Neutral Citation Number: [2020] EWHC 467 (Admin)

Case No: CO/4028/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

(On appeal from a Disciplinary Tribunal of the Council of the Inns of Court PC 2017/0455)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2020

Before:

MR JUSTICE WARBY

- -

Between:

Martin John Carr Diggins	**Appellant**
- and -	
Bar Standards Board	**Respondent**

- -
- -

The Appellant in person
Simon Clarke (instructed by **the Bar Standards Board**) for the **Respondent**

Hearing date: 11 February 2020

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Approved Judgment

Mr Justice Warby:

Introduction

1. On 14 June 2017, a young black female student at Cambridge University posted on Twitter an Open Letter to the English Faculty. The letter stated that it was

> "… the result of a meeting that took place amongst students about the need for the faculty to decolonize its reading lists and incorporate postcolonial thought alongside its existing curriculum … a call to not be so arrogant as to assume civilization began with the writing of white men and so this should be the basis of our learning."

A number of suggestions were made, among them "The inclusion of two or more postcolonial and BME authors on every exam paper" and "A zero tolerance policy on the dismissal of race as a subject worthy of discussion/enquiry in essays." Readers were invited to sign the Open Letter, to express support for its content and the suggestions it contained.

2. Martin Diggins is on Twitter, under the handle "@martindiggins". He is a believer in the Canon of Western literature and culture. He was upset by the Open Letter, and on 25 October 2017 he responded by tweeting, in reply to "@Cambridge_Uni" and "@CUSUWO" these words ("the Tweet"):-

> "Read it. Now; refuse to perform cunnilingus on shrill negroids who will destroy an academic reputation it has taken aeons to build."

3. These matters are before me now because of what followed. Mx Diggins is a barrister, called to the Bar by Middle Temple in 1992. In that capacity he is regulated by the Bar Standards Board ("BSB"), and subject to its Code of Conduct ("the Code"). The BSB brought proceedings against Mx Diggins before a Disciplinary Panel, alleging that the Tweet amounted to Professional Misconduct. The Panel agreed. It reprimanded Mx Diggins, and fined him £1,000. He now exercises his right of appeal to this Court, under s 24 of the Crime and Courts Act 2013 and PD52D 27.1A. He appeals against the finding of misconduct, and the sanction.

The proceedings below

4. On 26 October 2017, the day after the Tweet, Middle Temple referred to the BSB a complaint that Mx Diggins had used his Twitter account, linked to his personal website, to post a racist and sexually explicit slur against a young black Cambridge student.

5. On 13 December 2017, the BSB decided to conduct an investigation into whether, in the Tweet, Mx Diggins had "used racist and sexist language … contrary to CD5" of the BSB Handbook. This was a reference to Core Duty 5, which provides that

> "You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession…".

6. The BSB undertook an investigation, in the course of which it wrote to Mx Diggins for a response. He provided a detailed response on 25 January 2018, with some attachments.

7. On 7 June 2018, having considered the material before it, the BSB's Professional Conduct Committee decided that the complaint should form the basis of a charge before a three-person Disciplinary Tribunal of the Council of the Inns of Court ("COIC"). The charge was of "Professional misconduct, contrary to Core Duty 5", the Particulars being that

> "Martin Diggins, an unregistered barrister, behaved in a way which is likely to diminish the trust and confidence which the public places in him or in the profession, contrary to CD5 in that on 25 October 2017 he tweeted …"

the words set out at paragraph 2 above. An unregistered barrister is one who does not hold a practising certificate.

8. On 26 September 2019, there was a hearing before a 3-person Disciplinary Tribunal of the Council of the Inns of Court, Chaired by Jonathan Glasson QC. The BSB was represented by Mr Simon Clarke, who also represents it on this appeal. Mx Diggins, who acts in person before me, was represented before the Panel by Mark Simpson QC, acting *pro bono publico* under the scheme operated by BTAS (the Bar Tribunals and Adjudication Service).

9. Before the Panel were the Tweet, the Open Letter, a small number of other documents relating to the BSB investigation and charging decision, and some correspondence, including Mx Diggins' letter of 25 January 2018. It was not in dispute that the words complained of were in fact those of Mx Diggins; that he published them in the Tweet; that the Tweet contained a URL that, if followed, took the reader to Mx Diggins' website, which identified him as a barrister; and that he did not thereafter withdraw, delete or cancel the Tweet.

10. The advocates lodged succinct written Opening Notes, and made oral closing submissions.

11. The BSB submitted that the Panel's approach to the interpretation of the Tweet should be the one adopted by the Supreme Court in *Stocker v Stocker* [2019] UKSC 17 [2019] 2 WLR 1033 [25-26] and [42-45] (approving observations of mine in *Monroe v Hopkins* [2017] EWHC (QB) [2017] 4 WLR 68 [35] and of Nicklin J in *Monir v Wood* [2018] EWHC (QB) 3535 [90] and [92]). Some key features of that approach, as it applies to the present case, can be extracted from paragraphs [41-44] of the judgment of Lord Kerr (with whom all the other Justices agreed):

> "The judge tasked with deciding how a …tweet on Twitter would be interpreted by a social media user must keep in mind the way in which such … tweets are made and read.

> … it is wrong to engage in elaborate analysis of a tweet … this is a casual medium; it is in the nature of conversation rather than carefully chosen expression; and … is pre-eminently one in which the reader reads and passes on.
>
> … Twitter is a fast moving medium. People will tend to scroll through messages relatively quickly. … The essential message that is being conveyed by a Tweet is likely to be absorbed quickly by the reader."

12. The BSB's case was that, applying that approach, the Panel should conclude that the ordinary reasonable reader would read the tweet as "a personal attack upon an individual, using gender and perceived racial-characteristics-based language to convey what is a race and gender-based insult". Read in that way, it was said, the Tweet was likely to diminish the trust and confidence placed by the public in Mx Diggins as a barrister, and in the profession, because

> "the public expects, and trusts, the profession and its individual members to exercise judgment, restraint and a proper awareness of the feelings of others – it does not expect barristers to use offensive race and gender-based language in public utterings …"

13. Mr Simpson QC submitted on Mx Diggins' behalf that the proceedings before the Panel were ill-conceived, and should be dismissed, for three main reasons: (1) the Tweet was part of Mx Diggins' private life, unrelated to his public or professional life, and fell outside the scope of the Code; (2) in the eyes of an ordinary reasonable person the Tweet would not, in any event, diminish trust and confidence in the profession or Mx Diggins as a barrister; alternatively (3) the Tweet fell short of the threshold of seriousness that must be crossed before a finding of professional misconduct is made; it was not "particularly grave".

14. In support of the first submission, Mr Simpson relied on passages from the guidance in the BSB Handbook. One passage was in gC25, which contains a non-exhaustive list of "conduct which is likely to be treated as a breach of … CD5". The relevant item in this list was no 4: "seriously offensive or discreditable conduct towards third parties". Mr Simpson submitted that the Tweet failed that test. He also relied on gC27, which contains a non-exhaustive list of conduct which "is *not* likely to be treated as a breach of … CD5" (my emphasis). The relevant item here was no 2: "your conduct in your private or personal life, unless this involves (a) abuse of your professional position; or (b) committing a criminal offence, other than a minor criminal offence."

15. In support of his second submission, Mr Simpson agreed that the Panel should approach the case in accordance with the guidance in *Stocker v Stocker*. But he pointed out that Lord Kerr had also cited with approval some remarks of Eady J made eleven years earlier in *Smith v ADVFN plc* [2008] EWHC 1797 (QB), a case about bulletin boards:-

> "14. … Particular characteristics which I should have in mind are that they are read by relatively few people, most of whom

> will share an interest in the subject- matter; they are rather like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or 'give and take'.
>
> …
>
> 16. People do not often take a 'thread' and go through it as a whole like a newspaper article. They tend to read the remarks, make their own contributions if they feel inclined, and think no more about it."

16. Mr Simpson's third submission was founded on the well-known decision of the Visitors to the Inns of Court, given by Sir Anthony May on 19 September 2013 in *Walker v Bar Standards Board* PC 2011/0219. The Visitors held that the courts had been "astute to differentiate the isolated, albeit negligent, lapse from acceptable conduct from the serious kind of culpability which attracts the opprobrium of a finding of professional misconduct." They said this:

> "11. …consistent authorities … have made clear that the stigma and sanctions attached to the concept of professional misconduct across the professions generally are not to be applied for trivial lapses and, on the contrary, only arise if the misconduct is properly regarded as serious.
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> …
>
> 16. …the quite plain theme that comes from the … authorities … require[s] us to modify the literal effect of paragraph 907.1 …. The reason for this is the concept of professional misconduct carries resounding overtones of seriousness, reprehensible conduct which cannot extend to the trivial."

17. In addition, Mr Simpson argued that the proceedings against his client were procedurally flawed and unfair. It was argued, generally, that it was unfair and hopeless to proceed on the basis of the Tweet alone, without disclosing the identity of the complainant or calling evidence from him or her, and absent any evidence of the size of the audience for the Tweet. It was further submitted that the BSB had been inconsistent in its attempts to define the gravamen of the alleged misconduct, and that its final position before the Panel, quoted above, lacked clarity or cogency.

18. By a unanimous decision, the Panel found the charge proved, giving a summary of their reasons. Having heard mitigation on behalf of Mx Diggins it reprimanded him, and imposed a fine of £1,000. The Panel's full reasons were given in writing as part of Mr Glasson QC's Report on Finding and Sanction dated 2 October 2019.

19. In their reasons, the Panel dealt with the facts shortly, as follows:-

> "**The Facts**
>
> 15. It would seem that the underlying facts in this case are agreed:

a. The words alleged to have been used were in fact those of the Respondent; and

b. He published those words in a tweet on 25 October 2017.

16. The tweet was posted in response to an Open Letter entitled "Decolonising the English Faculty" which stated that it was written as a result of a meeting that took place amongst students at Cambridge University about the need for "the faculty to decolonize its reading lists and incorporate postcolonial thought amongst its existing curriculum".

17. We have been provided with relatively little evidence in relation to the context of the tweet. The complainant did not give evidence nor did the respondent. The tweet itself indicates that it was addressed to the twitter accounts of Cambridge University and the Cambridge University Student Union Women's Officer. It is common ground that the tweet was not taken down and that the Respondent has not apologised for the tweet. It is also common ground that the tweet was not a protected tweet but could be read by anyone on Twitter. The tweet itself indicates that it was commented upon by two individuals and liked by two individuals."

20. The Panel identified the question before them as whether the Tweet was "likely to diminish the trust and confidence which the public places" in Mx Diggins or the profession "such as to amount to professional misconduct". Having directed themselves to apply the criminal standard of proof to that question, they made the following findings:-

"32. In our view the fact that the Respondent's twitter "handle" directly took a user to a website in which the Respondent identified himself as a barrister crossed the public / private divide and therefore the BSB was correct to regard it as a matter that in principle called for investigation.

33. We take into account that that the tweet was not taken down and that it was directed to the Cambridge University as well as the Cambridge University Students Union Women's Officer. It was a tweet to the world at large. Consequently, we do not accept the Respondent's argument that there is an exact analogy between the tweet and a conversation in a bar which is "often uninhibited, casual and ill thought out".

34. It was argued that if we found against the Respondent in this case then it would set a concerning precedent. However, the findings we make are specific to this particular set of facts as they have been presented to us. It is not the responsibility of this Panel to set guidance as to how the BSB might or might not approach other instances of offensive comments by barristers on social media. Such cases will invariably fall to be assessed on their individual facts and by reference to the

> particular context in which the comments have been made. Moreover, the approach that we have taken in this case is consistent with the guidance in the Handbook to which we have been referred.
>
> 35. On the basis of the material that is before us we are satisfied to the criminal standard that the tweet was "seriously offensive". In our judgment the reference to "refuse to perform cunnilingus on shrill negroids" was racially charged and derogatory to women. In reaching that conclusion we have followed the guidance of Stocker and formed an impressionistic view of the meaning of that tweet by reference to what evidence that there is as to the context of the tweet.
>
> 36. In our judgment the use of such language is indeed likely to diminish the trust and confidence which the public place in the profession. The public rightly expects the profession to promote equality and diversity and for its members to avoid language which is racially charged and derogatory to women. As to whether this is conduct that can be regarded as "particularly grave" or otherwise "serious", we have concluded that such language is indeed particularly grave. It was not suggested that this was a "momentary and uncharacteristic lapse" as was the case in *Walker* (see para 37). In *Walker* the barrister had committed an error in cross-examination that was described as a "mistake, a slip, which was blurted out and to that extent it was no intentional" (para 32). The barrister immediately accepted that he gone too far, made an immediate retraction and apology in open court and volunteered a further apology to the witness in private (para 33). All of which contrasts with the situation with which we are concerned in this case. Mr Simpson told us that the tweet was made in anger. We were also told that the tweet has not been taken down and that the Respondent has not apologised for it. Moreover, as we noted at the outset the Respondent's position is that it was neither sexist nor racist.
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> 37. The line of seriousness, as Sir Anthony May said in paragraph 37 of *Walker*, is a question of judgment. Having regard to all of the evidence before us and taking into account the submissions we have heard we are satisfied to the requisite standard that the line was crossed in this case."

21. On the question of sanction, Mr Simpson submitted that the Sanctions Guidance indicated that the appropriate sanction was a reprimand, possibly accompanied by a low level fine. The Panel accepted this, identifying a "low-level fine" as one "up to £1,000", according to the Guidance, and imposing the highest level of fine within that bracket.

This Court's role

22. Section 24 of the Crime and Courts Act 2013 abolished the appellate jurisdiction of High Court Judges as Visitors to the Inns of Court, but at the same time authorised the Inns of Court to confer a right of appeal to the High Court in relation to a matter relating to regulation of barristers, which they have done.

23. The Act provides, by s 24(6), that on such an appeal "The High Court may make such order as it thinks fit." The regime that applies under the CPR provides that such an appeal will be allowed where the decision of the lower court was "(a) wrong, or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court": r 52.21(3).

24. The Court's approach to those threshold requirements is well-established. A decision is "wrong" if it contains an error of law or fact or discretion which affects the outcome. Reported cases of procedural irregularity which made a hearing unjust are few, but they include failures to hear a party before finding against them, and reliance on matters on which the parties have had no opportunity to make submissions: see Civil Procedure 2019, n 52.21.5.

25. Ordinarily, an appeal of this kind proceeds as a review of the decision of the Panel, and not a re-hearing (CPR 52.21(1)) and the appeal court will not receive oral evidence, or evidence which was not before the lower court (r.52.21(2)). The process of "review" is one that goes beyond assessing whether the decision was procedurally correct. It engages with the merits. However, the appeal court

> "… will accord appropriate respect to the decision of the lower court. Appropriate respect will be tempered by the nature of the lower court and its decision-making process. There will also be a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged."

Dupont de Nemours (EI) & Co v ST Dupont (Note) [2003] EWCA Civ 1368 [2006] 1 WLR 2793 [94] (May LJ).

26. One aspect of the "appropriate respect" to be shown by the appeal court is that, working from the same evidence, it will not lightly interfere with the conclusions of fact drawn from that evidence by the court or tribunal below. There are many authorities which reflect this well-established point. One, cited by Mr Clarke, is *Subesh v Secretary of State for the Home Department* [2004] EWCA Civ 56 where Laws LJ said this, at [44]:

> "As appellant, if he is to succeed, he must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one. The divide between these positions is not caught by the difference between a perceived error and a disagreement. In either case the appeal court disagrees with the court below, and, indeed, may express itself in such terms. The true distinction is between the case where an

> appeal court might prefer a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, require it to adopt a different view. The burden which an appellant assumes is to show that the case falls within this latter category."

27. As Lord Kerr pointed out in *Stocker* at [58], the reasons justifying this deference are not limited to the fact that the trial judge is in a privileged position to assess the credibility of witnesses' evidence. They include policy considerations, identified by the United States Supreme Court in *Anderson v City of Bessemer* (1985) 470 US 564, 574-575:

> "The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be 'the 'main event' … rather than a 'try-out on the road'' …"

28. Hence, in *Stocker* itself, the Supreme Court held that the appellate role, when asked to interfere with a finding of fact as to the meaning of an allegedly defamatory statement, called for "disciplined restraint".

> "Certainly, the trial judge's conclusion should not be lightly set aside but if an appellate court considers that the meaning that he has given to the statement was outside the range of reasonably available alternatives, it should not be deterred from so saying by the use of epithets such as "plainly" or "quite" satisfied. If it was vitiated by an error of law then the appellate court will have to choose between remitting the matter or, more usually in this context, determining the meaning afresh. But if the appellate court would just prefer a different meaning within a reasonably available range, then it should not interfere."

29. There is another strand to the self-restraint required of an appeal court that is relevant here. This is an appeal against a professional disciplinary Panel. Where the Court considers on appeal a decision of a profession's regulatory or disciplinary body it "will place weight on the expertise brought to bear in evaluating how best the needs of the profession and the public should be protected": *Council for the Regulation of Healthcare Professionals v General Medical Council* [2005] EWCA Civ 1356 [2005] 1 WLR 717 [78]. In the context of sanctions imposed by regulators of the legal profession, the Court will keep in mind that the tribunal

> ".. comprises an expert and informed tribunal, which is particularly well placed in any case to assess what measures are

> required to deal with defaulting solicitors and to protect the public interest. Absent any error of law, the High Court must pay considerable respect to the sentencing decisions of the tribunal. Nevertheless if the High Court, despite paying such respect, is satisfied that the sentencing decision was clearly inappropriate, then the court will interfere."

Law Society v Salsbury [2008] EWCA Civ 1285 [2009] 1 WLR 1286 [30] (Jackson LJ).

30. In accordance with the flexible approach indicated by *Dupont*, the extent to which this factor comes into play in an individual case will vary according to the nature of (a) the lower tribunal, (b) its decision and (c) the issues on appeal.

This appeal

31. The Appellant's Notice of 15 October 2019 identifies 14 grounds of appeal. These overlap to some extent. They can fairly be analysed as falling into six categories. In summary:

(1) Abuse of process. It is contended that the BSB's processes of investigation, charge and prosecution were "fatally flawed by political prejudice", evidenced by (among other things) a "deliberate failure" to prosecute others for worse offences (Grounds 6 & 7).

(2) Actual or apparent bias on the part of the Panel. It is said that the prosecutor and adjudicator are identical; reliance is also placed on the alleged political motivation of the Chairman "whose political sympathies are clearly at opposite poles" to those of the appellant; and it is said that the outcome and/or the reasoning demonstrate this (Grounds 2, 6 and 10).

(3) Procedural unfairness. It is said that (a) the refusal to identify and permit cross-examination of the complainant was a breach of natural justice and Mx Diggins' fair trial rights; (b) the shifting sands of the BSB's multiple attempts to define the gravamen of the alleged misconduct meant that the appellant was never clearly told the case he had to meet; and (c) the BSB relied on material that "should never have been relied upon" (Grounds 1, 2, 4, 5 and 7).

(4) Misdirection or error of law. It is said that the Panel failed in four main respects: (a) by failing to recognise that Mx Diggins' participation in a the "twitter spat" was an aspect of his private life which, on the proper interpretation of the BSB's own rules and guidance and/or as a matter of human rights law, falls wholly outside the proper scope of professional regulation, with the consequence that the prosecution represented an unlawful interference with Mx Diggins' rights under Article 8 of the Convention; alternatively, (b) by failing to acknowledge, properly or at all, Mx Diggins' free speech rights at common law and under Article 10; and/or (c) by failing to treat the Tweet, in accordance with *Stocker* as something "casual, uninhibited and ill thought out"; (d) by failing to apply, or misapplying, the *Walker* threshold; it is argued that a single Tweet could never cross that threshold so as to amount to professional misconduct (Grounds 3 and 11-13).

(5) Perversity. It is argued that the evidence before the Panel was incapable of justifying the Panel's conclusions, which were based on false predicates, reliance on untenable imputations of racism, or "potential" racism, contrary to dictionary definitions of usage (Grounds 1 and 8-10).

(6) Manifestly excessive penalty (Ground 14).

32. In his Appellant's Notice, Mx Diggins applied for orders that this appeal should proceed as a re-hearing, and that he should be allowed to adduce evidence and argument not relied on before the Panel. On 31 October 2019, Cavanagh J dealt with these applications on the papers. He refused to make any such orders, observing that "as things stand there is no valid basis for making an exceptional order" of that kind. But he noted that it would be open to Mx Diggins to ask the Judge hearing the appeal to take a different view.

33. In the event, Mx Diggins did not renew his application for an appeal by way of re-hearing. Nor did he apply to vary or amend his grounds of appeal. He did, however, put in a very lengthy "Skeleton Argument" running to 67 pages and 358 paragraphs, relying on a wide range of facts and matters that had not been put before the Panel. He also lodged a 200-page "Trial Bundle" containing 39 documents, many of which had not been before the Panel. And before me, he renewed his application to adduce evidence that had not been relied on before the Panel.

34. Mr Clarke opposed that application, relying principally on the three-part test in *Ladd v Marshall* [1954] 1 WLR 1489. He submitted that the application plainly failed the first and second *Ladd v Marshall* requirements: the evidence could, with reasonable diligence, have been obtained in time for the hearing below; and it could not be said that any of it would "probably have had an important influence on the result of the case".

35. There was clearly some force in these points. In particular, none of the material appeared to be truly "fresh" evidence. Most of it was either in Mx Diggins' hands at the time of the Panel hearing, or easily accessible then. For my part, I was also concerned by the volume of material; doubtful as to the relevance of much of it; and some of it appeared to relate to grounds of appeal that raised new points, and therefore might not properly be available to Mx Diggins.

36. Mx Diggins told me that the reason the material was only put forward now was Counsel who represented him before the Panel had made clear that there were certain points he was not prepared to argue, and items of evidence he would not be prepared to adduce. Further, he said, he had been advised that he would be able to rely on this material on appeal, if he lost. Mx Diggins made clear that in saying this he did not intend to waive privilege. It is hard to see how these submissions, disclosing the substance of the alleged advice with the intention of influencing the Court's decision, did not amount to a waiver. But Mr Clarke made clear that the BSB did not wish to press that point, or to investigate the issues thus raised. They have not been investigated, and I make no findings about what advice was or was not given.

37. It is of course a principle of appellate jurisprudence that a party is not generally permitted to raise new points on appeal, let alone deliberately to hold back a point, or some evidence, with the aim of bringing it forward if the first instance proceedings go

against him. Advice from Counsel is unlikely to justify such a course. After all, a litigant is never obliged to accept his lawyer's advice; and it is only in very unusual circumstances that such advice can justify a change of stance at the appeal stage. An alternative for the litigant whose lawyer refuses to pursue certain lines of argument is to represent himself. Mx Diggins said that alternative had been made clear to him.

38. I concluded, nevertheless, that the best course was to allow Mx Diggins to rely on and deploy the controversial material, as the saying goes "*de bene esse*", deferring a decision on its relevance and admissibility until after I had heard all the parties' submissions, and been shown the additional documents. Before reaching that decision, I established that no point about my own lack of impartiality would be taken. Mx Diggins' skeleton argument alleged that one of 8 "morbid symptoms" of the process he experienced was an "attempt to fix the result" by Desmond Browne QC, Chairman of COIC. He was said to have chosen a Chair from the "notoriously hard left" chambers, Matrix. This appointment (and a previous proposal for a different Chair, from Doughty Street Chambers) were said to give rise, at least, to the appearance of bias. I made it clear to the appellant that I know Mr Browne very well, and have done for over 30 years. He was clear that he did not object to me proceeding to deal with the case.

39. I noted that some of the "fresh" material – such as poems by Sir Philip Larkin and T S Eliot - was more illustrative than evidential, as indeed Mx Diggins pointed out. I was conscious of the need to avoid taking up too much time on preliminary skirmishes. It was clear from the skeleton argument that Mx Diggins, acting in this case as a litigant in person, had prepared for the hearing by reference to this body of material. Whether or not that was wise or appropriate, interference with the approach he had prepared did not seem necessary or proportionate in pursuit of the overriding objective.

40. In the event, Mx Diggins presented his case with admirable clarity and economy, and the hearing concluded within the day which had been allowed by the directions order. I am confident the BSB was not unfairly prejudiced by my decision to postpone a ruling on admissibility.

The Liability Appeal

41. It is convenient to deal with the first five categories of grounds of appeal in turn.

Abuse of process

42. This is the appropriate label for a number of separate complaints and criticisms, attributing political motivation to those involved in the process of sifting, investigation, prosecution and decision-making in this case. The appellant describes himself as a Native-British, White-Skinned Heterosexual Conservative Male. His case is that he has been "singled out for prosecution" by the BSB, which is "seeking to make an example of me to demonstrate that the most discriminatory profession … is passionate about non-discrimination." The BSB's prosecution is said to exhibit "the rankest hypocrisy and nauseating virtue-signalling".

43. Mx Diggins' arguments have a number of strands. He relies on "the alacrity" with which the original complaint was passed on by the Middle Temple; some capitalisation in an internal record of a telephone conversation between a BSB staff

member and the appellant; the "risk assessment" carried out internally at the BSB; the procedural history of the case; the fact that a number of politicians who are unregistered barristers, including Tony Blair, have not been charged with professional misconduct, despite (according to the appellant) having committed far more shameful deeds; and on the COIC Chairman's selection of Panel Chairs from Doughty Street, described as a "notoriously hard-left" set of chambers, and then Matrix, said to be "infamously hard-left". The appellant also relies on aspects of the decision of the Panel, which he attributes to Mr Glasson QC.

44. The response of the BSB, through Mr Clarke, is that the appellant has provided no material which could sensibly be said to support his assertions of political motivation, which should be dismissed.

45. My starting point is to question both the relevance and the procedural propriety of this ground of appeal.

46. An allegation of political bias, prejudice, or predisposition on the part of the Chair of a decision-making Panel is plainly capable of sustaining a challenge to the decision. That is a separate ground of appeal, to which I shall come next. Allegations of "political" motivation on the part of those who brought the matter before the Panel are different. They are challenges to the prosecutorial process, not the decision under appeal.

47. This is, moreover, a new point, not taken before the Panel by Mr Simpson QC, on Mx Diggins' behalf. The principles that apply where an appellant seeks to raise a point that was not taken before the tribunal of first instance are well-established. The appeal court will be cautious before allowing a point to be run for the first time on appeal, and will generally refuse to permit this if the point would require new evidence or, had it been run below, would have led to the proceedings being conducted differently, with regards to the evidence: *Singh v Dass* [2019] EWCA Civ 360 [16-18] (Haddon-Cave LJ).

48. This ground of appeal does involve allegations of fact, and any finding of fact in the appellant's favour would have to be based on evidence which was not before the Panel. Admission of such evidence would be exceptional. It would also require a fair opportunity for the BSB to respond, which it was not afforded below, and has not been afforded on this appeal. The material now relied on, served shortly before the hearing, is not "fresh" in the sense that it has only become available lately; it was available to the appellant when he came before the Panel, but not deployed. Nor is this a point that has only occurred to Mx Diggins after the event. He has made clear that he has always believed that he was the victim of a politically motivated charge. He plainly has always believed this; it was a point made forcibly in his letter of 25 January 2019. But Mr Simpson QC made no submission that the proceedings were brought for improper motives or were otherwise an abuse of the process.

49. The appellant does not dispute that the point, and the material now relied on, were both available to him before the Panel. His case is that they were not put forward on Counsel's advice, and that he believed that he could reserve them for use on appeal if necessary. Any belief that this would be a legitimate tactic was mistaken. He has told me that he was advised that it could be done. But besides the fact that this was said by way of submission, not evidence, he has also asserted his right to privilege. I could

not find his explanation proved. Applying the principles I have identified, I do not consider this ground of appeal is properly open to the appellant.

50. I would have dismissed this ground on its merits in any event. The appellant's case is not one of party-political bias. Rather, it is tied to political philosophies or standpoints. Mx Diggins characterises the standpoint of which he complains in various ways, including the "liberal fascism" of "self-hating whiteys". There is no evidence from which I could infer this state of mind, or the alleged intention to make an example of Mx Diggins for a "political" motive, on the part of the BSB. It is not possible to draw such an inference, as Mx Diggins invites me to do, from the fact that the BSB has not accused others of professional misconduct over other, quite separate and distinct behaviour. I am unpersuaded by the argument in reliance on the risk assessment, which is not obviously flawed, and is manifestly an element of a larger internal procedural process. Nor can I see any basis on which an appeal court could draw the inference that Mx Diggins invites about the Chair of COIC, that he set out to skew the process by "fixing" the result before the Panel. This aspect of the appellant's case is based on broad assertions about the political standpoint of the chambers to which the Chairs belong, rather than specific evidence about their attitudes and biases, or those of Mr Browne.

Bias

51. The appellant's first pleaded point on this aspect of the case (that the BSB has a dual role) is unsupported by evidence and clearly unfounded. The BSB conducts an investigation and prefers charges, which are then put before and adjudicated upon by a tribunal established and operated by COIC, which is separate from and independent of the BSB. It may be for these reasons that the appellant did not press the point in his written or oral argument.

52. Beyond this, the appellant's case is, as already indicated, that Mr Glasson was biased, in the sense that he was predisposed to favour the case for the BSB and to find against the appellant.

53. The appellant's skeleton argument says (at para 132) that both he and Mr Simpson "assumed, once we found out that Glasson was to be the Chairman, that I would be found guilty of the charge, irrespective of anything he could argue on my behalf". Yet no application was made for Mr Glasson to recuse himself. This, too, is therefore a point which could have been taken before the Panel, but on the appellant's own account of things has been deliberately kept back by him, for use on appeal if necessary. Generally, a party is not entitled to reserve such a point in this way. I am not persuaded that, on the facts of this case, there is any justification for having done so.

54. Again, I would have dismissed the ground of appeal on its merits in any event. The appellant's argument is that even if he cannot show actual bias, the facts demonstrate the appearance of bias, given the "wholly political and racial nature" of the dispute. Mx Diggins relies on the proposition that a barrister who, like Mr Glasson, is in Matrix Chambers, cannot be relied on fairly to assess the appellant's "critique" of the Open Letter. The argument includes the assertions that "unlike 99% of all other Chambers" Matrix specialises in discrimination law; and that it has a number of policies on race and discrimination, including a mandatory requirement to attend

equality and diversity training. I have no evidence about these matters, but I am satisfied that they could not be enough to show actual or apparent bias, so as to disqualify Mr Glasson from chairing the Panel.

55. The legal principle is clear: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased": *Porter v Magill* [2001] UKHL 67 [2002] 2 AC 357 [102] (Lord Hope). "The facts" for this purpose, include all facts bearing on the question of bias, not just those which are relied upon by the party alleging actual or apparent bias. This is one reason why it is important for a party who wishes to raise such a point to apply to the allegedly biased judge or tribunal member to recuse himself. If that is done, the full factual picture can be investigated and fairly debated. Any court or tribunal reviewing the case on appeal will be able properly to assess the conclusion arrived at. It is unreasonable, and unfair to the BSB and the Panel, for Mx Diggins to raise this point for the first time on this appeal.

56. The argument is far too weak to prevail, anyway. No fair-minded observer could identify a real possibility of bias on the part of Mr Glasson, on the basis of nothing more than his membership of a set of Chambers with the characteristics which the appellant attributes to Matrix. There is no suggestion that Mr Glasson had any financial interest in the case, or that he had a close relationship with anybody involved. The fair-minded observer, tasked with assessing the possibility of biased attitudes towards the *issues* in the case, would start by identifying those issues. These did not include evaluation of any "critique" of the Open Letter by Mx Diggins. The central issue was and remains whether the language of the Tweet, and in particular its use of the terms "cunnilingus" and "shrill negroids", was likely to undermine trust and confidence in the appellant and/or the profession, so as to amount to professional misconduct.

57. The observer would then consider the characteristics of the individual in relation to whom the possibility of bias is raised. The observer must be taken to know that Queen's Counsel is a senior rank in the profession, and of the professional standards and ethical traditions of the Bar. Nothing is said by the appellant about any statements by Mr Glasson himself, or any other conduct by him, that might call into question his ability to implement those standards and traditions by performing, fairly and independently, the function of Panel Chair. I do not accept that the impartial observer would or could conclude, on the basis of any of the matters about Matrix chambers that are relied on by the appellant, either individually or in combination, that Mr Glasson might be predisposed to resolve the issues against the appellant, and to find professional misconduct, on the basis of "political sympathies" that were not aligned with those of Mx Diggins.

58. The appellant's case is that the Panel's conclusions demonstrate "its and the Chairman's over-zealousness to make a finding of guilt: irrespective of the evidence … arguments …and burden of proof …" It is alleged that Mr Glasson was "obsessed with finding me guilty whatever the facts." I shall come to the substance of the Panel's reasons, but say now that I cannot detect in them any evidence to support these contentions. I see no basis in the reasons for concluding that Mr Glasson's approach to the issues was predetermined, or that his conclusions resulted from attitudes, political or otherwise, that predisposed him to find in favour of the BSB.

Procedural unfairness

59. The appellant submits, as Mr Simpson did below, that the identity of the complainant was a vital fact. Mx Diggins now contends, on the basis of what he says is inadvertent disclosure by the BSB, that the complainant was a Cambridge University Student possessed of "snowflake" characteristics, typical of a generation of "hyper-sensitive liberal fascists that infest University campuses". The complainant, says Mx Diggins, is over-sensitive to criticism, easily upset, and hence incapable of counting as an "ordinary reasonable reader" when applying the test identified in *Stocker.*

60. This is muddled. The question for the Panel was whether the Tweet was "likely" to undermine the trust and confidence reposed by others in the appellant and the Bar. That is a question about the tendency of the Tweet. It was common ground between the parties that the way to determine that question was to apply the principles in *Stocker*. These require the tribunal to assess how a hypothetical "ordinary reasonable reader" would be likely to respond to the social media statement under consideration. This is an objective process. It does not require evidence of the reactions of actual readers. Indeed, it is well-established in defamation law that evidence of that kind is irrelevant for the purposes of assessing meaning, and defamatory tendency.

61. The Panel's task was to read the Tweet, consider such evidence as there was of its context and, applying their common-sense and knowledge of the world, to make an assessment of how the Tweet would be likely to affect the attitudes of ordinary reasonable readers to the Bar or to the appellant, or both. The BSB was therefore right to take the view that the identity of the complainant, and other information about the complainant, was wholly irrelevant. By the same token, the appellant is wrong to complain of the BSB's non-disclosure of such matters, or its attempts to withhold them. His case, that the actual response of the unidentified "snowflake" undermines the BSB's case or tends to support his own case, is misconceived.

62. For the same reasons, the contention advanced below and before me, that the appellant's fair trial rights were infringed by the BSB's failure to identify the complainant and make him or her available for cross-examination, must be rejected. The content of the Tweet, and such matters of context as could affect the response of the ordinary reasonable reader, were agreed. The complainant could not provide any evidence relevant to any of those matters. Nor could the complainant give relevant and hence admissible evidence about the likely reaction of the hypothetical reasonable reader. Cross-examination designed to establish the alleged "snowflake" characteristics of the complainant, and any prejudice or other flaw in the complainant's own views, would not have gone to any issue in the case. The same applies to any motive for complaining that the complainant may have had. Such motive would be irrelevant to the issues.

63. Reliance on Article 6 of the Convention does not advance this aspect of the appellant's case. Even if, which the BSB disputes, these proceedings attracted the guarantees of Article 6(3)(d) ("to examine or have examined witnesses against him…") the facts of the case provide no purchase for those rights: the facts relevant to liability were agreed, and there were no witnesses to those facts for the appellant or his Counsel to examine. To proceed without calling the complainant for cross-examination was plainly consistent with the Convention guarantee of overall fairness. The contrary is unarguable.

64. The grounds of appeal complain at para 7 of reliance by the BSB on material "that should never have been relied on". The grounds refer to BSB Policy Guidance of which the appellant "was wholly (and understandably) unaware", but although a copy of the guidance is in the bundle put before me by the appellant, I see no indication that it was before the Panel; and the Panel did not base any aspect of its conclusions on the guidance. Otherwise, though I have read the grounds and Mx Diggins' skeleton argument carefully, I have not been able to pin down just what is meant by this ground of appeal.

65. In his skeleton argument, Mx Diggins complained of multiple shifts in the way the BSB put its case before the Panel. This, as I have said, is a point that was advanced by Mr Simpson below. He put it forward as a ground of procedural unfairness. That aspect of the case is revived by the appellant on this appeal. That was done initially in a single sentence of the skeleton argument where the appellant contends that "the Bar … of all professional organisations, would recognise the centrality in a fair trial that a defendant to a charge must be informed clearly of the case against him". In oral argument, the appellant developed the point, contending that he had faced six different bases for a charge. This does not feature in the grounds of appeal. In that sense it is a new point in this appeal, and strictly speaking an application for permission to amend the grounds was necessary. However, the BSB did not take objection, and I do not consider it unfair or wrong to allow this argument to be advanced and relied on at this hearing. To the extent necessary, therefore, I grant permission to pursue it. But I reject it on its merits.

66. I have quoted at [7] above the wording of the charge that Mx Diggins faced before the Panel. It is clear, and sufficient, and it never changed. What did change from time to time was the nature of the argument advanced by the BSB in support of the charge, and the documents to which it sought to refer in support of its arguments. Mr Clarke has fairly acknowledged that this was the case, and that (as he puts it) the BSB got itself in "a bit of a pickle". He has taken the responsibility on his own shoulders. He argues, or concedes, that some of the ways in which he sought to frame the case in support of the charge were over-elaborate, contrary to *Stocker*. He submits, however, that the final way the case was put by him before the Panel (see [12] above) was not only compliant with the *Stocker* principles, but sufficiently clear and timely to allow a fair trial. I accept that submission. The passage quoted above comes from Mr Clarke's written Opening Note before the Panel, dated 16 September 2019. There was plenty of time for the appellant and his Leading Counsel to address that way of putting the case before the hearing on 26 September 2019. Mr Simpson did address it in his own Opening Note, dated 23 September 2019.

67. Mx Diggins' argument about the BSB's changes of position goes rather further. He deploys the changes in the "prosecutor's" case in two other ways, in a section of his skeleton argument (between paragraphs 269 and 321) headed "The prosecution's evidence fails its own threshold test". The first argument is that the many ways of framing the case show that it was not possible for a reasonable tribunal to be sure that the BSB's case was proved. That is not a new point. It is a line of argument relied on in support of grounds 9 & 10, which complain that there was not enough before the Panel to justify its conclusions. That in turn is a version of the arguments advanced by Mr Simpson below. I shall address it later, under the heading of "perversity". Secondly, Mx Diggins complains that the Panel found against him on a basis which

had not been put forward by the BSB. This is a separate point, but one which I shall also address when dealing with "perversity".

Error of law

Was the Tweet outside the Panel's jurisdiction?

68. The appellant's contention (ground 12) is that the Panel misdirected itself, in breach of the explicit guidance in the BSB's own Handbook "which makes clear that, other than in exceptional circumstances (none of which apply here) it is not the BSB's role to police a barrister's private life." This is a version of Mr Simpson's argument below, and also relies on the passages from the guidance that I have cited: see [13-14] above.

69. The Panel's conclusion was that the Tweet was not a purely private matter. It was (1) a Tweet to the world at large, which was (2) "seriously offensive", accompanied by (3) a link to the appellant's website, on which he identified himself as a barrister, which was (4) likely to diminish trust and confidence in the profession. I have reservations about the third element of this reasoning. But in my judgment the Panel's decision was not wrong in this respect, whether for the reason given by the appellant or at all.

70. I begin with the argument based on gC27 and gC25. There are some obvious difficulties with the appellant's argument. First, the guidance is just that. It does not purport to define the limits of the core Duty or the Panel's jurisdiction. It merely indicates categories of conduct that are "likely" or "not likely" to be treated as breaches of CD5 (and other duties). The guidance is not to be treated as if it were a statute, or a hard-edged rule defining the scope of the BSB's role, let alone that of the Panel. Secondly, on a fair reading the terms of the guidance do not prohibit a charge, or a finding, of misconduct in respect of behaviour engaged in as part of a person's private life. On the contrary, gC25(4) indicates that "seriously offensive ... conduct towards third parties" is likely to be treated as a breach.

71. The submission that this part of the guidance is concerned only with conduct in a professional role is hard to reconcile with the terms of the two pieces of guidance, read as a whole. The argument is that "seriously offensive conduct towards third parties" could not be "a criminal offence, other than a minor criminal offence" and thus could only fall foul of gC27 if it amounted to "abuse of your professional position". The problem with that is that gC25(7) identifies "abuse of your professional position" as a distinct category of conduct "likely" to be treated as misconduct. I would not suggest that the wording of these two pieces of guidance is crystal clear, but I do not consider it fairly arguable that they constrain the powers of the BSB or the Panel in the way suggested.

72. Thirdly, like the Panel, I cannot accept that there is some "bright line" to be drawn between that which falls purely within the private realm, and that which is sufficiently public to engage the disciplinary jurisdiction of the BSB and the COIC tribunals. In my view this is a false point. In the course of argument, I put a hypothetical example to the appellant: a barrister who, on occasions wholly unrelated to his professional practice, committed a number of rapes. The conduct, as opposed to any consequent criminal proceedings, could be characterised as private. The appellant accepted that a

bright line could not be drawn on the basis of a distinction between what is private and what is public, but relied on the "criminal offence" exception in gG27. In my judgment, that was to miss the point. Ultimately, the question for the Panel in a case under CD5 is whether the conduct admitted or proved is likely to undermine trust and confidence in an individual barrister (as a barrister) or the profession. That is a question for assessment on the basis of the facts of the individual case. The range of factual scenarios that could properly raise such a question has no theoretical limits. Some public conduct may be too trivial to satisfy this requirement. Some private conduct may clearly cross the line. Some conduct may be hard to categorise as either public or private. A Panel will have to evaluate the conduct in all the circumstances.

73. It cannot be necessary for a barrister to be immediately or readily identifiable as such, before a charge under CD5 can be brought or made out. Nor can the link to the website in this case be the key factor, that takes the Tweet into the public domain. But I do not believe that is what the Panel was suggesting in its para 32. As it found, the Tweet was in the public domain anyway, as a public tweet, accessible to anybody. The URL, enabling a reader to travel from the Tweet to the appellant's website and identify him as a barrister, is an element of the factual matrix that was relevant to the Panel's assessment of whether his conduct met the test of being "likely to undermine trust and confidence". The overall approach adopted by the Panel in its paragraphs 32 to 35, and the first two sentences of paragraph 36, is consistent with what I have said above, and discloses no error of law.

Did the Panel's approach ignore or err in its approach to human rights?

74. The framework is clear. The following is adapted from my judgment in *Khan v Bar Standards Board* [2018] EWHC 2184 (Admin) [58]:

(1) The BSB and the Panel are both public authorities for the purposes of the Human Rights Act 1998 (HRA). They are therefore subject to the duty imposed on all public authorities by s 6(1) of the HRA, not to act incompatibly with the Convention Rights. (This Court is under the same duty, of course).

(2) The appellant's Tweet is speech protected by Article 10(1) of the Convention, which extends to cover speech which offends, shocks or disturbs, or which is painful or distasteful satire, iconoclasm, rudeness, unpopular and unfashionable opinion, banter, humour, and speech which is no more than abuse. The imposition of sanctions in respect of the Tweet interferes with the appellant's right to freedom of expression. It therefore requires justification pursuant to Article 10(2).

(3) The imposition of a sanction also represents an interference with the appellant's Convention rights under Article 8(1). Whether or not a Tweet is "correspondence" within the meaning of that provision, Mx Diggins is right to say that his conduct in posting it was an aspect of his private life, respect for which is guaranteed by Article 8(1). The interference requires justification pursuant to Article 8(2).

(4) An interference can only be justified if it is prescribed by law, and pursues a legitimate aim, and it is convincingly established that the measure in question is necessary and proportionate in pursuit of that aim. The legitimate aims specified in Articles 8(2) and 10(2) are to be construed strictly. "Necessary" does not mean indispensable, but nor is it to be treated as synonymous with "useful",

> "reasonable" or "desirable". And the test of necessity requires the party charged with the interference to persuade the court that the measure at issue corresponds, and is proportionate, to a "pressing social need".

See the authorities cited in *Khan* [59]

75. CD5 sufficiently prescribes the nature of the conduct that may be subject to sanction, and the range of sanctions that may be imposed. The contrary has not been argued. The BSB's disciplinary processes, and those of the COIC Panel, pursue legitimate aims. I considered the question in *Khan* at [63]:

> "In my judgment a, if not the, central function of the BSB's regulatory regime is "the protection of the reputation and rights of others". Core duty 5, which the Tribunal found to have been breached in this case, is expressly aimed at maintaining public confidence in barristers and the profession generally. That is a reputational matter. Other barristers have a proper and legitimate interest in ensuring that their reputations are not tarnished by association with those who misconduct themselves professionally. But this duty is also concerned with the rights of others which include, importantly, the rights of those who employ barristers. They are entitled to expect adherence to high ethical standards."

Here, then, the essential issues (as will normally be the case where a barrister faces disciplinary proceedings over speech) are those of necessity and proportionality.

76. Mr Simpson's argument before the Panel was not expressly put in terms of Articles 8 and 10. That is a modified way of putting the matter, raised before me on appeal. But Mr Simpson did emphasise that the Tweet was part of the appellant's personal and private life, and that he was "exercising [his] right to freedom of expression". None of that was in dispute. Further, as a matter of substance, necessity and proportionality are the factors on which Mr Simpson focused attention in this part of his argument. He argued that the Panel was concerned with a single Tweet, on a private rather than a professional topic, expressed casually, in a way analogous to someone chatting in a bar. The central thrust of his case was that if, contrary to his submissions, the facts were within the authorities' remit, they were too trivial to justify disciplinary sanction, with all the stigma that attaches to that. The Panel addressed those factors, and I do not think it is right to say that they were ignored.

77. Whether the Panel's assessment was wrong in law depends, as it seems to me, on whether it erred in one or more of the other respects alleged under this head. Put another way, the appellant's contention that the Panel was legally wrong in its assessment of necessity and proportionality can be fairly assessed by reference to the three further complaints to which I now turn.

Did the Panel err in its approach to *Stocker*?

78. The grounds of appeal contend (at 11) that the Panel "perversely ignored the fact that this was (as most Twitter spats are) 'casual, uninhibited and ill thought-out' in its very nature and should only be judged as such (*Stocker* @ 46)". I disagree.

79. It cannot be said that the Panel ignored the appellant's argument to this effect. The internal quotation in the passage I have just quoted comes from *ADVFN* [14]. At paragraph 27, the Panel cited that very passage. At paragraph 34, the Panel expressly addressed and rejected the argument, that the Tweet fitted this description and was analogous to a conversation in a bar. The appellant has also failed to persuade me that the Panel was wrong in this respect. It was entitled to draw a distinction between a private conversation in a relatively secluded location, and a message addressed to several people, posted on a public platform for all to read. I see no merit in the appellant's criticism of the Panel for failing to find, and proceed on the basis, that the Tweet was "casual, uninhibited and ill-thought out".

80. The Tweet was in evidence, and it would be easy to conclude from its wording that it was "uninhibited" and unwise. But the appellant gave no evidence, and there was no evidential basis for a finding of fact that his approach to its composition qualified as "casual" or "ill thought-out". Why, in any event, should any of this matter, for present purposes?

81. It is important not to misunderstand the relevance of *Stocker* in a context such as this. The decision in that case was concerned with the way in which a Court should approach the determination of the meaning of a social media post, in the context of a claim in defamation. It stands as an important warning against over-elaborate analysis of the meaning of words that are written, and understood to be written, in the fast-moving and relatively informal context of social media. Those points, and the principles identified above, were adopted and applied by the Panel here, in assessing how an ordinary reasonable reader would interpret and respond to the Tweet. I shall come to the substance of the Panel's assessment.

82. But *Stocker* has nothing to say about whether a social media post can or cannot be treated as having a seriously defamatory, or seriously offensive, tendency. The Supreme Court did not hold that a person who is criticised for a tweet can excuse or justify a message which has such a tendency by proving that they tweeted causally, without thought or inhibition. As everybody knows, some of the most damaging and hurtful statements are those made casually, without proper forethought or self-restraint.

83. Nor does *Stocker* provide any support for the further argument advanced to me by the appellant, that the Panel could not properly find against him because "Twitter is famously rude and offensive and complaining of that is like going to a Motorhead concert and complaining it is too loud". It is a notorious fact that many on Twitter use rude and offensive language, indeed that some engage in harassment of others, or wounding "pile-ons". But I have no evidence, nor is it a matter of common knowledge, that everybody on Twitter behaves in these ways. Even if that was so, a descriptive norm of that kind could not confer a right on any individual user to post rude or offensive messages. If the argument is that every Twitter user makes a voluntary submission to behaviour of that kind, no such argument was advanced below, and I consider it to be untenable. I see no evidential or other basis for concluding that all Twitter users consent to being treated abusively or offensively.

Did the Panel err in relation to Article 10?

84. At paragraph 13 of his grounds, the appellant relies on the scope of his right to freedom of expression which "includes … a right to be not merely offensive but to be seriously so if one chooses". He contends that the Panel failed to acknowledge that right, properly or at all. This is a highly unattractive argument. The case for Mx Diggins below was explicitly put on the basis that the Tweet could not be the subject of disciplinary sanction because it was a purely private matter that was *not* seriously offensive. Again, it seems to me that the appellant is seeking unjustifiably to have two bites at the cherry, pursuing on appeal a case which is wholly different from the case advanced below. I am not persuaded, anyway, that the Panel is shown to have taken an unduly narrow view of the appellant's right to freedom of expression.

Did the Panel err in relation to *Walker?*

85. The grounds of appeal assert that the Panel erred in failing to take any account, or any proper account, of "the mandatory requirement that the stigma and sanctions attached to a finding of professional misconduct are not to be applied for trivial lapses and only arise if the misconduct is properly regarded as serious." I think it is somewhat over-rigid to describe the decision in *Walker* as imposing a "mandatory requirement", but otherwise I would accept the appellant's characterisation of the principle identified in that case. I cannot agree that the Panel failed to take account of that principle. On the contrary, the Panel expressly recounted the submissions made by Mr Simpson and plainly accepted and applied them in reaching its decision.

86. The appellant's pleaded case, in paragraph 3 of the grounds, is that "A single tweet is, by definition and prima facie, a de minimis breach and cannot ever be the subject of a finding of professional misconduct." In his submissions to me he argued that it is an oxymoron to speak of "a particularly grave tweet". The question of law thus raised is stark: can a single Tweet ever cross the *Walker* threshold? The only possible answer is yes. As the Panel observed in its paragraph 37, the question whether conduct crosses that line of seriousness is one of judgment: see [20] above. It would be wholly inconsistent with that approach to immunise a communication with the world at large on no better basis that it was only a single tweet. Twitter imposes character limits on individual tweets, but it cannot sensibly be suggested that a limit of 140 -characters (the limit at the time) makes it impossible for a barrister to post on Twitter a grossly offensive and inappropriate message, worthy of disciplinary measures. No other controls imposed by Twitter have been relied on by the appellant.

Conclusion on the allegation of error of law

87. For these reasons I have concluded that the appellant has failed to identify any misdirection or error of law on the part of the Panel in this case.

Perversity

88. The grounds of appeal contain a range of complaints, which I have sought to summarise in paragraph 31(5) above. Having considered these with care, my overall conclusion is that, applying the tests identified at [24-30] above, there is no basis for this Court to interfere with the judgment of the Panel. The Panel's decision was rational, and within the range of conclusions that were fairly and reasonably open to an expert tribunal, applying the Code and the applicable legal principles to the material before them.

89. The Panel correctly identified the question posed by the charge: was it sure that the Tweet was likely to diminish trust and confidence in the appellant or the profession? It answered that the Tweet was "indeed likely to diminish the trust and confidence which the public place in the profession". The essence of the chain of reasoning, in the passages quoted at [20] above, can easily be identified. The Tweet was a message directed at the University and the Student Union Women's Officer, but published to the world at large; adopting an impressionistic approach, the use in the Tweet of the words "cunnilingus" and "shrill negroids" was "seriously offensive" to third parties; this would lower the profession in the eyes of the public because it represented a departure from the standards which the public rightly expects the profession to espouse: the promotion of equality and diversity, and the avoidance of language which is "racially charged and derogatory to women"; the conduct was "particularly grave", and crossed the *Walker* threshold, because it was not a mere momentary lapse, acknowledged as such, and apologised for; it was (on the appellant's own case) carried out in anger; it was kept online; and the appellant showed no remorse or insight. This chain of reasoning cannot be characterised as irrational or unsustainable.

90. The appellant says that the meaning and import of the Tweet are clear: he was addressing Cambridge University, his message being "I have read it. Now; don't be cowed just because a black person tells you your syllabus is racist". But none of this was said before the Panel. It is not possible to see how the appellant can fairly complain that the Panel did not take it into account. The issue for decision there was not what meaning the appellant intended to convey; so he is not to be criticised for not giving evidence to this effect. But there was no obstacle to his Counsel arguing that this was the message carried by the words used. In any event, the Panel's conclusions are not inconsistent with this argument. Quite properly, their focus was not so much on the message as the likely effect of the florid language employed to express that message.

91. The appellant complains that the BSB adduced no evidence to support its case. By this he means there was no evidence other than the Tweet. That is not quite right, as there was some contextual material. But it is correct that no entirely extraneous material was relied on. The complaint is ill-founded, as a matter of principle. For reasons already explained at [60-61] above, no other evidence was relevant or admissible. The appellant seeks to rely on what the Oxford English Dictionary says about the word "negroid" to demonstrate that the word is not racist or offensive in its usage. That approach is contrary to the position established by *Stocker*, which was common ground before the Panel: that dictionary definitions are not admissible for this purpose. I do not accept the submission that there is a distinction to be drawn, for this purpose, between the use of a dictionary to find a word's meaning, and its use as a source of commentary on usage. Also inadmissible is the "fresh" evidence on which the appellant seeks to rely, in rebuttal of any suggestion that his words were racist: Martin Luther King's "I have a dream" speech, and US census forms from 2010, allowing respondents to identify as "negro". These are not legitimate ways to test the meaning or likely effect of a tweet, let alone one posted in the UK in 2017. All of these arguments are, in addition, immaterial to the way the case was ultimately put before the Panel by the BSB, as quoted at [12] above.

92. Forensically, there is some obvious attraction in the appellant's argument, that the twists and turns in the ways the BSB had earlier sought to frame its argument tend to

undermine its case. The complaint was recorded as being that the Tweet contained "a racist and sexually explicit slur". And the BSB's letter of 3 January 2018 referred to "racist and sexist language", a formulation that was later dropped. Mx Diggins has spent much time analysing and criticising the BSB's "pre-trial" arguments. On analysis, however, the merits or demerits of those arguments are of no account. They were never incorporated into the charge, which remained the same throughout. The BSB's case at the final hearing was clear. The only relevant question is the simple one of whether, on the material placed before it at the hearing, the Panel was entitled to reach the conclusions which it did.

93. The wording used by the Panel in its reasons was not identical to the language used by the BSB in presenting the charge, but I do not accept that this is a flaw. The charge was clear enough, and the appellant had and took advantage of a full and fair opportunity to present his case as to why the Tweet should not be considered a breach of the Code as alleged. The Panel's reasons for finding the Tweet to be "seriously offensive" do not differ fundamentally from those advanced by the BSB. Nor am I persuaded by the appellant's criticisms of the Panel's reasoning. He focuses on the terms "racially charged" and "derogatory to women" in paragraph 35, arguing that both are impermissibly over-broad, vague and undefined. He offers illustrations of publications by others that could be equally (and, by implication, wrongly) castigated as "racially charged" and wonders rhetorically how Erica Jong might react to the characterisation of the Tweet as "derogatory to women". In my judgment, such arguments are over-subtle, and fall into the trap of over-elaboration against which the Supreme Court warned in *Stocker*. The substance of the Panel's reasoning is clear enough, and I do not consider that its conclusions are open to challenge as irrational or otherwise illegitimate. Nor do I accept the appellant's complaint, that the Panel's reasoning contained "no analysis of the Tweet at all", and attributes to Mr Glasson a "liberal fascist logic which is that no explanation as to its meaning is required [and] … that only the High Priests of Liberal Fascism are entitled to know the meaning of their own denunciation".

94. In all the circumstances, however, albeit at the risk of over-elaboration myself, I add the following. The Tweet may not have been easy for all to understand, without its full context. But it plainly expresses hostility to people whom the appellant describes as "shrill", and who he claims "will destroy an academic reputation". Those who are criticised in these ways are identified only as "negroids", a term which defines more than one person exclusively by reference to their appearance and racial or ethnic origin. The Tweet provides no indication why those characteristics might justify, support, or be relevant to the criticism. It was legitimate for the BSB to describe this as "offensive race-based language", and equally proper for the Panel, applying ordinary community standards, to find that it was "racially charged". The reasonable reader will also have gleaned from the Tweet itself that the appellant was strongly urging someone to refuse the "negroids" something they were seeking, in connection with academic matters; and that he was doing so by deploying sexual language depicting the "negroids" as women seeking, metaphorically, oral sex. No indication was given of the relevance of the gender of the "negroids", or why such a sexual metaphor might be considered fitting. It was legitimate for the BSB to describe this as "offensive … gender-based language" and for the Panel to conclude that it was "derogatory to women".

95. The appellant makes no apology for his use of language but submits that it was justifiably strong, for a number of reasons. Not only was he reacting to the "liberal fascism" of the Open Letter, which was highly offensive to him, there were "three excellent literary reasons" for using crudity. Crudity, he argues, acts as "a powerful linguistic intensifier"; it works well when space is artificially constrained; and it has an immediacy in a medium as crowded and transient as Twitter. It is in this context that the appellant draws on comparisons with the works of Larkin and T S Eliot. All of this is new. It was not advanced before the Panel. Further, even if all these propositions were true, I would reject, for reasons which will be evident from what I have said already, the argument that crudity was "forced upon" the appellant "by the limits Twitter places on its users". I note that the appellant has himself provided a much shorter summary of his essential message, without crude language, which falls well short of the 140-character limit in force at the time: see [90] above. The Panel was plainly right to approach the use of crudity on the basis that it was the appellant's deliberate choice.

96. The appellant's argument that his choice of words was legitimate is best considered in the context of his human rights arguments, which are, in substance, that it was not open to the Panel to regard the legitimate aim of professional regulation as a sufficient justification for the interference with his Convention rights that the sanctions represent. I approach this issue on the footing that the Court's duty under s 6 HRA means that intense scrutiny is required. The submission advanced before me is that this case stands in stark contrast with the facts of *Khan v BSB*. The appellant was not acting in a professional capacity or in a professional place; he was communicating as a private individual on a topic of legitimate public interest, provoked by the Open Letter. He did not target anyone, defame them, or intrude into their private lives in ways they had gone to law to prevent. All of this is true. But there are countervailing factors, perhaps best encapsulated in Mr Clarke's submission to the Panel that the public expects, and trusts, members of the profession to exercise judgment, restraint and a proper awareness of the feelings of others. Having now reviewed the case in detail, I do not consider the Panel was wrong to strike the balance between the appellant's free speech and privacy rights, and the rights of others, in the way that it did.

The Penalty Appeal

97. Sanction was approached in accordance with the applicable guidance. It was and is common ground that the Tweet counted as an "isolated incident" of discourtesy, for which the starting point in the guidance is "Reprimand, possibly accompanied by a low-level fine." A "low-level fine" for this purpose means "up to £1,000". It was the appellant's own case before the Panel that the appropriate sanction was a reprimand. The only issue, therefore, is whether it was manifestly excessive to impose a fine, or a fine of the amount imposed.

98. The Panel considered the aggravating and mitigating factors in the case, by reference to a list in Annex 1 to the guidance. The appellant's case is that it misdirected itself by double-counting in terms of aggravating factors, and ignoring three mitigating factors: "heat of the moment", "co-operation with the investigation" and "previous good character". He relies on the Panel's reasons and on a document which he says emanated from the Panel, on which some of the factors have been circled, but not others.

99. This argument faces the fundamental difficulty that, once again, it is new. This is not how Mx Diggins' case on penalty was put to the Panel. I have a transcript of the short hearing on that topic. The Panel was told that Counsel were agreed on the penalty range. When asked about a fine, Mr Simpson said only that his client had the means to pay such a fine. There was no submission that a fine would be excessive, nor any mention of any of the mitigating factors now relied on. For good measure, I add that there was no evidence that the Tweet was sent in the "heat of the moment", which could not be assumed; the appellant's submission that it was sent "in anger" did not prove that point. In any event, the fine of £1,000 cannot in my judgment be said to be manifestly excessive, even for an individual of Mx Diggins' unblemished previous good character. Accordingly, the Penalty Appeal is also dismissed.