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: 25/02/2013

Before:

SIR WYN WILLIAMS
MR TOM WEISSELBERG
MR KENNETH CROFTON-MARTIN

Between:

AMANDA QUINN	**Appellant**
- and -	
THE BAR STANDARDS BOARD	**Respondent**

Hearing date: 15 February 2013

JUDGMENT

Sir Wyn Williams:

1. At the conclusion of the oral hearing of this appeal we announced that the appeal would be allowed. We made various consequential orders. These are our reasons for allowing the appeal and for making the orders which we did.

2. The Appellant was called to the Bar on 11 October 2001. In 2012 she was convicted by a Disciplinary Tribunal of 3 charges of professional misconduct contrary to Paragraph 901.7 of the Code of Conduct of the Bar of England and Wales (8th Edition). Count 1 alleged that the Appellant had engaged in conduct which was dishonest or otherwise discreditable to a barrister in that on 16 April 2008 she told Manchester County Court that a Mr Nicholas Matthew, a litigant in person, and the other party in family proceedings in which she was instructed on behalf of the mother had expressly agreed to an adjournment of a hearing listed on 17 April 2008 when he had not. Count 2 alleged that the same misconduct was prejudicial to the administration of justice. Count 3 alleged that the Appellant had engaged in conduct which was prejudicial to the administration of justice in that on 16 April 2008 she spoke to a Mr Martin Collins, a CAFCASS family court adviser in the proceedings to which we have referred and told him that the hearing listed on 17 April 2008 had been adjourned when it had not.

3. In respect of these offences the Tribunal imposed concurrent sentences of suspension from practice for 2 years; the suspension was to take

effect at the date of promulgation by the Appellant's Inn, Middle Temple.

4. The Appellant appealed against her convictions on all 3 charges. She also appealed against the sentences imposed but that appeal became academic in the light of our decision upon the appeal against convictions.

The relevant facts

5. In April 2008 the Appellant was employed by a firm of solicitors. One of her clients was a lady by the name of Gugwana Dlamini. Ms Dlamini was involved in a protracted and bitter dispute with Mr Nicholas Matthew over their son Daniel, a boy then aged 6. Litigation had begun in 2007; its principal focus was upon the issue of contact between Daniel and his mother although by April 2008 mother had begun to suggest that Daniel should reside with her. A hearing in this long-running dispute had been scheduled to take place on 17 April 2008 at the Manchester County Court before DJ Rawkins.

6. Earlier in the proceedings Mr Matthew had instructed lawyers. Shortly before the hearing scheduled for 17 April 2008, however, he notified the court and the Appellant that he was acting in person.

7. It is common ground that during the course of the afternoon of 16 April 2008 a telephone call took place between the Appellant and Mr Matthew. Before the Tribunal there was a conflict between the evidence of the Appellant and that of Mr Matthew about what was said.

8. Mr Matthew's account of the telephone conversation was that the Appellant rang him to say that the hearing scheduled for the next day had been adjourned by the court. He was told, so he says, that a court official had rung the Appellant to say that DJ Rawkins had a meeting in the afternoon and that there was insufficient time for the case to be heard.

9. According to Mr Matthew he was suspicious that what he was being told was untrue. Accordingly the next day he turned up at court. He discovered that DJ Rawkins was present at court and willing to hear the case. However, neither the Appellant nor her client appeared.

10. It was not just the Appellant and her client who did not appear. The CAFCASS officer, Mr Martin Collins, also failed to appear. Mr Collins did not appear because he was telephoned by the Appellant who told him that the case had been adjourned.

11. The Appellant has always contested Mr Matthew's version of the telephone conversation which took place between them on 16 April. According to the Appellant some time during the afternoon of 16 April 2008 a lady by the name of Kate, one of the administrative staff at the Manchester County Court, telephoned her to say that DJ Rawkins was not available for a hearing which would take the whole of the day. Kate apparently enquired about whether the hearing could be dealt with during the course of the morning. The Appellant informed Kate that this was unlikely whereupon Kate suggested she would speak to the District Judge with a view to the case being taken out of the list and re-listed at a

time when a full day was available. Some hours then passed. At around 4.40pm Kate spoke to the Appellant to say that the case could be re-listed but that District Judge Rawkins required the consent of both parties before adjourning it. The Appellant has always maintained that in the face of this information she telephoned Mr Matthew to relay to him the information which had been given to her by Kate. Thereafter, they discussed whether or not the case should be adjourned and the Appellant considered she had secured his agreement to an adjournment. Believing agreement had been reached the Appellant spoke to Kate, indicated that both parties had agreed an adjournment and was told that the case would be re-listed on a date in May 2008. It was then and only then that she rang Mr Collins, the CAFCASS officer, and informed him that the hearing on 17 April had been adjourned.

12. The Appellant's convictions on the three charges are explicable only on the basis that the Tribunal accepted Mr. Matthews' account of the telephone call and rejected the account given by the Appellant.

13. As we have said Mr Matthews appeared at the County Court on the morning of 17 April 2008. The District Judge decided to proceed with the case in the absence of the Appellant and her client. He made notes of what he was told by Mr Matthews. At some point during the morning of 17 April 2008 the court staff attempted to contact the Appellant. So much is clear from an email which the Appellant sent to the court at 11.56 am. In that email the Appellant set out her version of what had transpired in the conversation with Mr Matthew the previous afternoon.

Further, she disclosed that her conversation with Mr Matthew had occurred after she had spoken to "Kate from the court office." She sent an attachment with her email; the attachment was, she said, an attendance note which she had made of her telephone conversation with Mr Matthew.

14. Following the hearing before DJ Rawkins the Appellant's client decided to appeal. Counsel was instructed to draft grounds of appeal and a skeleton argument. The appeal came on for hearing before HH Judge Kushner QC on 5 June 2008. The learned judge allowed the appeal, finding that DJ Rawkins should not have proceeded to hear the case in the absence of the Appellant's client. That said, the order which she made in relation to arrangements for the child was not markedly different from that which had been made by the District Judge.

15. Meanwhile Mr Matthew had made a complaint to the Respondent. He complained that the Appellant had told him that the hearing had been adjourned when that was not true. He also complained that she had told Mr Collins that the hearing had been adjourned when that, too, was not true.

16. The Respondent's investigation did not begin immediately. That was because of the appeal against the order of DJ Rawkins. However, following the hearing before HH Judge Kushner QC the Respondent felt itself in a position to commence an investigation.

17. On 4 July 2008 a complaints officer of the Respondent wrote to the Appellant asking her to provide her response to Mr Matthew's

complaint. It suffices that we say that the Appellant provided no meaningful response at that time and, indeed, for many months thereafter, because, sadly, in July of 2008 her then partner committed suicide. Obviously, the Appellant was extremely upset at this turn of events and the Respondent permitted many months to elapse before it began to press her for her response to Mr Matthew's complaint. Ultimately, however, the Appellant responded by informing the Respondent of her version of events as we have summarised it above.

18. In due course the Respondent brought 4 charges of professional misconduct against the Appellant. In November 2009 she was found guilty by a Disciplinary Tribunal of all four charges. The Appellant did not appear at the hearing and we know very little of what went on.

19. Notwithstanding that the Appellant had not appeared before the Tribunal, she appealed against its determination. The appeal was to the Visitors. In February 2012 her appeal was allowed and a re-hearing was ordered.

20. The re-hearing took place on 20 April and 29 May 2012. At the conclusion of the hearing on 29 May, the chairman of the Tribunal, HH Timothy Ryland announced that the Tribunal had found the Appellant guilty of the 3 charges which we set out earlier in this judgment. We have provided with a transcript of what he said. It reads as follows:-

> "The Tribunal has considered the matter, as set out in the charge sheet with a great deal of care. We have listened to the addresses of both Counsel. We have had regard to the evidence and, of course, we have come to our conclusions based upon a

standard of proof, which is the criminal standard of proof, in respect of each of the four charges on the charge sheet....."

The Chairman then read out each of the charges announcing that in respect of charge 1 the Appellant had been convicted by a majority of four to one, in respect of charges 2 and 3 she had been convicted unanimously and in respect of the 4th charge she had been acquitted unanimously.

21. On 1 June 2012 the Tribunal produced a written record of its decisions. Under the heading "Evidence" it was recorded that Mr Matthew and the Appellant had given oral evidence. Under the heading "Findings" the record reads:-

> "The Panel, by a majority of four to one, found charge 1 proved. The Panel also found charges 2 and 3 proved and charge 4 was dismissed, unanimously. The Panel made its findings of charges 1-3 were proved on the basis the evidence of the BSB met the criminal standard of proof in demonstrating that the defendant had committed the alleged acts."

Under the sentence "Sentence and Reasons" there appears:-

> "On charges 1-3, the Panel impose three sentences, to run concurrently, of suspension from practice for 2 years, to come into effect that the date of promulgation by the [Appellant's] Inn. The Panel's reasons for these sentences are that the [Appellant] is unlikely to repeat the acts in question, there is no current risk to the public as the defendant is not practising and the defendant encountered difficult personal circumstances shortly after the events in question.
>
> The [Appellant] was ordered to pay the costs of the hearing, assessed in the sum of £2564, within 3 months of promulgation of sentence by the defendant's Inn."

This appeal

22. As we have said the Appellant appealed against both convictions and sentence. In her petition of appeal she advanced a number of grounds as to why her convictions should be quashed. In the event only one of those grounds was considered at the oral hearing namely that the Tribunal had failed to give adequate reasons for the findings which it made.

23. Following the filing of the petition of appeal there was considerable email correspondence between the Appellant's then solicitor and Ms Fredelinda Telfer, an investigating officer employed by the respondent. As a consequence of the content of some of the emails the Appellant's solicitor asked the Directions Judge, the Right Honourable Sir Anthony May, to determine, summarily, that the Respondent had conceded that the Tribunal had failed to give adequate reasons for its findings. In a direction dated 11 October 2012 the Directions Judge declined to make such a determination.

24. Although Sir Anthony May declined to determine whether the Respondent had conceded that the Tribunal had failed to give adequate reasons for its findings he invited the parties to consider whether they wished to operate the procedure referred to in English v Emery Reinbold & Strick Ltd [2002] 1 WLR 2409. The procedure to which he referred was that which is set out in paragraphs 24 and 25 of the judgment.

> "24. We are not greatly attracted by suggestion that a judge who has given inadequate reasons should be invited to have a second bite of the cherry. But we are much less attracted at the

prospect of expensive appellate proceedings on the ground of lack of reasons. Where the judge who has heard the evidence has based a rational decision on it, the successful party will suffer an injustice if that decision is appealed, let alone set aside, simply because the judge has not included in his judgment adequate reasons for his decision. The Appellate Court will not be in as good a position to substitute its decision, should it decide that this course is viable, while an appeal followed by a re-hearing will involve a hideous waste of costs.

25. Accordingly, we recommend the following course. If an application for permission to appeal on the ground of lack of reasons is made to the trial judge, the judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the Appellate Court and it appears to the Appellate court that the application is well-founded, it should consider adjourning the application and remitting the case to the trial judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings. Where the Appellate Court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing, on notice to the Respondent."

25. In accordance with the direction given by the Directions Judge both the Respondent and the Appellant provided written submissions. In summary, the Respondent was content that the appeal should be adjourned and the matter remitted to the Tribunal in order that "additional reasons" for the Tribunal's findings could be provided. The Appellant took a different view. Her solicitor set out a number of reasons why remission to the Tribunal was not appropriate in an email of 24 October 2012. The Directions Judge accepted the reasoning of the Appellant's solicitor – see the direction of 1 November 2012.

26. Shortly before the appeal was to be heard the Appellant dispensed with the services of her solicitor. In his stead she instructed Mr Marc Beaumont. Almost immediately Mr Beaumont, on behalf of the Appellant, sought permission to file and serve a supplemental petition and grounds of appeal. It suffices that we say that in the face of this application, the Directions Judge provided a mechanism whereby the supplemental petition could be considered at some future date in the event that the grounds of appeal upon which the Appellant had relied to that point were dismissed.

27. On the day before the appeal was due to be heard, Mr Beaumont filed a skeleton argument. The contents of the skeleton argument were foreshadowed in an email which Mr Beaumont sent to the clerk to the Visitors shortly before he filed his skeleton.

28. The skeleton argument raised two issues. First, it set out the detail of an objection to Mr Crofton-Martin sitting as one of the Visitors to hear this appeal. Second, it set out the detail of the argument in support of the ground of appeal that the Tribunal had failed to provide adequate reasons for its findings.

The position of Mr Crofton-Martin

29. When a petition is served upon the clerk to the Visitors the Lord Chief Justice nominates the persons who are to hear the appeal – see Rule 12(1) of the Hearings before the Visitors Rules 2010 ("the 2010 Rules"). The Lord Chief Justice has delegated this function to the Directions Judge.

30. There can be no doubt that Mr Crofton-Martin was duly appointed to sit on this panel in accordance with this procedure. Nonetheless in his email of 14 February 2013 and in his skeleton argument Mr Beaumont objected to Mr Crofton-Martin remaining on the panel. His reasons for objecting were closely allied to the ground of appeal which was developed in the supplemental petition.

31. It is unnecessary to record and consider the objections which were raised to Mr Crofton-Martin. Once it became clear that we were minded to allow the appeal the objection to Mr Crofton-Martin remaining on the panel was not pressed. In any event, as we understand it, the points raised by Mr Beaumont relating to the appointment of members of the Tribunal and/or a panel of Visitors will be resolved in an appeal to be heard shortly.

Reasons

32. The Disciplinary Tribunal Regulations 2009 (amended February 2012) govern the proceedings before a Disciplinary Tribunal. Regulation 18 provides:-

> "At the conclusion of the hearing, the finding of the Disciplinary Tribunal on each charge, together with its reasons, shall be set down in writing and signed by the chairman and all members of the Tribunal. If the members of the Tribunal are not unanimous as to the finding on any charge, the finding to be recorded on that charge will be that of the majority. If the members of the Tribunal are equally divided as to the finding on any charge, then, the burden of proof being on the BSB, the finding to be recorded on that charge shall be that which is the most favourable for the Defendant. The chairman of the Tribunal shall then announce the Tribunal's finding on the charge or charges, and state whether each such finding is unanimous or by a majority."

Regulation 24 specifies that as soon as practicable after the conclusion of the proceedings the chairman of a Tribunal shall prepare a report in writing of the finding on the charges of professional misconduct and the reasons for each finding.

33. There can be no doubt that the Tribunal was under a duty to provide reasons for its decision given the terms of those regulations.

34. At the conclusion of the hearing before the Tribunal its chairman announced a decision on each charge. He prefaced the announcement with the remarks which are set out at paragraph 20 above. Further a written report was provided in accordance with regulation 24; the relevant parts thereof are also set out in paragraph 21 above. It is submitted on behalf the Appellant that there was a signal failure to provide reasons for her conviction on charges 1 to 3.

35. Mrs Burns, on behalf of the Respondent, did not accept the alleged failure. She submitted that the task for the Tribunal was to consider whether or not it was sure that the evidence of Mr Matthew was truthful and accurate. By its verdicts on charges 1 to 3 the Tribunal demonstrated that it was so satisfied. The reasoning process of the Tribunal was obvious from its verdicts, submitted Mrs Burns.

36. During the course of her oral submissions she relied upon passages in the judgment in English. Further, and in particular, she relied upon the following passage from the judgment of Henry LJ in Flannery v Halifax Estates Agencies Ltd [2000] 1 WLR 377.

"(1) The duty [to give reasons] is a function of due process, and therefore justice. Its rationale has two principal aspects. The first is that fairness surely requires the parties especially the losing party to be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in *Ex p Dave*) whether the court had misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it was not.

(2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.

(3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes x rather than y; indeed, there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.

(4) This is not to suggest that there is one rule for cases concerning the witness's truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain *why* he has reached his decision. The question is always, what is required of the judge to do so; that will differ from case to case. Transparency should be the watchword."

Not surprisingly, Mrs Burns relied very heavily upon paragraph (3) of the extract set out above.

37. We do not agree that this was a case in which the Tribunal was essentially making a choice between two principal witnesses who were

giving evidence, unaided, about their recollection of events which had taken place some years before. The Appellant relied upon a series of attendance notes which, she claimed, had been created either during the course of the afternoon of 16 April 2008 or very shortly thereafter. Each of the attendance notes purported to record what was said in the conversations which had taken place between the Appellant and Kate and the Appellant and Mr Matthew. On any view these documents were potentially significant and their true evidential status needed careful assessment by the Tribunal.

38. No doubt, too, the Appellant relied upon her email sent to the court on 17 April 2008. By the time of the sending of that email, on any view the attendance note of the conversation with Mr Matthew was in existence. As with all other documents created by her contemporaneously the evidential significance of the email needed careful assessment.

39. There were other documents before the Tribunal. In particular, the Respondent relied upon the notes created by DJ Rawkins. This document, too, required careful assessment so as to ascertain its evidential status and significance.

40. In our judgment it was incumbent upon the Tribunal to explain its reasoning process in respect of all the documentation to which we have just referred. It did not do so and, in our judgment, it thereby fell into error. In a case of this type with such serious potential consequences for the Appellant it was not sufficient, in our judgment, for the Tribunal to

announce verdicts without explaining in some detail the reasoning process which underpinned them.

41. In these circumstances it seemed to us that we had no option but to allow the appeal and quash the convictions recorded against the Appellant.

Consequential orders

42. Mr Beaumont invited us, in effect, to permit the Respondent to decide whether to convene a re-hearing of the allegations against the Appellant. Mrs Burns did not dissent from that proposed course of action.

43. Rule 15(3) of the 2010 Rules provide as follows:-

> "(3) In respect of an appeal against the decision of a Disciplinary Tribunal, the Visitors may
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> a) dismiss the appeal;
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> b) allow an appeal in whole or in parts;
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> c) confirm or vary an order of the Disciplinary Tribunal whose decision is being appealed;
>
> d) order a re-hearing on such terms as they may deem appropriate in the circumstances;
>
> e) in a case of an appeal brought by the BSB against a decision of a Disciplinary Tribunal, issue a declaration, but only where this would have no consequences whatsoever for the Defendant."

In the particular circumstances of this case – there having been two hearings before the Disciplinary Tribunal already – it seemed to us that we should retain the ability to determine whether or not there should be a further hearing. We directed that the Respondent should indicate in writing whether or not it sought a re-hearing (giving reasons for its stance) and that the Appellant should reply, if necessary, within a further 14 days. We make it clear, at this stage, that if the Respondent does not

seek a re-hearing we will probably respect that view. It would not be appropriate to comment, at this stage, on our likely attitude should the Respondent seek a further hearing.

44. An issue arose as to the costs of the appeal. Mrs Burns submitted that we should make no order for costs; Mr Beaumont initially sought an order that the Respondent should pay the Appellant's costs both of the appeal and below but ultimately confined himself to seeking an order for costs in relation to the appeal.

45. The foundation of Mrs Burns' argument was a principle which she derived from a series of cases including Baxendale-Walker v The Law Society [2007] 3AER 330. The principle is conveniently summarised in the White Book as follows:-

> "A regulator brings proceedings in the public interest in the exercise of a public function which it is required to perform. In those circumstances the principles applicable to an award of costs differ from those in relation to private civil litigation. Absent dishonesty or a lack of good faith a costs order should not be made against such a regulator unless there is good reason to do so. That reason must be more than that the other party has succeeded. In considering making such an order the court must consider, on the one hand, the financial prejudice to the particular complainant, weighed against the need to encourage public bodies to exercise their public function of making reasonable and sound decisions, without fear of exposure to undue financial prejudice, if the decision is successfully challenged."

We have no doubt that this approach is justified in first instance proceedings i.e. in this context before the Tribunal. We doubt, however, whether the principle is applicable when the decision of the first instance body is under appeal.

46. Be that as it may, in this case there are factors which pointed clearly in favour of making an order for costs. Almost as soon as this appeal was launched the Appellant's legal advisers invited the Respondent to concede the appeal on the ground which has succeeded. That offer was repeated, most recently, shortly before the hearing. In our judgment there was always a very good prospect that the appeal would succeed for the reasons which we have articulated yet the Respondent decided to contest the appeal with vigour.

47. There can be little doubt from the information available that funding this appeal has been difficult for the Appellant. In the context of this appeal we took that consideration into account.

48. Unhesitatingly, we were of the view that justice demanded that the Respondent should pay the Appellant's costs of and incidental to the appeal.

49. We directed that the Appellant should file and serve a schedule of costs within 14 days of the receipt of this judgment and made a further direction that the Respondent should reply thereto within 14 days of the receipt of the schedule. We will assess the costs thereafter.

50. At the hearing we did not address whether or not it was appropriate for the order for costs made by the Tribunal against the Appellant to stand. The discussion was confined to whether or not the Appellant could seek an order that her costs below should be paid. Accordingly we direct that within 14 days of receipt of this judgment the parties should file and serve written representations upon whether the order for costs below

should stand or whether there should be substituted a direction that there be no order for costs.