippon replied by repeating his unwillingness to attend and suggesting that attendance on 17 May 2010 "would be impossible since I have an important medical appointment in Sussex on that day."

29. The next day, 12 May 2010, Ms Telfer e-mailed Mr Rippon asking him to attend on Tuesday 18 May. Mr Rippon did not respond; as we understand it as of 17 May 2010 the Respondent simply did not know whether or not Mr Rippon was intending to attend the Tribunal.

30. Mr Rippon did not appear at the Tribunal on the first day, 17 May 2010. The hearing began with submissions about what should be done given his non-attendance. Mr. Beaumont submitted that the case against the Appellant should be dismissed. Alternatively, he submitted that an order should be made "debarring" the Respondent from relying upon the evidence of Mr. Rippon. Quite early on in the course of submissions the chairman of the Tribunal remarked:-

> "We have read the documents. It is clear on the face of it that Mr Rippon is an unwilling witness. Having said that, we have no powers to issue a subpoena. In those circumstances, however, surely it should be indicated to him that the tribunal is not impressed by that. He should be reminded of the fact that he is a solicitor of the Supreme Court. It seems to me that this is something that should not be tolerated in a solicitor who behaves in this way."

Counsel for the Respondent said:-

> "Those comments are very welcome. We will pass them on. I can say with some confidence that we have reminded him of that position."

31. During the course of his ruling on the applications to dismiss or for a debarring order the chairman pondered aloud whether or not it had been open to the Respondent to

obtain a witness summons from the High Court to compel Mr Rippon's attendance. The Tribunal reached no concluded view on that point. The chairman then made comments about the desirability of Mr Rippon attending the Tribunal:-

> "Having said that, it is fair to say that they have tried to get him. It is clear that we should indicate here our displeasure at a solicitor of the Supreme Court, who is still in practice, not coming along to give evidence in a serious proceeding such as these. It is to be hoped that he will, in the light of those observations, be encouraged to come…..
>
> It should be made clear, in the way I have indicated, that we expect him to be here tomorrow. I make it clear that, although we are not going to make a debarring order to say that if he is not here, for example, by 10 or 1030 tomorrow morning, the Bar Standards Board will be debarred from calling him, we make it clear that unless there is good reason for his not being here at 1030 tomorrow morning, and Mr Beaumont makes a further application, it is highly likely that we will make an appropriate order to say that the matter has to proceed and we will not be admitting that evidence."

32. The Tribunal declined to dismiss the case against the Appellant; it also declined to make a debarring order. Detailed reasons were given for reaching those conclusions which are to be found in the transcript of the proceedings.

33. Immediately following the ruling the Appellant was asked to plead to the charge. She pleaded not guilty. Counsel for the Respondent opened the case against her and a witness, Mr Marriot, was called to give oral evidence. There then followed the following exchange:-

> "MR ACHESON [Counsel for the Respondent]: I'm asked to raise another matter. Given the tribunal's ruling in relation to whether a witness summons had been an available sanction it would have adopted, our efforts might be assisted by the tribunal sanctioning the use of the Council of the Inns of Court headed notepaper to set out what your observations were to Mr Rippon.
>
> THE JUDGE: Send him an e-mail with that on, part of the attachment?
>
> MR ACHESON: That would be one suggestion.
>
> MR BEAUMONT: I would suggest that such a thing is unknown to this tribunal. It has no power to do it. It must be careful not to appear to be partisan, in the sense of being excessively interested in the evidence of a prosecution witness. It is not an inquisitorial procedure. It is an adversarial procedure. It appears to be no accident that you do not have power to summons the witness. I could have said nothing and

> stored up the submission for a later stage. Perhaps a letter from the Bar Standards Board is quite frightening enough. I do not think you need do anymore.
>
> THE JUDGE: What does it say? What does the letter from the Bar Standards Board say to the witness?
>
> MISS TELFER: We have not done one.
>
> MR ACHESON: There was a phone call to Mr Whitehouse of the firm. His avenue of contact to Mr Rippon would be by e-mail.
>
> MISS TELFER: The Bar Standards Board could get Miss Hilson to fax it as an attachment. They could e-mail it to them.
>
> THE JUDGE: No. I am not happy about him acting as a conduit.
>
> MR ACHESON: He is our only avenue.
>
> THE JUDGE: As far as you are concerned he has sent it.
>
> MISS TELFER: When I spoke to Mr Whitehouse at lunch time today, he said that he did not have a telephone number for Mr Rippon but he did have an e-mail. He was going to send him an e-mail message to record the comments that you had given this morning.
>
> THE JUDGE: We have listened to what you have said in this regard. I think we ought to go out."

34. The Tribunal retired to consider the request made on behalf of the Respondent. In due course a ruling was given to the effect that it was appropriate for the Tribunal to write to Mr Rippon; the chairman dictated what was to be written. The letter was sent on the headed notepaper of COIC. It was sent as an attachment to an email to an address which was not Mr Rippon's but that of a member of his firm. It is probable that the gist of what the chairman had said earlier in the day had been communicated, at least to an intermediary, during a telephone call. The letter reads:-

> "The tribunal consider David Rippon may have evidence which should be heard in the interests of justice and accordingly request David Rippon, as a solicitor of the Supreme Court, to attend the Disciplinary Tribunal of the Council of the Inns of Court at 10 Fleet Street, London EC4Y 1AU, on Tuesday 18th May 2010 at 10.30am."

35. Mr Rippon did not appear by 10.30 on 18 May 2010. Counsel for the Respondent addressed the Tribunal shortly and succinctly. He said, in effect, "enough is enough" and he was proposing to call his next (and only remaining) witness, Mr Norton, and then close his case.

36. Mr Beaumont renewed his application for a debarring order. The Tribunal declined to make such an order at that stage lest there was a good reason why Mr Rippon had not attended. Mr Norton was called to give evidence. At the conclusion of his evidence Counsel for the Respondent formally closed his case.

37. It must have been at or about this time that Mr Rippon sent an e-mail to the Respondent. In it he indicated his willingness to sign a witness statement. The probability is that Mr Rippon also spoke to Ms Telfer on the telephone and indicated his willingness to attend the Tribunal on Wednesday 19 May.

38. The proceedings continued. The Appellant gave evidence as did two witnesses on her behalf. By the conclusion of the proceedings on 18 May both the parties and the Tribunal were live to the possibility that Mr Rippon would appear the next day.

39. Mr Rippon appeared at the hearing on 19 May 2010. Counsel for the Respondent presented a skeleton argument to the Tribunal in support of his application to call Mr Rippon to give evidence. Mr Beaumont opposed the application with vigour. Following a lengthy adjournment to consider the position (approximately one hour) the Tribunal ruled that Mr Rippon should be permitted to give evidence. It gave detailed reasons as to why it had reached that conclusion and we shall return to those reasons in due course.

40. While the Tribunal was considering whether to permit the Respondent to re-open its case and call Mr Rippon to give evidence he, Mr Rippon, left the Tribunal. It was not then known whether he intended to return. The Tribunal ruled that if Mr Rippon was not present by the time that all the evidence for the Petitioner had been called the Respondent would not be permitted to call Mr Rippon. In fact, Mr Rippon had returned to the Tribunal by the time the last witness for the Petitioner had completed his evidence.

41. Mr Rippon was called to give evidence during the afternoon of 19 May. Before he began his evidence he signed his witness statement. He was cross-examined at length. A significant part of the cross-examination was concerned with the reasons why Mr Rippon had not signed his witness statement until 19 May and why he had not attended the Tribunal until that date. The cross-examination continued into 20 May.

42. Following Mr Rippon's evidence the Tribunal afforded the Petitioner an opportunity to give further evidence. She declined. Mr Beaumont then made a closing speech on her behalf. By the time he had finished there was insufficient time to complete the hearing on 20 May. The Tribunal adjourned to 21 June 2010. On that day it produced a written judgment explaining the decision to find proved the charge of professional misconduct. On 25 June 2010 HH William Barnett QC compiled a report of the proceedings before the Tribunal. His report contains the substance of the reasons why the Tribunal made the decisions which are under challenge before us.

<u>The letter to Mr Rippon and the remarks which preceded it</u>

43. Mr Beaumont submits that HH William Barnett QC should not have complained openly about Mr Rippon's non-attendance (see paragraphs 30 and 31 above). Mr Beaumont argues that the chairman's words contained scarcely veiled threats to the

effect that if Mr Rippon did not attend the Tribunal and give evidence he might be the subject of disciplinary proceedings. Mr Beaumont submits that in expressing himself in argument and in his ruling as he did, the chairman exceeded his function and "entered the arena".

44. Further, Mr Beaumont submits that the Tribunal should not have sent the letter on the headed notepaper of COIC inviting Mr Rippon to attend the Tribunal to give evidence. He submits that it was tantamount to the issue of a witness summons even though the Tribunal had no power to issue a subpoena or witness summons. Accordingly, submits Mr Beaumont, the sending of the letter was ultra vires the powers of the Tribunal. As an alternative Mr Beaumont submits that by sending the letter the Tribunal manifested partiality towards the Respondent so that a fair-minded and informed observer would conclude that there was a real possibility of bias on the part of the Tribunal. Finally, as yet a further alternative, Mr Beaumont suggests that by sending the letter the Tribunal undermined its own impartiality within the meaning of Article 6 of the European Convention on Human Rights (ECHR).

45. It is common ground that the Tribunal had no power to order Mr Rippon to attend. Mr Caudle, however, submits that the letter and the oral exhortations which preceded it were, in truth, no more than requests by or on behalf of the Tribunal that Mr Rippon should attend to assist the Tribunal in reaching a just conclusion in the proceedings before it. The Tribunal was not exceeding its jurisdiction or its power since it was making no direction or order. To repeat, all that the Tribunal was doing was seeking to persuade Mr Rippon to come to give evidence albeit in robust terms.

46. We accept that the Tribunal did not act outside the ambit of its jurisdiction or in excess of its power when the chairman made his exhortatory remarks and/or when it caused the letter to be sent to Mr Rippon. The remarks constituted a strongly worded request that Mr Rippon should attend to give evidence; the letter was less strongly worded. Mr Rippon was free to accept or reject the invitation to give evidence. In our judgment there was no veiled threat of a complaint to Mr Rippon's professional body in the event that he declined to give evidence either in the words spoken by the chairman or in the letter or even if the words spoken and the terms of the letter are taken in combination.

47. Further we reject the submission that the chairman's remarks and the sending of the letter had the effect of undermining the impartiality of the Tribunal or manifested partiality towards the prosecution. We will consider the law relating to bias and judicial independence within the meaning of Article 6 of the Convention later in this judgment. At this stage it is sufficient to say that we are satisfied beyond any reasonable doubt that a fair-minded and informed observer would not conclude that the chairman's remarks and the sending of the letter demonstrated a real possibility of bias on the part of the chairman personally or the Tribunal. The conduct complained of was not "entering the arena"; this was no more than legitimate encouragement to an important witness to give his evidence. There was nothing improper in the Tribunal pointing out that it expected that a solicitor - an officer of the court - would assist its process by giving evidence about crucial aspects of the case which it was considering. Its conduct simply cannot be compared with the examples of judicial behaviour which were considered in the authorities cited to us.

The refusal to make a debarring order

48. Mr Beaumont submits that the Tribunal ought to have made an order debarring the Respondent from relying upon the evidence of Mr Rippon. He points out that he applied for such an order at "various key stages of the trial" and he argues that there was no good reason for refusing to make such an order either on 17 or 18 May 2010.

49. Mr Caudle accepts that it was open to the Tribunal to make such an order but submits that the Tribunal was entitled to decline to make a debarring order essentially for the reasons given by the Tribunal when refusing to make the order sought.

50. The Tribunal was first asked to make a debarring order at the commencement of the proceedings on 17 May 2010. At that stage Mr Beaumont's application for the order was inextricably linked to an application made, at the same time, to strike out the proceedings against the Petitioner.

51. Much of the ruling given at the conclusion of Mr Beaumont's submissions related to the application to strike out. However, during the course of the ruling the Tribunal said, in terms, that it expected Mr Rippon to attend the following day and that, in those circumstances, a debarring order was not appropriate.

52. It is clear from the ruling that the Tribunal was fully aware of the history which we have described in paragraphs 22 to 29 above. The Tribunal knew that Mr Rippon was a reluctant witness. Equally, it was aware of the crucial nature of his evidence. In our judgment it cannot be said that the Tribunal exercised its discretion wrongly or inappropriately or failed to take a material consideration into account when deciding that rather than make a debarring order it would encourage Mr Rippon to attend and review the position the following morning. Finding, as we do, that there was nothing unlawful or inappropriate about the Tribunal encouraging Mr Rippon to attend, we see no basis for criticising its discretionary decision to decline to make a debarring order.

53. We acknowledge that when the Tribunal made its decision to refuse a debarring order it had it in mind that Mr Rippon might be attending a medical appointment on the morning of 17 May 2010. It subsequently transpired that it was his wife not he who had the appointment. It is not suggested, however, that anyone at the Tribunal or any employee of the Respondent knew of the true state of affairs on the morning of 17 May 2010.

54. As Mr Beaumont points out in his skeleton argument, although the Tribunal declined to make a debarring order it said in clear terms that it was very likely to make such an order in the event that Mr Rippon did not appear the following day "without good reason". First thing on 18 May the position of Mr Rippon was discussed. Counsel for the Respondent explained what had been done to bring to Mr Rippon's attention the letter of the Tribunal. He then continued:-

> "There is no Mr Rippon as now. I suppose it is possible that there are medical reasons or other reasons for his failure to attend but, in the circumstances, I think the moment has come when we must say that enough is enough. I am going to

> propose to call the next witness and very shortly thereafter the Bar Standard's case will close."

After further exchanges between Counsel for the Respondent and the chairman Mr Beaumont intervened to seek a debarring order.

55. The Tribunal does not appear to have spent time considering Mr Beaumont's application for an order at this stage. By reference to the transcript the chairman simply responded by saying:-

> "I think we can short circuit this. We have been talking for about a quarter of an hour. Unless there is a good reason, a train being late, something of that nature, we will be minded to make a debarring order. We are not going to make at the moment. There would have to be a good reason. I think the best thing is to get on."

56. Mr Beaumont submits that the Tribunal was wrong to decline to make a debarring order at that point. He submits that it "sidestepped" the issue; it ought to have ruled upon the application one way or the other.

57. In our judgment the Tribunal, by the chairman, did rule upon the application. In substance the Tribunal declined to make a debarring order because it wished to cater for the possibility that Mr Rippon was unavoidably delayed.

58. The Respondent called Mr Norton to give evidence; Mr Beaumont asked a few questions in cross-examination and individual members of the Tribunal asked further questions. At the conclusion of Mr Norton's evidence, as we have said, the Respondent closed its case.

59. We acknowledge that a differently constituted Tribunal might have made a debarring order when Mr Rippon failed to appear at the start of proceedings on 18 May 2010. We do not consider, however, that the Tribunal is reasonably to be criticised for allowing for the possibility that Mr Rippon would come late. In our judgment it was a reasonable exercise of discretion for the Tribunal to wait to see whether Mr Rippon arrived at the Tribunal during the course of the morning. We would probably have made the same decision ourselves.

60. It appears from the transcript that the Respondent first became aware that Mr Rippon might attend as a witness just before lunch on 18 May. By that time the Petitioner had begun her evidence. During the course of a short adjournment in the afternoon Mr Beaumont raised, again, the issue of a debarring order. He sought clarification from the Tribunal as to whether it had made such an order that morning and on being told that it had not he indicated that he would "be applying forthwith that you make that debarring order given the circumstances which are now well known to the Tribunal."

61. This application, of course, was made in the middle of the Petitioner's evidence. In fact she was being cross-examined by Counsel for the Respondent. He protested about dealing with Mr Beaumont's application at that stage, a protestation with which the Tribunal agreed. The Tribunal not did adjudicate upon it. It is hardly to be criticised for failing to deal with this application in the middle of the cross-

examination of the Petitioner and to be fair to Mr Beaumont he did not suggest that the Tribunal had fallen into error at this stage.

62. Following the conclusion of the Petitioner's evidence there was a short "discussion" about what might occur if Mr Rippon were to attend. Mr Beaumont did not seek a ruling upon whether a debarring order should be made; rather he was at pains to point out that the Respondent had closed its case. The discussion between the chairman and Counsel ended with the chairman saying:-

> "If you are right that the case has been closed it must be rare circumstances where he could adduce evidence as to why he is not here. I think you had better sort that out. It might be better to get the witness out of the way first."

The reference to the witness was a reference to Mr Donald Curry who gave evidence on behalf of the Petitioner. At the conclusion of Mr Curry's evidence Mr Beaumont indicated that there was one more witness for the Petitioner but that he was not available until the next morning. Accordingly, the Tribunal adjourned. Before it did so, however, there was a further "discussion" about the position of Mr Rippon although nothing was decided. At this stage Mr Beaumont did not press for a debarring order. That is not surprising; his stance at this stage was that the Respondent had closed its case and it was simply not appropriate for the Tribunal to permit the Respondent to reopen its case and call Mr Rippon.

63. We have reached the conclusion that there is no proper basis for concluding that the Tribunal was wrong in any of its decisions to decline to make a debarring order. Even if we are wrong in this conclusion, however, the Petitioner faces this further difficulty. Mr Beaumont readily acknowledges that just as the Tribunal had power to make a debarring order so it had the power to revoke it. Even if, therefore, a debarring order had been made in respect of Mr Rippon's evidence on 18 May 2010, as Mr Beaumont urges should have been the case, necessarily it would have been reviewed when Mr Rippon appeared at the Tribunal on 19 May. Further, no doubt, the issue of whether the debarring order was to be revoked would have been determined by reference to the very same considerations which were germane to the decision as to whether or not the Respondent was to be permitted to reopen its case and call Mr Rippon to give evidence. The two issues, inevitably, would have been inextricably linked. Accordingly, it seems to us that the crucial issue is whether or not we should uphold the Tribunal's decision to permit the Respondent to reopen its case and call Mr Rippon to give evidence. It is to that issue which we now turn.

<u>Permitting the Respondent to reopen its case so as to call Mr Rippon as a witness</u>

64. It is clear that the Tribunal gave very anxious consideration to whether or not it should accede to the Respondent's application to reopen its case and call Mr Rippon. It gave a long and detailed ruling. The substance of its ruling is contained within the chairman's report to which we have referred in paragraph 42 above. Paragraph 17 of the report reads as follows:-

> "The Panel's decision was, in summary, as follows:

a. We want to make it very clear that we have given very considerable thought to this matter.

b. We were well aware of the fact that the prosecution decided that they would close their case and they did so having being asked to do so by Mr Beaumont so that it was clear that that was all the evidence they intended to call. We indicated that we were not prepared to make a debarring order, but there would need to be a good reason for the witness not to come.

c. Mr Rippon is a vital witness. He had not signed his proof of evidence and he had been reluctant to come. We have taken those factors into account. We are well aware it is exceptional to allow a witness to give evidence after the close of the claimant's case.

d. We considered the position under civil and criminal law, but this is a tribunal with Regulations governing its procedure. Regulations 11 makes it clear that we should be governed by the rules of natural justice subject to which the tribunal may, inter alia, give directions regarding the admission of evidence as it considers appropriate, for securing that the defendant has a proper opportunity of answering the charge or otherwise as shall be just.

e. We take that at face value, and are concerned with the interests of justice, fairness and the regulatory framework.

f. We bear in mind authorities from other jurisdictions, and we carefully consider cases referred to us today and *Malcolm v DPP*.

g. We have very carefully listened to the very able submissions of Mr Beaumont. We bear in mind the unequivocal election of the BSB when closing their case. Mr Beaumont had discussed with the Defendant whether she wished to give evidence and we bear in mind why Mr Rippon has not attended and have considered the bundle.

h. Having said that, we bear in mind that as far as the recent situation is concerned, there was a good reason for Mr Rippon's non-attendance. There was a breakdown in communication. He did not get certain documents. Therefore taking these factors into account we consider we should allow the evidence in.

i. We have weighed up very carefully all of Mr Beaumont's and Mr Acheson's arguments and it seems to us that it is not in the circumstances unfair to her, that this evidence should go in.

j. If matters come up which she has not dealt with in her evidence, of course she could be recalled. We will bear in mind that she may have to give evidence twice. We bear in mind her illness, which happily, at the moment, is in regression.

k. Therefore taking into account all the factors, this being a discretionary matter, on these facts, we should hear the evidence; the exceptional course should be taken in this case.

l. Therefore Mr Rippon should be allowed to give evidence."

65. We should make it clear that the ruling given by the Tribunal was made in the context of detailed submissions from Counsel for the Respondent and Mr Beaumont. Counsel for the Respondent produced a written argument. Mr Beaumont made detailed oral submissions. Mr Beaumont, in particular, sought to persuade the Tribunal that it should approach the issue for determination very much as would a criminal court or a court trying a civil dispute.

66. It seems to us that the Tribunal was right when it concluded that it should determine the issue by reference to the Regulations and in particular Regulation 11(2). The task of the Tribunal was to conduct the proceedings in accordance with the rules of natural justice. With that principle as the overarching context it was empowered to give such directions with regard to the conduct of and procedure at the hearing as it considered just and appropriate for securing that the Petitioner had a proper opportunity of answering the charge against her.

67. Before us there were no detailed submissions as to the content of the rules of natural justice in a forum such as the Tribunal. Obviously the rules require that the Tribunal acts fairly but what constitutes fairness in any given case depends on a number of factors - see R v Home Secretary ex parte Doody [1994] 531 and, in particular, Lord Mustill at page 560.

68. It seems to us that in determining what is fair in any given case before the Tribunal it would be bound to take account of the following factors. First, its own purpose; it is a body convened to adjudicate upon charges of professional misconduct and, if appropriate, impose sanctions. Both a finding of professional misconduct against a barrister and the sanction imposed upon her may have very significant consequences and wide reaching effects. Second, its procedural rules as contained within the Regulations; the Regulations contain detailed provisions which govern the procedure to be adopted both before and at the hearing of disciplinary charges. It is clear that the procedural provisions which govern the process before the hearing are designed to ensure that each party is fully aware of the case of the other well in advance of the hearing. In that regard the directions judge has very significant powers. Third, the

fact that the Tribunal must apply the criminal standard of proof when adjudicating upon charges of professional misconduct. Inevitably, in our judgment, the fact that charges of professional misconduct must be proved to the criminal standard is likely to influence the Tribunal to conduct its process in a manner which is at least similar to the process by which criminal charges are proved in the criminal courts. That said, fourth, the conduct of proceedings in criminal courts is now governed by a comprehensive code (the Criminal Procedure Rules 2005). There is no suggestion (nor could there be) that either those rules or the Civil Procedure Rules 1998 are, somehow, to govern the process before the Tribunal or are to be incorporated into its processes.

69. Mr Beaumont submitted to the Tribunal and submits before us that no criminal court would permit the prosecution to reopen its case and call a prosecution witness after the defence evidence had concluded unless exceptional circumstances existed. In making that submission he relied upon such decisions as James v South Glamorgan CC [1994] 99 Crim.App. R.321 and R v Francis [1990] 91 Cr.App. R 271. In Francis Lloyd LJ (giving the judgment of the court) formulated the following general principles:-

> "(1) The general rule is that the prosecution must call the whole of their evidence before closing their case. The rule has been described as being most salutary.
>
> (2) There are, however, exceptions. The best known exception is that the prosecution may call evidence in rebuttal to deal with matters which have arisen ex improviso: see *Pilcher* [1974] 60 Cr.App. R.1.
>
> (3) The prosecution do not have to foresee every eventuality. They are entitled to make reasonable assumptions, see *Scott* [1984] 79 Cr.App. R.49.
>
> (4) Another exception to the general rule is where what has been admitted is a mere formality as distinct from a central issue in the case – contrast *Royal v Prescott-Clark* [1966] 2 All E.R 366 with *ex parte Garnier*.
>
> (5) In cases within the above exceptions the judge has a discretion to admit the evidence. Like any other discretion it must be exercised judicially and within the principles which have been established by the Court of Appeal. If the discretion is exercised in a way that no reasonable judge or no reasonable bench of Magistrates could have exercised it, the decision would be set aside as erroneous in law. See *Royal v Prescott-Clark* (*supra).*
>
> (6) The earlier the application to admit the further evidence is made after the close of the prosecution case the more likely it is the discretion will be exercised in favour of the prosecution.

> So far so good. The real question in the present case is whether discretion of the judge to admit late evidence is limited to the two classes of exception which we have mentioned.
>
> …….
>
> (7) The discretion of the judge to admit evidence after the close of the prosecution case is not confined to the two well established exceptions. There is a wider discretion. We refrain from defining precisely the limit of that discretion since we cannot foresee all the circumstances in which it might fall to be exercised. It is of the essence of any discretion that it should be kept flexible. But lest there be any misunderstanding and lest it be thought we are opening the door too wide, we would echo what was said by Edmund-Davies L.J in the *Doran* case at p.437 [a reference to *Doran* [1972] 56 Cr.App. R.429] that the discretion is one which would only be exercised outside the two established exceptions on the rarest of occasions."

70. In Malcolm v Director of Public Prosecutions [2007] 1WLR 1230 the Divisional Court provided further guidance but set in the context that the Criminal Procedure Rules 2005 had recently come into force. During the course of his judgment (with which Maurice Kay LJ agreed) Stanley Burnton J (as he then was) formulated the applicable principles as follows:-

> "31. In my judgment, Miss Calder's submissions, which emphasised the obligation of the prosecution to prove its case in its entirety before closing its case, and certainly before the end of the final speech for the defence, has an anachronistic, and obsolete, ring. Criminal trials are no longer to be treated as a game, in which each move is final and any omission by the prosecution leads to its failure. It is the duty of the defence to make its defence and the issues it raises clear to the prosecution and to the court at an early stage. That duty is implicit in rule 3.3 of the Criminal procedure Rules 2005, which requires the parties actively to assist the exercise by the court of its case management powers, the exercise of which requires early identification of the *real issues*……
>
> 32. That was not done in this case….
>
> 33 …..
>
> 34 ….
>
> 35 ….
>
> 36 What are special circumstances justifying permitting the prosecution to reopen its case varies from time to time? As the above citations from the Pydar Justices case 160 JP 87, Cook's case [2001] Crim LR 321 and Gleeson's case demonstrate, the

> principles of criminal procedure are not now what they were when Webb v Leadbetter [1966] 1 WLR 245 was decided. Today, practitioners and the courts must take into account the overall objective of criminal procedure, as set out in Rule 1.1 of the Criminal Procedure Rules 2005, which was referred to by the justices in the Case Stated: "(1) The overriding objective of this new code is that criminal cases be dealt with justly. (2) Dealing with a criminal case justly includes – a) acquitting the innocent and convicting the guilty….""

71. In our judgment the decision in Malcolm represents the most recent articulation of the relevant principles which guide criminal judges and lay justices when confronted with an application by the prosecution to reopen its case and adduce evidence after the defence case has closed. Essentially, special circumstances must be identified to justify the application succeeding.

72. It is clear that the Tribunal adopted this approach except that it directed itself that exceptional circumstances were necessary (as opposed to special circumstances) before it would be fair to accede to the Respondent's application.

73. Having given the matter careful consideration we are satisfied that the Tribunal made no error of principle or approach in its consideration of the Respondent's application to reopen its case and call Mr Rippon to give evidence. It correctly directed itself that the issue was to be judged by reference to the rules of natural justice and in interpreting those rules in the manner in which it did it aligned itself very closely with what would have occurred in a criminal court. In our judgment, to repeat, there was no error in such an approach.

74. That is not the end of the matter. Mr Beaumont complains that the Tribunal fell into error in its application of the principles to the facts of this case. In his written skeleton argument he advanced 15 separate reasons (which, in oral submissions, he elevated to 18 reasons) why the Tribunal should not have acceded to the Respondent's application. We do not propose to deal, sequentially, with each of the reasons advanced by Mr Beaumont. It suffices that we focus upon those which seem to us to call for detailed consideration.

75. Mr Beaumont submits that by giving leave for the Respondent to call its primary witness after the Appellant had given her evidence the Appellant was deprived of the opportunity to make a submission of no case to answer based on the lack of credibility of Mr Rippon. This submission is premised upon the proposition that Mr Rippon may have been so discredited by Mr Beaumont's cross-examination that a successful submission of no case to answer would have become a realistic possibility.

76. We do not accept there was ever a realistic possibility that Mr Rippon's evidence would have become so discredited by cross-examination that there was a realistic prospect of a successful submission of no case. In reaching this conclusion we have reviewed the transcript of Mr Rippon's evidence. It is clear that Mr Rippon was subject to a detailed and searching cross-examination. It is equally clear that his credibility was put in issue. We are unpersuaded, however, that cross-examination of Mr Rippon either did produce or would have produced a state of affairs whereby the criteria for upholding a submission of no case to answer could be met (assuming he

was cross-examined before the Petitioner gave her evidence). On the central issues Mr Rippon maintained what he had always said, namely, that he was not in partnership with the Petitioner at any material time. There is the further feature that the Petitioner's "conviction" before SDT constituted prima facie evidence of her guilt. We consider it to be no more than a very remote possibility that a submission of no case to answer would have succeeded in whichever way or order the evidence was presented in this case.

77. Mr Beaumont next submits that had Mr Rippon given his evidence at the normal time the Petitioner would have been able to assess whether or not she should give evidence in the light of his performance as a witness. In our judgment there is a short answer to this point. The Petitioner decided to give evidence even though, at that point in time, it was wholly unclear whether Mr Rippon would appear and if so whether he would be permitted to give his evidence. She correctly recognised the need for her to put her side of the story to the Tribunal. Even allowing for Mr Beaumont's forensic skills as a cross-examiner we find it to be no more than a remote possibility that Mr Rippon's performance in the witness box would have encouraged the Petitioner to the view that she need not give evidence.

78. We take together those points made by Mr Beaumont which relate to the fact that Mr Rippon was a reluctant witness and the history which demonstrates his reluctance. Clearly those matters needed careful consideration. Equally clearly the Tribunal gave them proper consideration. In our judgment it was necessary to weigh these points against the fact that Mr Rippon's evidence was crucial.

79. Mr Beaumont also relies upon what Counsel for the Respondent said from time to time, during the course of the hearing. He submits that, in effect, that there came a point in time, mainly during the morning of 18 May 2010, when Counsel effectively abandoned Mr Rippon as a witness. We accept that Counsel for the Respondent did express himself in clear terms, namely, that he proposed to continue with the case whether or not Mr Rippon attended. We do not consider, however, that he ever led the Tribunal or the Petitioner to believe that he would not seek to adduce the evidence of Mr Rippon should the witness make a belated appearance at the Tribunal.

80. Having reviewed Mr Beaumont's critique of the reasons underpinning the Tribunal's decision we find ourselves satisfied that the Tribunal took account of all the matters which were prayed in aid by Mr Beaumont and reached a conclusion about what constituted fairness in this case which was unimpeachable.

81. In his skeleton argument and, particularly, in his oral submissions, Mr Beaumont made much of the fact that the Tribunal failed to take account of the fact that the Respondent could and should have applied for a witness summons from the court in order to ensure Mr Rippon's attendance at the Tribunal. Mr Beaumont submits that the Tribunal's failure to take this matter into account inevitably vitiates the exercise of its discretion.

82. This point must be dealt with in stages. It is correct that during the course of submissions on the morning of 17 May 2010 there was a debate about whether it had been open to the Respondent to seek a witness summons from a court. Mr Beaumont submitted that this course had been open to the Respondent; Counsel for the

Respondent was disposed to doubt whether such a course was open to it. In its ruling the Tribunal reached no conclusion upon the matter. There the matter lay.

83. When Mr Beaumont was resisting the Respondent's application to reopen its case and call Mr Rippon he made a number of detailed oral submissions, as we have said, but our examination of the transcript demonstrates that he did not invite the Tribunal to refuse the Respondent's application on the basis that the Respondent could have ensured Mr Rippon's attendance by seeking a witness summons. In these circumstances it does not seem to us to be proper to conclude that the Tribunal failed to take a material consideration into account when making its decision upon the Respondent's application. The alleged material consideration was never presented to the Tribunal as such.

84. Be that as it may the point is now, squarely, before us. Since the appeal to us is by way of re-hearing it seems to us that we must grapple with the point.

85. The power to issue a witness summons to compel attendance before a Tribunal is derived from CPR 34.4. The rule is in the following terms:-

> "(1) The court may issue a witness summons in aid of an inferior court or of a Tribunal.
>
> (2) …..
>
> (3) In this rule "inferior court or Tribunal" means any court or Tribunal that does not have power to issue a witness summons in relation to proceedings before it.""

86. As we have said, before the Tribunal the stance of the Respondent was equivocal as to whether or not it could have invoked this power. Before us, however, Mr Lewis QC, on instructions, expressly accepted that it would have been open to the Respondent to seek a witness summons in respect of Mr Rippon in reliance upon CPR 34.4.

87. We are not persuaded that we should conclude that it was not fair to permit the Respondent to re-open its case and call Mr. Rippon on account of the Respondent's failure to seek a witness summons from the court to compel Mr Rippon's attendance. Short of seeking a witness summons the Respondent did all that it could, reasonably, to ensure the attendance of Mr Rippon at the Tribunal. The history demonstrates as much. The Respondent was not and is not to be punished for its failure to take a procedural step which it genuinely believed may not have been open to it albeit it now accepts that this genuine belief was erroneous. We are satisfied that all the reasons which led the Tribunal to conclude that the Respondent should be permitted to re-open its case and call Mr Rippon justified its decision and we do not consider we should take a different view simply on account of the Respondent's failure to seek a witness summons from the court to compel Mr Rippon to attend the Tribunal.

88. That disposes of the grounds of appeal which relate to the decisions made by the Tribunal. We turn, therefore, to deal with the "procedural issues".

Appointments to Disciplinary Tribunals

89. COIC is responsible for the appointment of the persons who will sit on Disciplinary Tribunals. That is made clear by its constitution – see Part III paragraph 1F and paragraph 14. That has been the position since 1986. For many years COIC has maintained lists of barristers and lay persons who might be called upon from time to time to sit on tribunals. We shall refer to these lists as panels in the remainder of this judgment.

90. In early 2006 COIC decided to constitute a body known as the Tribunals Appointment Body (hereinafter referred to as "TAB"). The terms of reference, composition, terms of office and functions of TAB were set out in a document dated 6 April 2006 which consisted of 20 clauses referred to within the document as "Rules". There is no evidence that the Rules were ever formally adopted (see paragraph 7 of the first Russell judgment) but it seems to us proper to infer that TAB intended to conduct itself in accordance with these Rules and that, at least in broad terms, it did so. The following Rules are relevant to the issues in this case.

> "1. The Tribunals Appointment Body (the Body) is a COIC appointed Body. It is established to vet the applications of those people desirous of being members of the panel of persons to sit and decide on issues of misconduct and inadequate professional services and fitness to practise brought by the BSB and certify that those they select to the panels are fit and properly qualified to conduct the business for which they have been selected.
>
> 2. The Body shall consist of a Chairman, two barristers, one of whom should be in silk and a lay representative. The Body will be appointed by the President of COIC in consultation with the treasurers of the four Inns after canvassing the Inns for volunteers. Persons who have been convicted of misconduct or inadequate professional service by a Tribunal or any other hearing in the previous ten years will not be appointed.
>
> 4. Persons appointed to the Body will normally serve three years, save that in the first three years of operation one barrister will change after one year, the lay representative and the other barrister member after two years and the Chairman after three years.
>
> 7. The Body will meet as necessary and at least once per year, as directed by the Chairman. They will consider applications to sit on disciplinary and other hearings from Barristers and Lay Representatives which will be made in response to advertisements in Counsel magazine and the national press respectively. Barristers may put themselves forward for consideration at other times and such applications may be reviewed as a paper exercise. The Body will be responsible for designing and amending as necessary an application form.

8. The Body's task will be to vet such applications, take up references as necessary to ensure that members of the Barristers and the Lay Representatives Panels are representative of their groups and suitably qualified to sit on disciplinary and fitness to practise panels and hearings. A separate list will be maintained of those selected to be clerks to tribunals.

9. The Body will review the entire lists at least once each calendar year.

12. Lay Representatives, Silk and Barristers who wish to sit on panels…..will apply to the Body by means of the pro forma at Annex A. Posts will be advertised…..

Application forms will be sent out on request by the Tribunal's Secretary or downloaded from the Inns' websites.

Recruitment of Lay Representatives will be separated by time from those for professional members of the tribunal panels. A separate recruitment round will be conducted for the appointment of clerks.

13. Applications will be collated by the Tribunal's Secretary and will be circulated to all members of the Body to be scored and vetted……

14. Candidates will be assessed against the criteria set out at Annex B. A scoring sheet also forms part of the Annex.

18. All candidates will have to undertake a short training course and be required to attend a hearing as observers, before they will be permitted to sit at a hearing or act as a clerk. Candidates are to undertake the training within 3 months of their interview.

19. The Tribunal's Secretary will maintain the following lists:

a. **Lay representatives** available for hearings: 30-40 each appointed for 5 years, renewable once.

b. **Barristers** volunteering for hearings: approximately 150. Existing panel members will be permitted to remain on the panel for up to a further 3 years. Barristers once appointed may serve on the Panel for 5 years, renewable once…..

c. **Silks** volunteering to sit on and chair hearings: approximately 30. Save for the numbers, recruitment and service will be as for barristers at paragraph 19.(b) above.

d. …."

91. As originally constituted the members of TAB were Stanley Burnton J (as he then was) the chairman, David Phillips QC, Ms Desiree Artesi, the barrister and Mrs Sophia Lambert, the lay member. It appears probable that those four persons remained the members of TAB until 2 February 2012.

92. During the period 1 January 2006 and 31 December 2011 Ms Artesi was a member of the Professional Conduct and Complaints Committee of the Respondent. At all times material to this appeal the Committee was the body responsible for deciding whether to prosecute a member of the Bar against whom a complaint of misconduct had been made.

93. On 2 May 2001 Mr Smart received a letter informing him that his name would be added to "our volunteers list of Panel Members for Disciplinary Tribunals". This letter was sent by the Secretary to the Under Treasurer of Lincoln's Inn presumably on behalf of COIC. The letter did not specify any period during which Mr Smart would remain a member of the panel. Following the constitution of TAB Mr Smart's membership of the panel became time limited by virtue of Rule 19.b; Mr Smart was to remain a member of the panel until 5 April 2009. The significance of the fact that Mr Smart's membership of the panel had expired by effluxion of time when he sat on the Tribunal which decided the case against the Petitioner was considered in depth by the Visitors in the first Russell judgment.

94. There is no evidence that TAB reviewed Mr. Smart's appointment to the panel at any time between 6 April 2006 and 5 April 2009. That said it seems to us to be reasonable to infer that such a review must have taken place on at least one occasion.

95. Mr Elliott was appointed to the panel in June 2007. In the summer of 2006 he saw an advertisement in Counsel and/or Bar News for barristers to sit on disciplinary tribunals. He was then working as a Crown Prosecutor in the special case work unit in London and his recollection is that he was encouraged to apply by someone within the Respondent.

96. Mr Beaumont submits that TAB was responsible for appointing Mr Elliott to the panel. It is probable that he was appointed in the summer of 2007 although no letter of appointment has been produced. His term of appointment would have been five years, assuming that there was adherence to the Rules – see Rule 19.b. Despite the fact that no letter of appointment has been produced we infer that Mr Elliott's appointment was confirmed after his application had been considered and vetted by TAB as the Rules envisaged.

97. Ms Chapman and Mrs Thompson (Ms Howes as she then was) were each appointed on 11 November 2005. Their letters of appointment are identical. The pertinent parts read as follows:-

> "Thank you for attending the familiarisation session on the 31st October. From the positive feedback received, it appears that it was a useful and, I hope, enjoyable evening.
>
> Although I mentioned on the evening that you would be formally appointed by the President of COIC; a letter was sent to you following your successful interview advising you of that

> fact. However, it is reliant on completion of a 'training session' and observing one or several hearings.
>
> You may recall at your interview that there is no legal contract between yourself and COIC. The initial term of office should be for three years, renewable for another three years, by invitation of the President of COIC. However, should circumstances arise whereby your suitability for membership of the Panel is in question; the President has the right to withdraw you from the Panel. Please find enclosed a copy of the terms and conditions and fees and expenses for lay representatives….."

The letter was sent, in each case, by the Under Treasurer of Lincoln's Inn who, we assume, was then dealing with these matters on behalf of COIC.

98. On 11 December 2008 Ms Chapman and Mrs Thompson received letters from the President of COIC (then Lady Justice Smith DBE). The letter was in the following terms:-

> "I am writing to you as Chairman of COIC. First I would like to thank you for the work you have done during the past three years as a lay member of the hearing Panel of the Bar disciplinary tribunals. I understand that you are willing to continue in that capacity and I now formally appoint you for a further three year term.
>
> I think that you probably understand already that there is no binding contract between you and COIC. There is a mutual expectation that you will be invited to sit from time to time and that you will accept the invitation whenever possible. However, COIC does not undertake to invite you to sit for a particular number of occasions and I and my successor as President of COIC retain the right to discontinue your Panel membership."

99. It is clear that it was the President of COIC who convened the Tribunal which determined the case against the Petitioner i.e. it was the President who chose HH William Barnett QC, Mr Elliott, Mr Smart, Ms Chapman and Mrs Thompson to be members of the Tribunal– see paragraph 6 of the first Russell judgment.

100. We were told that from about early 2009 the chair and vice chair of the Respondent together with the Respondent's chair of the Education and Training Committee have been members of COIC. Certainly they were members when this Tribunal was convened and when it heard the case against the Petitioner. It is also to be noted, however, that the constitution of COIC provides that the members of the Respondent are non-voting members of COIC – see clause 7 of the COIC constitution.

101. As a consequence of the arrangements and events described in the preceding paragraphs Mr Beaumont makes a number of submissions which, in summary, are that the Tribunal which determined the case against the Petitioner was tainted by

apparent bias and/or a lack of independence or impartiality as those words are understood in the context of Article 6 of ECHR.

Apparent Bias and/or lack of independence and impartiality

102. Before dealing with Mr Beaumont's submissions in some detail it is necessary to set out the relevant guiding principles from the leading cases on apparent bias, impartiality and independence.

103. The appropriate test for determining whether a decision of a tribunal should be struck down on the basis of apparent bias is that which was formulated in Porter v Magill [2002] 2 AC 357. In summary, the test is whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the Tribunal was biased – see the speech of Lord Hope of Craighead at pages 491 to 495 for a detailed analysis of the jurisprudence from which the test is derived.

104. In Helow v Secretary of State for the Home Department and another [2008] 1 WLR 2416 Lord Hope elucidated what he meant by the fair-minded and informed observer. He described him thus:-

> "2. The observer who is fair-minded is the sort of person who reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson (2000)* 2001 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test, ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations they have formed may make it difficult for them to judge the case before them impartially.
>
> 3. Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate the context forms an important part of the material which she must consider before passing judgment."

105. During the course of his submissions Mr Beaumont placed particular emphasis on the decisions in Re P (a Barrister) [2005] 1 WLR 3019 and R (Kaur) v Institute of Legal Executives Appeal Tribunal and another [2011] EWCA 1168. In Re P the Visitors held that a lay representative selected to serve on a Visitors Panel who was at that time a member of the Professional Conduct and Complaints Committee of the Bar Council was automatically disqualified from acting as a Visitor since he was acting as judge in his own cause. In Kaur the Court of Appeal considered the position of a member of the ILEX Appeal Tribunal who was at the same time the Vice President of the Council of ILEX. The judgment of the court, in effect, was delivered by Rix LJ and his conclusions are sufficiently described in the headnote to the report which reads:-

> "The doctrines of automatic disqualification and apparent bias could be seen as two strands of an over-arching requirement; judges should not sit or should face recusal or disqualification where there had been a real possibility on the objective appearance of things, assessed by the fair-minded and informed observer, that the Tribunal could be biased. The two doctrines could be analytically reconciled by regarding the 'automatic disqualification' test as dealing with cases where the personal interest of the judge concerned, if judged sufficient on the basis of appearances to raise the real possibility of preventing the judge from bringing an objective judgment to bear, was deemed to raise a case of apparent bias. The instant case was not one where it was necessary to choose between the doctrines. Applying either test, the vice president of ILEX was disqualified by her leading role in ILEX, and thus her inevitable interest in ILEX's policy of disciplinary regulation, from sitting on a disciplinary or appeal tribunal. There was little doubt that the fair-minded and informed observer ought to have and would have concluded that there was a real possibility of bias; he or she would be concerned that there was here the appearance and perception and indeed reality that through the ILEX's vice president, the [Appeal Tribunal] was not free of an influence which could prevent the bringing of an objective judgment to bear. Accordingly the appeal would be allowed."

106. In Findlay v United Kingdom (1997) 24 E.H.R.R. 221 the applicant to the European Court of Human Rights was a member of the British Army. He argued that he had been denied a fair hearing before a court martial and that it was not an independent and impartial tribunal. He relied, in particular, upon the fact that a single officer, known as a convening officer, had been responsible for the convening of the court martial, the appointment of all the participants in the court martial and the confirmation of the sentence. The court determined that in order to establish whether a tribunal could be considered as "independent" a number of issues had to be considered which included the manner of appointment of its members, their term of office, whether there existed guarantees against outside pressures and, if so, the nature of those guarantees and whether the body presented an appearance of independence. A court would be "impartial" if it was subjectively free of personal prejudice or bias and also impartial from an objective viewpoint in that there were sufficient guarantees

to exclude any legitimate doubt about its impartiality. In the view of the court the concepts of independence and objective impartiality were closely linked and would, normally, be considered together. On the facts of the case, as summarised above, the court found that the complaints of lack of independence and impartiality were objectively justified and that there had been a violation of Article 6.

107. As is clear from Findlay in determining whether or not a tribunal is independent the manner of appointment of its members and their terms of office are important considerations. The terms of office of temporary sheriffs in Scotland was scrutinised with care in Starrs v Ruxton 2000 SLT 42 in the context of temporary sheriffs appointed to hear criminal cases. By section 11(2) of the Sheriffs Court Scotland Act 1971 the Secretary of State for Scotland was empowered to appoint temporary sheriffs. Section 11(4) specified that the appointment should subsist until "recalled by the Secretary of State". In practice the decision that there was a requirement for temporary sheriffs was taken by the Lord Advocate, who also drew up a list of applicants to be interviewed, considered reports of interviews, drew up a list of provisional candidates for appointment and, in consultation in particular with the Lord President, made a final selection. An issue arose as to whether or not a hearing before a temporary sheriff satisfied the need for a hearing before an independent Tribunal in the context of Article 6 of the ECHR.

108. The Inner House of the Court of Session held that the initial appointment of temporary sheriffs by the Executive was not inherently objectionable, the involvement of an independent judiciary in the process of selection being a significant safeguard. However, security of tenure was an important cornerstone of judicial independence and temporary sheriffs did not as a matter of law enjoy any such security in the normally accepted sense of the term. The court further considered it to be relevant that temporary sheriffs were very often persons who hoped to graduate to permanent employment and that accordingly a perception might arise that temporary sheriffs who were interested in advancement might be influenced in their decision-making to avoid unpopularity with the Lord Advocate. The court concluded that a temporary sheriff could not be regarded as an independent tribunal.

109. It is clear from the judgments in this case that the judges were concerned, particularly, with the fact that temporary sheriffs enjoyed no security of tenure. It was common ground at the hearing before the Inner House that, as a matter of law, a temporary sheriff could be removed from office at any time for any reason. It was also common ground that although a temporary sheriff could be appointed on an annual basis his allocation to court and the renewal of his appointment were thereafter within the unfettered discretion of the Executive.

110. The decision of the Inner House in Starrs v Ruxton was delivered on 11 November 1999. On 4 April 2000 a differently constituted division of the Inner House handed down judgment in Clancy v Caird [2000] UKHRR 509. In that case objection had been taken to a private law contractual dispute being heard by a temporary judge of the Court of Session. The Inner House held that there had been no violation of Article 6 of the ECHR. During the course of his judgment Lord Sutherland had this to say about the link between security of tenure and judicial independence.

> "The most basic requirement for independence is security of tenure such as to provide a guarantee against any interference

with the judge's function from any outside source and in particular from the Executive. The obvious and ideal way to ensure such security is for every judicial appointment to be permanent and full-time with tenure ad vitam aut culpam. At common law the rule in Scotland was that a judicial office holder must have tenure ad vitam aut culpam. In *Mackay & Esslemont v Lord Advocate* 1937 SC 860 it was held that members of the Land Court were entitled to security ad vitam aut culpam, and an attempt by the Executive to impose an age limit on such members was rejected. Age limits are now of course statutory, as opposed to being imposed by the Executive, and such limits are not regarded as affecting independence. Does this mean that any appointment has to be for life (or until retirement age) to satisfy the requirement for independence? Clearly, in my view, it does not. In the UN Basic Principles on the independence of the judiciary it is provided in para 12 that 'judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists'. In *Zand Austria* Application No 7360/76)1978) 15 Dr 70 it was said that 'The irremoveability of judges during their term of office, whether it be for a limited period of time or for life time, is a necessary corollary of their independence'. In the Canadian case of *Valente* it was said that:

> 'The essence of security of tenure is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner'.

Indeed judges in the ECHR itself are appointed for a fixed term of between three and nine years. Accordingly, it appears to me clear that there can be no objection per se to the appointment of judges for a fixed term, provided that during that period there is security of tenure which guarantees against interference by the Executive in a discretionary or arbitrary manner. It may also be of significance that temporary judges are not full-time appointments for a fixed period. They only sit on a part-time basis as required, and that requirement is laid down not by the Executive but by the Lord President. It would appear from the authorities that there could be no objection to the appointment of a temporary judge to hear a particular case providing, of course, that he has security of tenure during that limited period. I do not, therefore, see any reason in principle why there should be any objection to the grant of a commission to a temporary judge in order to allow him to sit as and when required by the Lord President. The objection which found favour in *Starrs* was that the commission of temporary sheriffs was for a short period of one year, but more importantly, in terms of s 11(4) of

> the Sheriff Court Act 1971, it was specifically provided that the commission could be recalled at any time by the Executive and there was accordingly no security of tenure even for the limited period of the commission. The question, therefore, in my view, becomes whether there is security of tenure for a temporary judge appointed under the provisions of the 1990 Act."

The lay members of the Tribunal

111. Mr Beaumont makes three submissions in support of his contention that the lay members of the Tribunal were tainted by apparent bias and/or were not independent. First, he submits that the fair-minded and informed observer would conclude that there was a real possibility that the lay members of the Tribunal were biased in their consideration of the case against the Petitioner because TAB had the duty to review the panel of lay members once each calendar year and throughout the relevant period Ms Artesi was both a member of TAB and a member of the Professional Standards and Complaints Committee of the Respondent. He submits, second, that the fair-minded and informed observer would consider there to be a real risk of bias on the part of the lay members (and presumably the other members too) by reason of the fact from February 2009 there were members of the Respondent sitting on COIC. His third submission is that the Tribunal was not independent since the lay members did not enjoy such security of tenure as is required by Article 6 of ECHR. We will deal with each of those points in turn.

112. Mr Lewis QC submits that there is simply no evidence that TAB ever conducted a review of the panel of lay members. That is true. However, it seems to us that we must proceed on the basis that TAB sought to act in accordance with the Rules. We propose to infer that there must have been at least one occasion in the period between the coming into existence of TAB and the hearing before the Tribunal when TAB reviewed the persons on the panel. The lack of any documentary or other evidence about whether TAB conducted such a review is wholly unsatisfactory and does not reflect well upon either TAB or COIC. However, it seems to us to be reasonable to infer that there must have been one occasion, at least, when TAB undertook a responsibility which was conferred upon it by the Rules. We also infer that Ms Artesi must have been a party to such a review.

113. We cannot and do not accept that the fair-minded and informed observer would conclude that simply because one member of TAB was also a member of the Professional Standards and Complaints Committee of the Respondent at the time this review occurred there was a real risk that the persons who were the subject of such a review would be biased in favour of the Respondent when sitting upon a Tribunal months or even years later. There is no suggestion that the lay members knew of any review of the panel or met any of the members of TAB during the course of such review. The Rules are silent as to the procedure to be undertaken in relation to a review but we would be very surprised if it involved any personal contact between TAB and panel members unless there was a very specific reason for such contact. It is clear from the Rules, read as a whole, that the purpose of any review would be to ensure that the members of the panel remained suitably qualified to sit on a disciplinary tribunal. In context, suitably qualified would mean having appropriate judgment skills, including, no doubt, the ability to act objectively, fairly and impartially. We find it difficult to believe that any review would be more extensive

than to consider such documentary evidence as might have existed, e.g. judgments, which would throw light upon whether panel members were performing their function appropriately. We do not accept that the fair-minded and well informed observer would consider that Ms Artesi's involvement in that process made it a real possibility the persons who had been the subject of the review would be biased in favour of the Respondent when discharging their function as a member of a particular tribunal.

114. We also reject the suggestion that the mere presence of members of the Respondent at meetings of COIC (in a non-voting capacity) would lead the fair-minded and well informed observer to conclude that there was a real risk of bias on the part of the members of the panel eligible to sit on tribunals. As is clear the individual members of any particular tribunal are chosen to sit by the President of COIC. It seems to us to be unreal to suggest that the fair-minded and well informed observer would consider there to be a real risk of bias on the part of lay panel members (or any other members) simply by virtue of the fact that three members of the Respondent were/are non-voting members of COIC. We are satisfied on the evidence that COIC as a body has no part to play in deciding who should be invited to sit on particular tribunals; that function is performed by the President who is always a very distinguished judge. It seems equally unreal to suppose that the three members of the Respondent who were/are members of COIC would be in a position to lobby either COIC or its President about the panel, individual members of it or panel members who have been chosen by the President to sit on a particular tribunal.

115. We are satisfied, too, that the fair-minded and well informed observer would reach the same conclusion if he was asked to consider the position of Ms Artesi in conjunction with the position of the three members of the Respondent who were non-voting members of COIC.

116. We turn to Mr Beaumont's third point which relates to security of tenure. As we have set out at paragraph 97 above both lay members were appointed in 2005. In our judgment their letters of appointment make it clear that they were to be appointed for a term of three years but subject to removal "should circumstances arise whereby your suitability for membership of the Panel is in question". That same letter indicated that the appointment was renewable for a further three year term subject to the proviso just mentioned. The letters of appointment were not signed by the President of COIC but the letters made clear that the appointment was by the President as would be any decision to remove the lay members from the panel.

117. Both lay members were re-appointed by letter dated 11 December 2008 signed by the President of COIC. That letter made it clear that the President of COIC had the right to "discontinue your Panel membership". The letter did not specify the circumstances in which this might occur.

118. We are satisfied that the appointment letter and the re-appointment letter must be read together. We do not consider that there is a realistic possibility that the letter of 11 December 2008 was intended to be read as though the President of COIC was, from that time, entitled to withdraw membership of the panel at his or her whim. By 2008 TAB was in existence with its detailed Rules for appointment and review of members of the panel. Appointment was dependent upon suitability. We have found that the purpose of review was to determine continued suitability. In those circumstances it is inconceivable, in our judgment, that it was ever intended or contemplated that the

President of COIC could remove a panel member except in circumstances which related to the member's suitability for office.

119. The issue of membership of the panel is but one aspect of the issue of security of tenure. Membership of the panel did not and does not confer any right to sit as a member of a Tribunal although the expectation was and is that panel members sit from time to time. Once nominated by the President to sit on a tribunal the circumstances in which a panel member does not sit are set out in the Regulations. Following the making of a convening order the Defendant in the particular proceedings has the right to object to a member of a disciplinary tribunal whereupon the President will determine whether or not the objection is justified – see Reg. 8(3) and (4). Reg. 4(7) empowers the President to cancel a nomination "at any time before the commencement of the substantive hearing". Once a substantive hearing has commenced, however, the President has no power to remove a member from a tribunal.

120. In light of the features which we have highlighted in the preceding paragraphs we are satisfied that the lay members of tribunals enjoy sufficient security of tenure to make the tribunal independent. In summary, the lay members were appointed to the panel for defined periods and were removable from the panel only if their suitability to sit as tribunal members was judged to be impaired by the President of COIC. The President is always a very distinguished judge. There is no suggestion, nor could there be, that the President is not able to discharge this function fairly and independently. That must be right, in our judgment, whether or not, as a matter of fact, the President consults COIC about his decision or seeks no advice of any kind. Once nominated to sit on a particular tribunal and once a substantive hearing has commenced the President has no power to remove a lay member. In our judgment when the principles articulated in Findlay, Starrs and Clancy are applied in this case there is no foundation for the suggestion that the lay members of the tribunal which considered the case against the Petitioner were not independent or impartial.

Mr Smart

121. As we have said Mr Smart became a panel member on 2 May 2001. Following the constitution of TAB his appointment was, we infer, reviewed at least once by the members of TAB. Mr Beaumont makes the same point about this review as he did about the reviews concerning the lay members.

122. As in the case of the lay members, and for the same reasons, we are satisfied that the fair-minded and well informed observer would not conclude that there was a real risk of bias on the part of Mr Smart on account of the fact that his suitability for membership of the panel had been reviewed by TAB at a time when Ms Artesi was a member both of TAB and the Professional Standards and Complaints Committee of the Respondent.

Mr Elliott

123. We proceed on the basis that Mr Elliott's appointment in 2007 was confirmed after his application had been considered and vetted by TAB – see paragraph 96 above. We also infer that TAB conducted at least one review of his appointment prior to his sitting to determine the case against the Petitioner.

124. We have dealt with the significance of the review when considering the lay members and Mr Smart. There is no material distinction in the case of Mr Elliott. Does the fact that TAB, including Ms Artesi, was involved in the appointment process in relation to Mr Elliott lead to the conclusion that a fair-minded and well informed observer would conclude there was a real risk of bias on the part of Mr Elliott when he sat in the Tribunal which determined the case against the Petitioner?

125. We have reached the clear conclusion that such an observer would not conclude that there was a real risk of bias. The role of TAB was to consider applications to sit on disciplinary tribunals which applications were made in response to advertisements in Counsel. TAB vetted such applications and took up references as necessary so as to ensure that the applicant was suitably qualified to sit on disciplinary tribunals. TAB comprised four persons. The persons other than Ms Artesi were a lay member, a Silk and a High Court Judge. They were all appointed to TAB by the President of COIC in consultation with the treasurers of the four Inns. All of the persons making appointments to TAB would be eminent lawyers and, inevitably in our judgment, scrupulously fair and objective in making choices about persons suitable to be involved in TAB. The Rules of TAB contain detailed provisions about how selection of members of the panel was to be undertaken – see Rules 12 to 16. Very importantly, candidates were to be assessed against written criteria - see Rule 14.

126. After being chosen by TAB as a barrister suitable for inclusion on a panel Mr Elliott (like all other barristers chosen) would have undergone training and familiarisation organised and conducted by COIC. Then but only then would his name have been included as a panel member.

127. In our judgment it is clear that there were very many important safeguards in place so as to ensure that those appointed to a panel were chosen on merit and by reference to written criteria which were designed to facilitate the selection process and ensure that the best candidates were selected. In our judgment, and in the light of these safeguards, the fact of Ms Artesi's involvement in that process was not such to lead the fair-minded and informed observer to consider that there was any real possibility that panel members were biased when sitting as a member of a particular tribunal.

128. That is not the end of the matter so far as Mr Elliott is concerned. Mr Beaumont submits that certain aspects of Mr Elliott's conduct demonstrate that he was in fact biased against the Petitioner when he participated in the Tribunal. It is to this allegation that we turn next.

129. As this appeal evolved, those acting for the Petitioner made it clear that they intended to explore the circumstances surrounding the appointment of each of the members of the Tribunal, including Mr Elliott. On 9 March 2012 the Right Honourable Sir Anthony May directed that "the BSB shall make enquiries to determine the relevant facts concerning the appointment of the non-judicial member of the disciplinary Tribunal in the present case".

130. As it happens, on the same day Brigadier AJ Faith, Under Treasurer, Gray's Inn, the person then responsible for the oversight of COIC disciplinary tribunals, wrote to Mr Elliott (and many other panel members) seeking information from him about the circumstances of his appointment. That provoked a flurry of e-mails in which Mr Elliott provided some detail of the relevant circumstances.

131. On 1 June 2012 Mr Michael Carter, a case officer of the Respondent e-mailed Mr Elliott as follows:-

> "I am a Case Officer of the Bar Standards Board (BSB). Part of the role of the BSB is to put cases of professional misconduct for determination by a Disciplinary Tribunal (DT), administered by the Council of the Inns of Court (COIC).
>
> In March 2012, you were advised by COIC that an issue has arisen in relation to appointments of some members of the COIC Disciplinary Tribunals in recent years. One such Tribunal was the case of Ms Caron-Ann Russell, which took place on 17-21 May 2010, with findings of the Tribunal handed down on 21 June 2010. You were a member of the Panel which heard the charges against Ms Russell.
>
> Those acting on behalf of Ms Russell have raised an issue as to the validity of the determination handed down on 21 June 2010 in view of information give by COIC as to whether or not the term of appointments of some members of the Panel had expired at the time of the hearing in May 2010. The issue was raised following receipt of a letter from COIC relating to this matter. Please find enclosed a copy of the letter, dated 27 March 2012, which we received from COIC in relation to this matter. At our request, COIC also forwarded to us a copy of the correspondence between yourself and COIC in March 2012 relating to this issue.
>
> A hearing is due to take place on 29 June 2012 as part of Mr Russell's appeal against the decision of 21 June 2010 to determine the issues of validity of the decision of 21 June 2010, in light of submissions made by those acting on behalf of Ms Russell.
>
> As a result of those submissions, the BSB would like you to provide a statement for the hearing on 29 June 2012, at which it may be necessary for you to attend to give evidence. The statement will deal with, among other things:
>
> i. details of your previous involvement in sitting at COIC DT hearings;
>
> ii. your knowledge of the process of appointments of Panel members;
>
> iii. why, if you consider that to be the case, your appointment was not time expired at the date of the hearing in the absence of an appointment letter;

iv. any other reasons why the parties, other Tribunal members, the President of COIC would have assumed that you were entitled to be nominated; and

v. any other relevant useful information relating to the issue of your appointment and membership of the Panel which sat in May 2010.

The statement will be taken at a conference with counsel for the BSB, Tom Cross of 11 Kings Bench Walk. I would be grateful if you would attend the conference at 4pm on Thursday 7 June 2012 or 4pm on Friday 8 June 2012. Please reply to confirm whether or not you can attend on either of these dates. If not, please confirm two available afternoons, from Monday 11 June to Friday 15 June 2012 or whether you can make the suggested days, but at alternative times.

I look forward to hearing from you, hopefully by close of business on 6 June 2012."

On the same date Mr Carter sent Mr Elliott a letter in identical terms. We are satisfied that Mr Carter wrote as he did because he wished to initiate inquiries so as to comply with the direction of Sir Anthony May. On 5 June 2012 Mr Elliott replied confirming that he would be available to attend a conference and, if necessary, the hearing on 29 June 2012. In his short e-mail he expressed no reservation of any kind about attending such a conference, providing a statement or attending the hearing.

132. On 6 June Mr Carter sent an e-mail to Mr Elliott in which he informed him that a member of the Respondent would take and prepare the statement "at or following the conference with Counsel". The conference took place on 8 June 2012. Mr Carter, Mr Elliott and Mr Cross were present.

133. During the afternoon before the hearing before us commenced the Respondent disclosed handwritten notes made by Mr Carter of that part of the conference in which Mr Cross, Mr Elliott and he were together. Parts of the handwritten notes were redacted; the Respondent has explained that the redactions correspond to the record of legal advice which was given by Counsel. Following submissions by Mr Beaumont, we directed Mr Carter should make a statement verifying the accuracy of his handwritten notes. We were provided with such a statement on 19 April 2013.

134. The Respondent also disclosed typed notes. The typed notes, on their face, related to discussions which took place after Mr Elliott had left the conference. Most of the typing was redacted on the grounds that they recorded legal advice provided by Counsel to Mr Carter.

135. On 11 June 2012 Mr Carter e-mailed Mr Elliott to inform him that he had prepared a draft witness statement. The draft was sent as an attachment to the e-mail. Mr Elliott was asked to consider the same, make any amendments and, thereafter, sign and date the statement. On 12 June 2012 Mr Elliott replied:-

"I have tinkered. Actually, I've completely redrafted.

> Please confirm it is fit for purpose and I will sign off. Or add and amend if thought necessary."

136. Mr Carter responded on 13 June. He raised what he described as two minor points. On or about 13 June 2012 the statement was finalised. Thereafter it was disclosed to the Petitioner's solicitors.

137. On 25 June 2012 at 1455 Mr Elliott e-mailed Mr Carter as follows:-

> "Michael, in the unlikely event that I am required to give evidence on Friday will you please e-mail me. I will not be contactable during the day from Tuesday to Thursday. Thanks. If I am not required I hope all goes well."

Mr Carter replied promptly in the following terms:-

> "Thank you for your e-mail.
>
> We have asked those acting for Ms Russell to agree your witness statement and confirm that they do not require you to attend the hearing on Friday. I am awaiting their response and will let you know as soon as I hear anything further. The initial indication is that it is unlikely that you will need to attend on Friday. However this has not been confirmed and therefore you will hear from me definitively before 29 June 2012."

138. Mr Elliott was not required to attend the hearing before the Visitors. The broad sequence of events leading to the making of the witness statement was known to the Petitioner and her legal team at the time of the previous hearing on 29 June 2012 but the Petitioner had not been provided with the e-mail correspondence nor had she been provided with the notes of conference.

139. Mr Carter had written to Mr Smart in identical or virtually identical terms to his initial email and letter to Mr Elliott. After considering his position Mr Smart declined to engage with the process of attending a conference and making a witness statement. There was some attempt by Mr Carter to persuade Mr Smart to take a different view but he refused to alter his position. Essentially, Mr Smart thought it inappropriate to engage with the "prosecutor" when he had been a member of the Tribunal.

140. Mr Beaumont submits that the Petitioner is entitled to rely upon the circumstances and events we have just described in order to establish actual bias on the part of Mr Elliott at the time he was a member of the Tribunal. We accept, unreservedly, that conduct occurring after a tribunal has made its decision is capable of establishing actual bias at the time of the hearing and decision in question. As is obvious, however, whether a tribunal or tribunal member has been biased is fact specific. Our task is to determine whether on the facts set out above we are satisfied, on balance of probability, that Mr Elliott was biased in favour of the Respondent at any time leading to the decision of the Tribunal on 21 June 2010.

141. We should make two things clear. First, we do not consider it was appropriate for the Respondent to invite Mr Elliott to a conference with Counsel with a view to obtaining

a witness statement from him without first informing the Petitioner's legal advisers that it intended to take that step. We cannot say what would have happened had the Petitioner's advisors been so informed. Very likely, however, they would have protested about the proposed course of action. Second, we understand fully why Mr Smart responded as he did.

142. We are not persuaded, however, that Mr Elliott's willingness to engage in the process of attending a conference with Counsel and making a witness statement was improperly motivated; he did not act as he did because he wished, improperly, to assist the Respondent. We are satisfied that Mr Elliott believed that he was acting appropriately. We say that notwithstanding Mr Beaumont's reliance upon the extracts from the published guidelines of the Crown Prosecution Service about irregular communications with the judiciary which are set out in his skeleton argument – see paragraph 88 thereof. There is nothing about the e-mail correspondence, the notes of the conference, Mr Elliott's witness statement or the manner in which it evolved which suggest we should take a contrary view; we will return to his e-mail of 25 June in a moment. We are not persuaded that Mr Elliott's conduct in attending conference and providing a witness statement demonstrates that he was biased in favour of the Respondent when he was a member of the Tribunal two years earlier.

143. Mr Beaumont attaches considerable significance to the e-mail of 25 June 2012. He submits, in effect, that the e-mail is an express indication that Mr Elliott wanted the Respondent to win its case before the Visitors. That, submits Mr Beaumont, should lead us to infer or conclude that Mr Elliott had always been partial towards the Respondent or, at least, partial to the Respondent during the course of the hearing before the Tribunal and/or at the time it made its decision.

144. Mr Lewis QC submits that the e-mail must be read in its proper context. By the time it was written Mr Elliott had attended a conference with an officer of the Respondent and the Respondent's Counsel, he had engaged in e-mail correspondence over a number of days and, in reality, the expression "if I am not required I hope all goes well" was nothing more than a polite expression of hope that events in the Tribunal would run smoothly.

145. In our judgment no useful purpose is to be served by a minute analysis of the possible meaning of that one phrase taken in isolation. The issue for us is whether that phrase in the context of all that preceded and succeeded it is evidence upon which we could properly conclude, on balance of probability, that two years earlier Mr Elliott was biased in favour of the Respondent. In our judgment no such conclusion is permissible. Indeed all the known facts leave us completely satisfied that the allegation of actual bias against Mr Elliott cannot be sustained.

146. Would the fair-minded and well informed observer conclude that the sequence of events and circumstances described immediately above gives rise to a real risk that Mr Elliott had been biased two years previously? In our judgment he would not. In this context we keep well in mind and we have applied rigorously the observations of Lord Hope in paragraph 2 in Helow – see paragraph 104 above.

147. We have reached the conclusion that the Petitioner has failed to demonstrate that the Tribunal which heard the case against her was tainted by apparent bias or was lacking in independence or impartiality so as to contravene Article 6 of ECHR. Further, we

reject the suggestion that Mr Elliott was actually biased when acting as a member of the Tribunal.

148. We should record that Mr Beaumont relies upon changes in procedures which have taken place since the Tribunal made its decision in this case and, in particular, since the Report delivered in June 2012 by the "COIC Disciplinary Tribunals and Hearings Review Group" chaired by Desmond Browne QC. That said, we do not propose to deal with the changes which have taken place in this judgment. No detailed debate took place before us as to the rationale for any of the changes and it would be unsafe for us to assume or infer that procedural changes have been made because it is recognised by COIC or other bodies concerned with disciplinary tribunals that the procedures in place at the time this Tribunal made its decision were legally objectionable.

Conclusion.

149. This appeal is dismissed.

150. We recognise the possibility that we have not dealt with every point raised in Mr Beaumont's skeleton argument in support of his submissions. The document runs to 164 paragraphs over 47 pages. To deal with each and every point raised in that document would be to lengthen this judgment unacceptably; we are conscious, already, that many may consider this judgment to be far too long. We make it clear, however, that before reaching our conclusions we have carefully considered and taken account of all the points made by Mr Beaumont both orally and in writing.

151. Throughout the hearing Mr Beaumont complained about the disclosure process. We are satisfied that the notes of what occurred in the conference attended by Mr Elliott, suitably redacted, should have been disclosed long before 17 April 2013 - the day prior to the hearing before us commenced. On the basis of the submissions we received, however, we are satisfied that appropriate disclosure has taken place and that the parties and the Visitors have been able to deal properly with documents and submissions which have surfaced late in the day.